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ALLAHABAD SERIES

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(2021)12ILR A1
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.11.2021

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Bail No. 4237 of 2020

Sumit Kumar Gupta ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Vineet Kumar Mishra, Atul Verma, Hari Krishna Verma

Counsel for the Opposite Party:
G.A., Neeraj Sahu

(A) Criminal Law - Indian Penal Code, 1860 - Sections 498-A & 304-B - Dowry prohibition Act,1961 - Sections 3/4 - distinction between strangulation and hanging - The Code of Criminal Procedure, 1973 - Sections 82 ,174-A & 229-A.

Daughter of complainant married with applicant - accused persons unsatisfied with dowry - demanded additional dowry along with 4-wheeler - advised many times - not satisfied - accused persons hanged daughter of complainant after killing her.

HELD:-The charge-sheet has been filed, out of ten, only one witness has been examined so far, applicant has no criminal history , a fit case for enlarging the applicant on bail. (Para - 12)

Bail application allowed. (E-7)

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

1. Heard learned counsel for the applicant, learned counsel for the complainant and learned Additional Government Advocate for the State and perused the record.

2. The prosecution story as alleged in the first information report is that the marriage of daughter of the complainant was solemnised two years ago, with the applicant. The accused persons being unsatisfied with the dowry demanded additional dowry along with 4-wheeler. It is further alleged that she advised many times, but they were not satisfied. Hence, on 4.1.2020, the accused persons hanged the daughter of the complainant after killing her.

3. Learned counsel for the applicant submits that the independent witness Raghvendra Shukla has not supported the prosecution case. He has stated that the deceased has committed suicide. The door was locked from inside. The information was given to the in-laws of the applicant. The door was opened after applying force several times. He has denied the fact that the applicant had ever demanded dowry.

4. The learned counsel has drawn attention of this court towards the photograph of the brother of the deceased who is shown trying to open the door by applying force which was locked from inside by kicks.

5. It is further submitted that the applicant side has given an application to District Magistrate, Hardoi dated 5.1.2020 to get post-mortem done under supervision of a senior officer. Accordingly, Chief Medical Officer, Hardoi was directed and thereafter post mortem was conducted. In the post mortem, following injuries (page 21 of the paper book) have been found :

"1. An oblique ligature mark 30cm x 2 cm present around the neck above....cartilage in from of neck passing....obliquely upward and backward above....line of mandible.....by 3cm on poster-laterial aspect of Lt. Side of neck, ligature mark situated 3 cm below Lt.ear and 6 cm below. Rt Ear base of groove of underneath the ligature mark is yellowish hard and ...like. On opening sub cutaneous tissue underneath ligature mark are while and glistering. Dry stain of saliva....present on Rt. Angle of mouth.

2. Abrasion 1cm x 1 cm present on Rt. Palm

3. L.W. 1.5cm x 1 cm present on Rt Forearm 4cm above Rt. Wrist joint."

6. Learned counsel has invited attention of the court towards Modi Jurisprudence where difference between strangulation and hanging has been given. Chart (Annexure RA-1) is extracted below :

Hanging

"1.Mostly suicidal.

2 Face-Usually pale and petechiae rare

3 Saliva-Dribbling out of the mouth down on the chin and chest.

4 Neck-Stretched and elongated in fresh bodies

5 External signs of asphyxia, usually not well marked

6 Bleeding from the nose, mouth and ears very rare.

7. Ligature mark-Oblique, non-continuous placed high up in the neck between the chin and the larynx, the base of the groove or furrow being hard, yellow and parchment-like.

8 Abrasions and ecchymoses round about the edges of the ligature mark, rare.

9. Subcutaneous tissues under the mark-White, hard and glistening.

10 Injury to the muscles of the neck-Rare.

11 Carotid arteries, internal coats ruptured in violent cases of a long drop.

12 Fracture of the larynx and trachea-Very rare and that too in judicial hanging.

13 Fracture-dislocation of the cervical vertebrae Common in judicial hanging.

14 Scratches, abrasions and bruises on the face, neck and other parts of the

body Usually not present.

15 No evidence of sexual assault. 15 Sometimes evidence of sexual assault.

16 Emphysematous bullae on the surface of the lungs-Not present.

Strangulation

1. Mostly suicidal.

2 Face-Usually pale and petechiae rare livid marked with petechiae.

3 Saliva No such dribbling

4 Neck-Not so

5 External signs of asphyxia, ver not well marked (minimal if deat due to vasovagal and caroti sinus effect)

6 Bleeding from the nose, mouth and ears may be found. .

7. Ligature mark-Horizontal o transverse continuous rouind the neck, low down in the nec below the thyroad, the base of the groove or furrow being soft an reddish.

8 Abrasions and ecchymoses round about the edges of the ligature mark, common.

9. Subcutaneous tissues under the mark-Ecchmosed.

10 Injury to the muscles of the neck--common

11 Carotid arteries, internal coats ruptured

12 Fracture of the larynx an trachea-Often found also hyoi bone.

13 Fracture-dislocation of the cervical vertebrae -Rare.

14 Scratches, abrasions and bruises on the face, neck and other parts of the

body -Usually not present.

15 No evidence of sexual assault.

16 Emphysematous bullae on the surface of the lungs-may be present.

7. Learned counsel has emphasised points 3, 7 and 9 of the above chart in support of his arguments and submits that the same symptons have been noted by the doctor who has conducted post mortem and therefore, it is a clear case of hanging.

8. He has also submitted that applicant was doing a job in bank on contract basis in Lucknow. The deceased being ambitious lady wanted to reside in Lucknow and was exerting pressure to live there, however, economic, condition of the applicant was not such, therefore, he could not bring her to Lucknow. It is submitted that due to this fact, she became annoyed and committed suicide.

9. It is further submitted that the first injury suffered by the deceased is abrasion and the second is lacerated wound on the wrist joint and on non-vital part and are not on such part which may suggest that the deceased was subjected to any violence before the death. The applicant has no previous criminal history. The applicant is in jail since 4.1.2020.

10. It is further submitted that there is no possibility of the applicant of fleeing away after being released on bail or tampering with the witnesses. In case the applicant is enlarged on bail, he shall not misuse the liberty of bail.

11. Learned A.G.A. and learned counsel for the complainant have opposed the prayer for bail but could not dispute the fact that findings in the post mortem are suggestive of a case of suicide/hanging.

12. Considering the facts and circumstances of the case, including the fact that the charge-sheet has been filed, out of ten, only one witness has been examined so far, applicant has no criminal history, arguments advanced by learned counsel for the parties, for the period for which he is in jail and without expressing any opinion on the merits of the case, I find it to be a fit case for enlarging the applicant on bail and accordingly, the bail application is allowed.

13. Let the applicant Sumit Kumar Gupta, involved in Case Crime No.06/2020, under sections 498-A, 304-B I.P.C. and sections 3/4 D.P. Act, P.S. Kotwali Sahar, district Hardoi 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 which are being imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not pressurize/ intimidate the prosecution witness.

(iii) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

(iv) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(v) 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.

(vi) In case the applicant misuses the liberty of bail during trial 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.

(2021)12ILR A4
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.09.2021

BEFORE

THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Misc. Bail Application No. 16539 of 2021

Imran ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Rajeev Kumar Rai

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 439 - Indian Penal Code, 1860 -Sections 147, 148, 149, 307, 34 & 414 - Constitution of India - Article 21 - refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution - bail is the rule and committal to jail is an exception .(Para - 9)

Sub-Inspector - on patrolling duty - got information from informer - few persons involved in the activities of cow slaughtering - police party reached the spot - all accused persons started firing upon the police party - saving themselves, arrested co-accused - recovered slaughtering instruments - hence application for bail.

HELD:-The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the court . (Para - 9)

Bail application allowed. (E-7)

List of Cases cited:-

1. Arnab Manoranjan Goswami Vs St. of Mah., (2021) 2 SCC 427

2. St. of Raj. Vs Balchand @ Baliay, (1977) 4 SCC 308

3. Gudikanti Narasimhulu & ors. Vs Public Prosecutor, High Court Of A.P., AIR 1978 SC 429

(Delivered by Hon'ble Sanjay Kumar Pachori, J.)

1. Heard, Sri Rajeev Kumar Rai, learned counsel for the applicant, learned A.G.A. for the State and perused the material on record.

2. The present bail application has been filed on behalf of applicant **Imran** under Section 439 of The Code of Criminal Procedure, with a prayer to release him on bail in Case Crime No. 936 of 2020, under Sections 147, 148, 149, 307, 34, 414 of the Indian Penal Code, registered at Police Station Dadri District Gautam Budh Nagar, during pendency of the trial.

3. Brief facts of the case as unfolded from the First Information Report is that on 26.12.2020 at 21.00 hours, Sub-Inspector Narendra Sharma was on the patrolling duty, he got information from the informer that a car is standing behind the Children Academy on an open place and few persons involved in the activities of cow slaughtering. The police party reached at the spot, after seeing the police, all accused persons started firing upon the police party, saving themselves, arrested co-accused Mehtab at 00.30 hours on 27.12.2020, and recovered slaughtering instruments from unnumbered Honda City Car, five other miscreants fled away taking benefit of darkness.

4. It has been submitted by learned counsel for the applicant that the applicant is innocent and has been falsely implicated in the present case due to ulterior motive. The FIR of the present case has been lodged on false and frivolous allegations on the basis of planted recovery. The applicant has not been arrested from the spot. He has been implicated in the present case on the basis of confessional statement of co-accused Mehtab. This is police encounter no injury case. It is further submitted that the applicant has no concern with the co-accused Mehtab. No incriminating article has been recovered from the possession or pointing out of the applicant, no prima facie case is made out against the applicant. The applicant has surrendered before the court on 1.2.2021. The applicant has been implicated in 14 other criminal cases, which all were registered at P.S. Dadri District Gautam Budh Nagar, detail descriptions are as follows:

Sr. No.	Case Crime No.	Sections	Description
1.	92 of 2006	5/6 of U. P. Prevention of Cow Slaughter Act.	No witness has been examined till today.
2.	103 of 2007	302 of I.P.C.	Acquitted by trial court.
3.	148 of 2007	4/25 Arms Act.	Acquitted by trial court.
4.	342 of 2007	3(2) of National Security Act.	lapsed after acquittal in case no. 103 of 2007
5.	132 of 2008	452, 504, 506 of IPC.	No witness has been examined till today.
6.	664 of 2008	110 G of Cr.PC.	lapsed.
7.	915 of 2018	8/20 of NDPS Act.	No witness has been examined till today.
8.	10 of 2019	307, 504, 506 of IPC	No injury case.
9.	275 of 2020	188, 269, 270 of IPC and 11 of Prevention of Cruelty to Animals Act.	
10.	338 of 2020	188, 269, 270 of IPC and 11 of Prevention of Cruelty to Animals Act.	
11.	352 of 2020	188, 269, 270 of IPC and 3/11	

		of Prevention of Cruelty to Animals Act.	
12.	416 of 2020	188, 269, 270 of IPC and 11 of Prevention of Cruelty to Animals Act.	
13.	928 of 2020	3/5 of U.P. Prevention of Cow Slaughter Act.	Implicated on the basis of confessional statement
14.	482 of 2021	2/3 of U. P. Gangsters & Anti Social Activities (Prevention) Act.	Not applied for bail.

5. Learned counsel for the applicant next submitted that the applicant has been acquitted in two cases (Sr. No. 2 and 3), two cases (Sr. No. 4 and 6) in which proceedings have been lapsed after acquittal in case at Sr. No.2, he has no criminal antecedent during the period of 2008 to 2018 and the applicant has been implicated in 10 other criminal cases out of 14 cases by the police of same police station, which are not heinous in nature. The applicant has been granted bail in all the cases except one case Sr. No. 14. The applicant has not undergone any imprisonment after conviction by any court in respect of any offence.

6. It is further submitted that co-accused Furkan, Mehraj, Irshad and Mehtab, having similar criminal antecedent, have been granted bail by the Co-ordinate Benches of this Court vide orders dated 22.7.2021, 2.8.2021, 3.9.2021 and 11.8.2021 in Criminal Misc. Bail Application Nos. 16512 of 2021, 21946 of 2021, 16991 of 2021 and 29317 of 2021 respectively. Copies of bail orders have been annexed as Annexure RA-1 to the rejoinder affidavit. It is next contended that there is no possibility of the applicant either fleeing away from the judicial process or tampering with the witnesses. The applicant is languishing in jail since 1.2.2021, undertakes that he will not misuse the liberty, if granted. It has also been pointed out that in the wake of heavy pendency of cases in the court, there is no likelihood of any early conclusion of trial.

7. Per contra, learned A.G.A. has opposed the prayer of bail and submitted that the applicant is a hardened criminal and having long criminal history. After collecting sufficient credible evidence against the applicant and other co-accused charge sheet has been submitted. In case the applicant is released on bail, he will again indulge in similar activities and will misuse the liberty of bail.

8. The duty of the Courts with regard to the liberty of citizen has been considered by the Supreme Court in **Arnab Manoranjan Goswami v. State of Maharashtra, (2021) 2 SCC 427,** wherein it was observed thus:

"67...Courts must be alive to the need to safeguard the public interest in ensuring that the due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally it is the duty of courts across the spectrum - the district judiciary, the High Courts and the Supreme Court - to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Courts should be alive to both ends of the spectrum - the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. Liberty across human eras is as tenuous as tenuous can be. Liberty survives by the vigilance of her citizens, on the cacophony of the media and in the dusty corridors of courts alive to the rule of (and not by) law. Yet, much too often, liberty is a casualty when one of these components is found wanting.

70. More than four decades ago, in a celebrated judgment in State of Rajasthan v.

Balchand1 Krishna Iyer, J. pithily reminded us that the basic rule of our criminal justice system is "bail is not jail"2. The High Courts and courts in the district judiciary of India must enforce this principle in practice, and forego that duty, leaving this Court to intervene at all times. We must in particular also emphasise the role of the district judiciary, which provides the first point of interface to the citizen. Our district judiciary is wrongly referred to as the "subordinate judiciary". It may be subordinate in hierarchy but it is not subordinate in terms of its importance in the lives of citizens or in terms of the duty to render justice to them...."

9. It is settled position of law that bail is the rule and committal to jail is an exception in the case of **State of Rajasthan Vs. Balchand @ Baliay (1977) 4 SCC 308,** the Apex Court observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution and opined in para 2 "The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the court. We do not intend to be exhaustive but only illustrative" and considering the facts of the present case and keeping in mind, the ratio of the Apex Court's judgment in the case of **Gudikanti Narasimhulu And Ors vs Public Prosecutor, High Court Of Andhra Pradesh, AIR 1978 SC 429,** larger mandate of Article 21 of the constitution of India, the nature of accusations, the nature of evidence in support thereof, the severity of punishment which conviction will entail, the character of the accused-applicant, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interest of the public/State and other circumstances, but without expressing any opinion on the merits, I am of the view that it is a fit case for grant of bail. Hence, the present bail application is **allowed.**

10. Let applicant, **Imran** 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-

(i) The applicant shall not directly or indirectly make any inducement, threat, or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence.

(ii) The applicant shall not pressurize/intimidate the prosecution witnesses.

(iii) 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 of Cr.P.C.

(iv) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in the trial court.

(v) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel.

11. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail. It is clarified that anything said in this order is limited to the purpose of determination of this bail application and will in no way be construed as an expression on the merits of the case. The trial court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything said in this order.

12. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by the applicant alongwith a self attested identity proof of the said person (preferably Aadhar Card) mentioning the mobile number to which the said Aadhar Card is linked.

13. 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.

(2021)12ILR A8
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2021

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Misc. 1st Bail Application No. 32726 of 2021

Lalit Gupta ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Shrikrishna Shukla

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

(A) Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 8/20 &50 - *"obscura nubes dubiorum"* (under the dark cloud of doubts) - "GIVE A DOG BAD NAME AND SHOOT HIM" - Uttar Pradesh Excise Act,1910 - Section 60 - Indian Penal Code, 1860 - SECTION 82 , 174-A , 229.

Informant (Sub Inspector) and co-accused - to burst a bigger racket dealing in psychotropic substance - accused indicated a person sitting over culvert - deals with psychotropic substance - nabbed accused himself disclosed that plastic gunny bag contains *cannabis (Ganja)* - total recovery is 29.600 Kgs. of *cannabis* in four packets - carried by applicant without any valid license - bail application rejected by Additional District & Sessions Judge/F.T.C.-2 - Hence this bail application.(Para - 5,6)

HELD:-Entire modus oprendi adopted by the police, wherein the applicant has been lifted from his residence and planted in the present case, puts the entire prosecution story doubtful. Entire arrest is flimsy, fallacious and based on a make-believe theory. Alleged seizure of psychotropic substance too is a doubtful proposition and makes entire prosecution story as a malicious prosecution and the arrest an illegal one. (Para - 11,12)

Bail application allowed. (E-7)

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Heard Shri Shrikrishna Shukla, learned counsel for the applicant; Shri M.C. Chaturvedi, learned A.A.G., assisted by Shri S.K. Pal, learned G.A. and Shri Ghanshyam Kumar, learned A.G.A. for the State. Perused the record.

2. Pleadings are exchanged between the parties and the matter is ripe for final submissions on merit.

3. Personal appearance of all the police officials pursuant to the earlier order of this Court dated 15.11.2021 is hereby exempted.

4. By means of the present bail application the applicant, who is facing prosecution in connection with Case Crime No.0356 of 2021, u/s 8/20 of N.D.P.S. Act, P.S.-Phase-2, District-Gautam Budh Nagar, is seeking his enlargement on bail during trial. The applicant is in jail since 14.6.2021.

5. Shri Shrikrishna Shukla, learned counsel for the applicant has drawn attention of the Court to the F.I.R. lodged by the Sub Inspector Ram Chandra Singh, P.S. Phase-II, NOIDA of Gautam Budh Nagar Commissionerate on 14.6.2021 at 13.34 hours against the lone named

accused person Lalit Gupta u/s 8/20 of N.D.P.S. Act at P.S Phase-II, Gautam Budh Nagar with the allegation that the informant, who is Sub Inspector, along with his team members and co-accused Sonu to burst a bigger racket dealing in the psychotropic substance, went to Kakrala 112 Feet Road, the accused Sonu indicated a person sitting over the culvert, that he is a person who deals with the psychotropic substance. The police personnel overpowered that person and caught hold of him. He disclosed his name as Lalit Gupta s/o Ramesh Chandra Gupta, Police Station -Sasni, District -Hathras. The nabbed accused himself disclosed that the plastic gunny bag which he is having, contains *cannabis (Ganja)* and thereafter a usual formality of asking the accused for alleged frisking in front of Gazetted Officer, as contemplated under Section 50 of the N.D.P.S. Act, was made by the informant and the samples of psychotropic substance were made for its testing. The total recovery shown is 29.600 Kgs. of *cannabis* in four packets, said to have been carried by the applicant without any valid license.

6. The bail application of the applicant was rejected by the learned Additional District & Sessions Judge/F.T.C.-2, Gautam Budh Nagar on 02.07.2021. Hence this bail application.

7. It is contended by counsel for the applicant that till date there is no laboratory report is on record to substantiate that the alleged seized substance is *cannabis*. Secondly, it was contended that the mandatory requirement of Section 50 of the N.D.P.S. Act has not been followed and as mentioned above, it was a mere formality of the F.I.R. by the informant. There is no independent witness to the alleged recovery, though the incident said to have been taken place in broad day light in an open area. In Para-18 of the affidavit the applicant himself has disclosed that from the Year 2001 to 2017 the applicant has got criminal antecedents of 11 cases, out of which only three cases relate to N.D.P.S. Act and rest of cases are of Section 60 of the Excise Act. Since the applicant is a resident of P.S.- Sasni, District- Hathras, and as such, interestingly all the 11 cases to the credit of applicant relate to P.S. Sasni, Hathras. From the criminal antecedents of the applicant, it is evident that there is no case registered outside the district Hathras against the applicant. In fact, it is a first case of P.S. Phase-II, Gautam Budh Nagar Commissionarate. In all these cases the applicant has been bailed out and facing trial. After 2017 there is no other case to the credit of the applicant.

8. Besides this, the primary argument made by the learned counsel for the applicant is that the way and the manner in which the applicant is being involved/dragged in the case is depictive of a typical approach by the police and a false implication by them in nabbing the applicant. Learned counsel for the applicant has filed supplementary affidavit dated 25.8.2021, in which he has tried to expose the typical approach by the police, who for the reason best known to them, nailed the applicant in the present offence. It has been contended by learned counsel for the applicant in the supplementary affidavit that the applicant was, in fact, lifted from his residence at Teacher's Colony Sasni Kotwali, District Hathras by four masked persons in civil dress. A CCTV has recorded every movement of the act of lifting of the applicant by those four persons. The wife of the applicant, who is a typical house maker, was advised by her relatives to make a complaint to the Superintendent of Police, Hathras narrating the entire story for the alleged abduction of her husband by four-five masked persons from her residence on 11.6.2021 around 7.45 P.M. After receipt of said application from the wife of the applicant, S.P. Hathras on his own wisdom entrusted the inquiry to one Shri Vipin Kumar Yadav, S.I. who submitted its report on 5.8.2021. The said report was received by the applicant's wife through R.T.I., and as such, she received that inquiry report on 5.8.2021.

9. In the said inquiry report, given by Shri Vipin Kumar Yadav, addressed to C.O. City

Harhras dated 5.8.2021 has made a startling revelation. This was indeed an eye-opener for those who are often indulged in such type of mal-practices. Said report is quoted herein below :

सेवा में,
रिपोर्ट थाना सासनी हाथरस
श्रीमान क्षेत्राधिकारी,महोदय
नगर हाथरस

विषय - पत्रांक ज०सू०अ० 353/21 आवेदिका श्रीमती विनीता गुप्ता w/o ललित गुप्ता नि० शिक्षक नगर कस्बा थाना सासनी जनपद हाथरस के सम्बन्ध में आख्या।

महोदय,

निवेदन है कि संलग्न प्रा० पत्र श्रीमती विनीता गुप्ता w/o ललित गुप्ता नि० शिक्षक नगर कस्बा थाना सासनी जनपद हाथरस की जांच मुझ उपनिरीक्ष द्वारा की गयी तो वाक्यात इस प्रकार पाये गये कि दिनांक 11.06.2021 को वादिया (आवेदिका) के मकान पर चार लोग अपने मुहू पर मास्क लगाये हुए आये थे जो आवेदिका के पति ललित गुप्ता को उठाकर ले गये ।जांच से यह बात प्रकाश में आयी कि सादा कपडो जो लोग आवेदिका के मकान पर आये थे वह नोएडा पुलिस के अधिकारी कर्मचारी होने की जानकारी हुई है। नोएडा पुलिस द्वारा थाना सासनी पर आने की अथवा किसी व्यक्ति को ले जाने की कोई सूचना उपलब्ध नहीं करायी है। वाद में काफी जानकारी पर ज्ञात हुआ कि थाना फेस II नोएडा पुलिस आयी थी। आवेदिका के पति के सम्बन्ध अन्य कोई जानकारी प्राप्त नहीं हो सकी है।

संलग्न आख्या सादर सेवा में प्रेषित है।
1-आवेशमय प्रा०पत्र-3 वर्क
2-आख्या- 1वर्क

ह०-अप०
Sir
5-8-21
Submitted
sd ill.
6-8-21

(विपिन कुमार यादव)
विपिन कुमार यादव
उ०नि०
थाना- सासनी
जनपद- हाथरस
PNO- 132550028

10. Today, when the case is taken up, Shri M.C. Chaturvedi, learned A.A.G., assisted by Shri S.K. Pal, learned G.A. candidly and fairly conceded the fact that there are excesses made on the part of the police of concerned police station. There is neither any *Aamad Report* at the police station at Hathras nor the police personnel were in proper dress, nor any proper process was issued by the concerned court to arrest such type of persons. This lifting of the applicant was affected way back on 11.6.2021 by those unnamed, masked persons and S.I. Ram Chandra Singh, in order to win the laurels of his senior officers, created a sham prosecution story implicating the applicant in this offence. It is simply a pitiable on the part of the informant, who brought down the esteem of the police to the shambles. There seem that the image of police. No doubt, the applicant has a criminal history of 11 cases, but no one has got an authority to add one more to his credit without having any substantial and credible evidence. In the criminal law there is an aged old phrase "GIVE A DOG BAD NAME AND SHOOT HIM" and the police has done so in the present case.

11. The applicant himself is facing the misery of his own conduct but on account of his past credentials the police personnel are not authorized to add one more to his credit. The entire arrest is flimsy, fallacious and based on a make-believe theory.

The Court records its strongest exception and concern about the way and the functioning of the police. The Court expects from the S.S.P. Gautam Budh Nagar to take a stringent criminal action against the informant of the present F.I.R. and identify all those four-five masked persons in a civilian dress, who lifted the applicant from his residence on the odd hours of the night without any authority or reason, after holding an internal departmental inquiry by him alone, and if they are found guilty, the S.S.P., Gautam Budh Nagar is further directed to lodge an F.I.R. against all the erring persons including the informant of the Case Crime No.356 of 2021, P.S.- Phase II, G.B. Nagar as well as all the four-five persons who were masked and pounced upon the applicant from his residence, lifted him and booked him in the present offence without any rhyme or reason and intimate the Court by filing a proper affidavit before the Court concerned i.e. the learned Additional District & Sessions Judge/F.T.C.-II, Gautam Budh Nagar latest by 31st December, 2021 as stringent action would also be taken against the S.S.P. concern for the willful defiance of this Court's order.

12. The Court further expects that the entire modus oprendi adopted by the police, wherein the applicant has been lifted from his residence and planted in the present case, puts the entire prosecution story is ***"obscura nubes dubiorum"*** (under the dark cloud of doubts). The alleged seizure of psychotropic substance too is a doubtful proposition and makes entire prosecution story as a malicious prosecution and the arrest an illegal one.

13. The Court appreciates the assistance provided by Shri M.C. Chaturvedi, learned A.A.G., who fairly conceded the drawbacks and the loopholes of the prosecution.

14. Taking into account the manner and the way in which the applicant has been lifted and involved in the present case and keeping in view the nature of the offence, evidence on record regarding complicity of the accused 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.

15. Let the applicant ***Lalit Gupta,*** who is involved in aforementioned case 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 subject to following conditions. Further, before issuing the release order, the sureties be verified.

(i) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE SHALL NOT SEEK ANY ADJOURNMENT ON THE DATE FIXED FOR EVIDENCE WHEN THE WITNESSES ARE PRESENT IN COURT. IN CASE OF DEFAULT OF THIS CONDITION, IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT IT AS ABUSE OF LIBERTY OF BAIL AND PASS ORDERS IN ACCORDANCE WITH LAW.

(ii) 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 IPC.

(iii) IN CASE, THE APPLICANT MISUSES THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HIS PRESENCE PROCLAMATION UNDER SECTION 82 CR.P.C., MAY BE ISSUED AND IF 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 IPC.

(iv) THE APPLICANT SHALL REMAIN PRESENT, IN PERSON, BEFORE THE TRIAL COURT ON DATES FIXED FOR (1) OPENING OF THE CASE, (2) FRAMING OF CHARGE AND (3) RECORDING OF STATEMENT UNDER SECTION 313 CR.P.C. IF IN THE OPINION OF THE TRIAL COURT ABSENCE OF THE APPLICANT IS DELIBERATE OR WITHOUT SUFFICIENT CAUSE, THEN IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT SUCH DEFAULT AS ABUSE OF LIBERTY OF BAIL AND PROCEED AGAINST HIM IN ACCORDANCE WITH LAW.

(v) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT.

16. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

17. It is made clear that observations made in granting bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

18. Since the bail application has been decided under extra-ordinary circumstances, thus in the interest of justice following additional conditions are being imposed just to facilitate the applicant to be released on bail forthwith. Needless to mention that these additional conditions are imposed to cope with emergent condition-:

1. 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.

2. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

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

4. 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.

19. However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her bail so granted by this Court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

(2021)12ILR A12
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.12.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Capital Case No. 1 of 2020
Connected with reference No. 1 of 2020

Nazil ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:

Sri Sadaful Islam Jafri, Ms. Nasira Adil, Sri Nazrul Islam Jafri (Senior Adv.)

Counsel for the Respondent:
A.G.A.

A. Criminal Law - Conviction based on circumstantial evidence - It is a settled law that to convict a person based on circumstantial evidence there must be a chain of circumstance 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. (Para 19)

Based on the abovementioned principle of law, the Court observed that the evidence of the deceased being last seen alive with the accused-appellant, on or about noon time, is not reliable and trust worthy and is liable to be discarded. Thus, the prosecution has failed to prove the circumstance of the deceased being last seen alive with the appellant beyond reasonable doubt. (Para 24)

Appeal Allowed. (E-10)

List of Cases cited:

1. Hamnumat Govind Nargundkar & anr. Vs St. of M.P. AIR 1952 SC 343

2. Sharad Birdhichand Sarda Vs St. of Mah. (1984) 4 SCC 116

3. Vijay Shankar Vs St. of Har. (2015) 12 SCC 644

4. Bablu Vs St. of Raj. (2006) 13 SCC 116

5. Shivaji Sahabrao Bobade & anr. Vs St. of Mah. (1973) 2 SCC 793

6. Devi Lal Vs St. of Raj. (2019) 19 SCC 447

7. Nizam Vs St. of Raj. (2016) 1 SCC 550

8. Navneetakrishnan Vs St. (2018) 16 SCC 161

9. Kanhaiya Lal Vs St. of Raj. (2014) 4 SCC 715

10. St. of U.P. Vs Satish (2005) 3 SCC 114

11. Ramreddy Rajesh Khanna Reddy & anr. Vs St. of A.P. (2006) 10 SCC 172

12. Bodhraj Vs St. of J & K (2002) 8 SCC 45

13. Kali Ram Vs St. of H.P. (1973) 2 SCC 808

14. Hate Singh Bhagat Singh Vs St. of M.B. AIR 1953 SC 468

15. Reena Hazarika Vs St. of Assam (2019) 13 SCC 289

16. Joginder kumar Vs St. of U.P. (1994) 4 SCC 260

17. Social Action Forum for Manav Adhikar & Anr. Vs U.O.I. (2018) 10 SCC 443

18. Mani Vs St. of T.N. (2009) 17 SCC 273

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

1. The appellant Nazil son of Nazim has been convicted by the court of Additional Sessions Judge, Fast Track Court (Crime against Women) /Special Judge, Protection of Children from Sexual Offences Act (Pocso Act), Rampur for offences punishable under Sections 363, 376-AB, 302 Indian Penal Code (IPC) and Section 6 of the Pocso Act, vide judgment dated 13.12.2019 passed in Special Case No.351 of 2019; and, by order dated 18.12.2019, has been awarded following punishment:

(i) Under Section 363 IPC, seven years rigorous imprisonment and fine of Rs.5,000/- with a default sentence of two months;

(ii) Under Section 376-AB IPC, capital punishment;

(iii) Under Section 302 IPC, capital punishment and fine of Rs.20,000/- with a default sentence of three months;

It be noted that as for the offence punishable under Section 6 of the Pocso Act, on the date of the incident, the maximum punishment was less than one prescribed for an offence punishable under Section 376-AB IPC, the appellant has been awarded punishment

under Section 376-AB IPC, as disclosed above. Aggrieved by the judgment and order of conviction, the appellant has filed this appeal with a prayer that the order of conviction and sentence passed by the court below be set aside. In addition thereto, the trial court has sent a reference, namely, reference no.1 of 2020, under section 366 of the Code of Criminal Procedure, 1973 (for short Code or CrPC), for confirmation of the capital punishment i.e. death penalty.

INTRODUCTORY FACTS IN A CHRONOLOGICAL ORDER

2. (i) On 08.05.2019, at about 14.29 hours, a missing report **(Ex. Ka-1)** was lodged by Sharif Khan (PW-1), which was registered as Case Crime No.367 of 2019 at P.S. Civil Lines, District Rampur **(Ex. Ka-6)**, wherein it was alleged that his daughter Zoya (the deceased), aged 6 years, on 07.05.2019, at 12.30 hours, wearing *Firozi* (dark blue) coloured knickers, had gone from her house to fetch curd but did not return and, despite hectic search, could not be found.

(ii) On 22.06.2019, at about 19.07 hrs PW-1 gave a written report **(Ex. Ka-2)** to the police stating therein that on receipt of information on 22.06.2019 that in Kashiram Colony, in a semi-built house, a body has been found, he reached the spot and from the slippers (Chappals), lying close to the body, and the clothes covering the body, he could identify the body as that of his daughter Zoya. Of this report there is G.D. Entry No.071, dated 22.06.2019, at 19.07 hrs **(Ex. Ka-15)**.

It be noted that neither in the missing report (Ex. Ka-6) nor in the written report (Ex. Ka-2) any suspect is named.

(iii) After receipt of information with regard to discovery of a body, on 22.06.2019 inquest proceeding is carried out at the spot i.e. where the body was found, and completed by about 20.35 hours by Sub-Inspector Rohit Yadav (PW-6), who also prepares the inquest report **(Ex. Ka-8)**. Inquest witness are: (a) Sharif (PW-1); (b) Aazam; (c) Junaid; (d) Farid; and (e) Rameshwar Prasad. The contents of inquest report reflects that the body was reduced to a skeleton; flesh had melted; **hair had got detached from the skull and were lying near the head;** the body had an upper garment (vest /*Baniyan*), dirty in color; and a dirty *Jamuni* (a shade of dark blue) colored lower garment (knickers). No external injury could be noticed, however, an autopsy was recommended.

(iv) At 21.10 hrs of 22.06.2019 the appellant (Nazil) is arrested after an encounter of which arrest memo **(Ex. Ka-17)** is prepared disclosing that he was arrested by S.I. Rohit Yadav (PW-6) and kept at District Hospital, Rampur. Importantly, no GD Entry of the arrest is made in the night of 22.06.2019. The GD Entry No.09 in respect thereof is dated 23.06.2019 at 06.18 hrs **(Ex. Ka-16).**

(v) At 10.22 pm i.e. 22.10 hrs of 22.06.2019, the medical examination of the appellant is held at District Hospital, Rampur. The medical examination report is part of paper no.16 Kha/ 29 and is part of the paper book at page 19 thereof, though not exhibited. However, from the statement of prosecution witness, namely, PW-6 (S.I. Rohit Yadav), which we shall examine later, as well as from arrest memo, it is established that Nazil was injured in the encounter and was taken to District Hospital, Rampur. The medical examination of the appellant reveals following injuries:

(a) Lacerated wound 0.7 cm x 0.7 cm x muscle deep over medial aspect of left knee joint 0.6 cm below upper border of left knee. No blackening present. Margins are irregular. Margins are everted, circular in shape. KUO. Advised X-ray of left leg and knee joint. Fresh bleeding present.

(b) Lacerated wound 0.5 cm x 0.5 cm x muscle deep over outer aspect of left leg 0.3 cm below lower border of left knee. Margins are inverted and irregular. Blackening around

wound present. No fresh bleeding present. KUO. Advised X-ray of left leg and left knee. Fresh bleeding present.

(c) Lacerated wound 0.6 cm x 0.6 cm x muscle deep over medial aspect of right leg 0.2 cm below lower border of right knee. Blackening around wound present. Margins are inverted. Fresh bleeding present. KUO. Advised X-ray of right leg and knee to know nature of injury.

(d) Lacerated wound 0.7 cm x 0.7 cm x muscle deep over outer aspect of right knee 0.3 cm below upper border of right knee. No blackening present. Margins are irregular and everted. Fresh bleeding present. KUO. Advised X-ray of right knee and leg to know the nature of injury.

Opinion: All injuries are KUO. Advised X-ray of right and left leg and knee joint to know nature of injury and cause. All injuries are fresh in duration.

(vi) On 23.06.2019, at 06.19 hours, two reports (Paper No.16 Kha /23-24 and Paper No.16 Kha/ 25-26) are lodged at P.S. Civil Lines, District Rampur in respect of the encounter that allegedly took place at 21.10 hrs on 22.06.2019. Both these reports are lodged at the instance of S.I. Rohit Yadav (PW-6). One is registered as Case Crime No.457 of 2019 under Section 307 IPC; and the other is registered as Case Crime No.458 of 2019, under Section 3/25 of the Arms Act, both against the appellant (Nazil). GD Entry No.09 in respect of the incident has been exhibited as Ex. Ka-16 noted above. In these reports, it is alleged that in connection with the murder of Km. Zoya, while PW-6 was busy investigating the case of Zoya and was at Ambedkar Park crossing, through informer, he received information that Nazil son of Nazim, resident of 112/12, Kashiram Colony, who is involved in the murder of Zoya, is waiting near Ashram Paddhati School to meet someone. Upon receipt of that information, the police team reached the spot and in the light of car bulbs, saw a man standing near a Mazhaar. The informer pointed towards Nazil. As soon as the police vehicles closed on him, Nazil started running away and when he was signalled to stop, he fired at the police party twice. It is alleged that by providence the police party escaped injury and in the fire that was returned, Nazil got injured and was arrested. On arrest, from Nazil, a country made pistol with two live cartridges were recovered and two empty cartridges lying on the spot were also recovered. These reports, though are part of the paper book, as parts of paper no.16 Kha, but have but not been marked Exhibits. However, narration of the police action giving rise to these reports have come in the testimony of PW-6.

(vii) On 23.06.2019, at 10.57 hrs, vide G.D. Entry No.27 **(Ex. Ka-18),** a written application **(Ex. Ka-3)** submitted by Sharif (PW-1) is taken. In this application it is alleged that in connection with Km. Zoya, he had given oral information on 22.06.2019, during the course of inquest proceedings, now, he is informing in writing that, to his understanding, Nazil son of Nazim is involved in the rape and murder of his daughter.

It be noted that the basis of informant's suspicion against Nazil is not disclosed in Ex. Ka-3.

(viii) On 23.06.2019, by about 3 pm, post-mortem examination of the body is carried out by Dr. O.P. Rai (PW-4). The post-mortem report **(Ex. Ka-4)** describes the body as follows:-

"Mummified; shrivelled body with decomposed tissues and loss of tissues at places, loss of hairs and loosening of joints, practically odour less, very dark almost black in color; skin hard, dry, leathery and adhered closely to shrunken body; Eyes mummified, mouth wide open, nails blackened, natural orifices lost."

Injuries noticed are as follows:-

"Lacerated wound of 5.0 cm x 4.0 cm over the occipital scalp with under the scalp dried bleeding with fracture of occipital bone and loosening of sutures (pieces of fractured

bone and the injured scalp - preserved for forensic expert opinion).

Mouth was found wide open; tongue, pharynx, larynx, vocal chords, trachea, thyroid, heart, oesophagus, lungs, bronchial trees all lost, hyoid fractured and pressured; ribs and chest wall mummified."

It be noted that the doctor in respect of internal examination of the abdomen had observed that all internal organs including intestine were mummified and lost. Further, in the opinion of the doctor, cause and manner of death was uncertain; viscera recovered from cervical, pelvic & cephalic region was preserved for forensic examination. The time of death was estimated as one and one-half month before.

(ix) On 25.06.2019, while the appellant (Nazil) was in District Jail Hospital, Rampur, permission was sought to record his statement. After obtaining permission, at 14.25 hours, Inspector Radhey Shyam (PW-8) allegedly records the statement of Nazil, entry of which is made in CD Parcha No.15. According to the prosecution, Nazil confessed his guilt and stated that he had taken Zoya to that semi-built house with a bottle of oil to be used as a lubricant for intercourse and when he attempted the intercourse, Zoya caught hold of his hair and pulled them as a result several of his hair might have fallen on the spot which he could get recovered. He also stated that the bottle of oil was hidden by him in a room in that semi-built house which he alone can get recovered.

(x) On 26.09.2019, Inspector Radhey Shyam (PW-8) moves application for police custody remand to effect recovery.

(xi) On 27.06.2019, police custody remand from 10 am to 5 pm of 28.06.2019 is allowed.

(xii) On 28.06.2019, the appellant is taken from jail in a police vehicle. As per record, he was taken out from the vehicle on a stretcher to effect recovery of his hair lying on the spot and the bottle of oil allegedly hidden by him. Recovery/ seizure memo (Ex. Ka-21) was prepared, which has no public witness. The seizure memo reflects that on 28.06.2019, at 9.45 hours, a police team, comprising Inspector Radhey Shyam (PW-8); Sub-Inspector Harendra Kumar; Constable Rakesh Kumar; Constable Imran Ali; Constable Yogendra Singh; and Constable Bhupendra Singh, with driver Head Constable Dalvir Singh went to District Jail, Rampur. At 9.55 hours, they enter the District Jail and, pursuant to the order of the court dated 27.06.2019, after getting entries in the register and medical examination of the accused-appellant, at 10.32 hours, take the accused to the spot. The Field Unit Team, headed by Shiv Kumar Chaudhary, is informed about their intended visit to the spot. When they arrive at the spot, the Field Unit Team with Sri Shiv Kumar Chaudhary is present. The accused gestures to stop the vehicle. The accused points towards the house where he had committed rape on Zoya and the place where Zoya had pulled his (accused's) hair and the place where he had hidden a bottle of oil. The seizure memo notes that by gestures, the accused guided the police party to the upper floor. On the upper floor, the accused took them to a bathroom type *Kothri* (small room) to point out the spot where he committed the crime and disclosed that the hair pulled from his head by Zoya are lying scattered here and there. It is recorded in the seizure memo that the accused requested for light, which was provided from the torch light of mobile phones, whereafter, the accused picked up the hair lying there, which were kept in transparent plastic polythene, provided by the Field Unit Team headed by Shiv Kumar Chaudhary, and sealed at 13.30 hours. After which, the accused took the team to the lower floor where there was a door-less *Kothri* (small room). It is recorded that there, from near the electricity board, he lifted a bottle of oil and told the police that this is that bottle which he had used to lubricate his organ for commission of rape. It is recorded that this bottle of oil was handed over to the Incharge of the Field Unit,

namely, Shiv Kumar Chaudhary; and the bottle was kept in a polythene and a plastic jar and sealed for the purposes of obtaining finger print.

(xiii) The incriminating material was dispatched to the Forensic Science Laboratory, U.P. The receipt of which, provided by Forensic Science Laboratory, was brought on record as **Exhibit Ka-23.**

(xiv) On 02.08.2019, PW-8 prepared and submitted charge sheet **(Ex. Ka-26)** against the appellant under section 363, 302, 376AB IPC and section 5/6, Pocso Act.

(xv) On 05.09.2019, the trial court charged the appellant for commission of offences of kidnapping, murder and rape of a minor punishable under Sections 302, 376-AB and 363 IPC; and Section 5(m)/6 of the Pocso Act. The appellant denied the charges and claimed trial.

(xvi) The blood sample of the accused Nazil; the hair sample of the accused Nazil; hair recovered from the spot; *Baniyan* (upper garment) and Knickers (lower garment) recovered from the body of the deceased, were all sent for forensic examination and to collect evidence including DNA profiling. The report of the Forensic Laboratory, U.P., Lucknow **(Exhibit-36)** indicated that the DNA profile of the blood of the accused matches with the DNA profile of the hair recovered from the spot. The forensic examination of the upper and lower garment of the deceased disclosed presence of allele (a form of a gene) with male characteristic but only partial DNA profile could be generated. Similarly, only a partial DNA profile of the hair collected from Nazil could be generated. The forensic report in respect of skull; hyoid bone; scalp skin; teeth; and tissue obtained from cervical, pelvic and cephalic region, was also obtained but it did not disclose presence of any kind of poison. The bottle of oil recovered from the spot was sent for finger print expert report. The finger print expert report was produced and marked as Ex. Ka-28. The finger print expert report indicated that the disputed sample No.5561 matched with sample No.5567; whereas the disputed sample Nos.5563, 5564, 5565 did not indicate sufficient characteristic to enable matching; and the sample No.5560 was blurred. It be noted that according to the report, the sample Nos. 5562 to 5575 were obtained from right hand whereas sample Nos.5576 to 5577 were obtained from left hand of the accused.

(xvii) In the trial, eight prosecution witnesses were examined, namely, **Sharif (PW-1)** Informant - Victim's father; **Rahima (PW-2)** - Victim's sister -witness of the deceased last seen with the appellant; **Guddu Khan (PW-3)** - witness of the deceased last seen with the appellant; **Dr. O.P. Rai (PW-4)** - Doctor who conducted autopsy; **Kuldeep Kumar (PW-5)** - police personnel who entered missing report; **Rohit Lal Yadav (PW-6)** - the first Investigation Officer (I.O.) who conducted inquest and effected arrest of the appellant on 22.06.2019 and proved papers in connection therewith; **Rishipal Singh (PW-7)** - the second I.O. who conducted investigation since 23.06.2019 - he took written application from PW-1 on 23.06.2019 and recorded clarificatory statement of PW-1 - prepared site plan **(Ex. Ka-19)** from where body of Zoya was recovered and video-graphed the confessional statement of the appellant made to the police, when he was arrested after encounter, from his mobile; **Radhey Shyam (PW-8)** - the third I.O. - he proved - recording of disclosure statement of the appellant made on 25.06.2019 while he was in district jail hospital - taking the appellant on police custody remand - making of recovery on 28.06.2019 - preparation of site plan **(Ex Ka-37)** of recovery - dispatch and receipt of materials for forensic examination - submission of charge sheet - receipt of forensic reports.

(xviii) On 24.10.2019 an application no.30 Kha, submitted by the appellant to summon the mother of Zoya, who was listed as prosecution witness in the charge sheet, and the doctor of District Hospital, Rampur as well as

the record to prove injury report, dated 22.06.2019, i.e. Paper No. 16 Kha/29 (supra) of the appellant, was rejected by the trial court on the ground that the prosecution has prayed to discharge Zoya's mother and the injury report was prepared in connection with the encounter case, which would be tried separately.

(xix) On 02.11.2019, the incriminating circumstances appearing in the prosecution evidence were put to the appellant for recording his statement under Section 313 Cr.P.C. In his statement under Section 313 Cr.P.C., the appellant admitted that a girl named Zoya had gone missing. But denied the allegation that on 07.05.2019, he was with Zoya and that informant's daughter Rahima had seen him with Zoya. He stated that the entire story was subsequently developed and it finds no mention in the report dated 08.05.2019. He denied that he was with Zoya and was spotted by PW-2 (Rahima) near the Talab. In respect of the testimony of PW-3 (Guddu Khan), he stated that he is brother-in-law of Sharif (PW-1) and that on account of being relative of PW-1, he is giving a false statement. In respect of incriminating material recovered, he stated that false recovery is shown by police to set up a false case to save themselves because they showed a false encounter. He denied having made any disclosure statement and stated that the police had prepared the documents sitting at the police station. He stated that the police had injured him, and on gun point got the disclosure statement signed from him. He stated that he committed no offence; that the police had arrested him on 22.06.2019 from taxi stand and they framed him in this case. He also stated that the police had forcibly pulled his hair to show recovery. He also stated that after he was injured, the police to save themselves had called Sharif to the police station and asked him to submit a written application against him. He reiterated that the entire police action is to save themselves and that the police recovered nothing from him. In addition to what is noticed above, he stated that Sharif's (PW-1's) wife's brother, namely, Azam, is also a taxi driver like him. He had taken the appellant's taxi and got that taxi involved in an accident. In connection with which, he had a fight with Azam and because of this enmity, Sharif had made false allegation and the police to show good work that they have solved the case, framed him and they took him to a secluded place and shot him on both his leg and the police in collusion with Sharif has falsely implicated him.

(xx) On 28.11.2019, the trial court rejected another application no.34 Kha of the appellant, under section 311 CrPC, for summoning the doctor, who examined the appellant on 22/23.06.2019, and the Ballistic Expert to demonstrate that the recovery of country made pistol and the cartridge in the encounter was bogus.

(xxi) On 29.11.2019, the appellant moved another application 37 Kha to bring on record certified copy of his injury report dated 22.06.2019, already on record as paper no.16 Kha/29, as paper no.39 Kha.

(xxii) On 02.12.2019, defence witness (DW-1) - Nazim - was examined to disclose that Guddu Khan (PW-3) is relative of Sharif and is a resident of some other place. On this date, the trial court also disposed off application 37 Kha by directing that the certified copy of the medical report of the appellant dated 22.06.2019 be taken on record though it was not assigned an exhibit number.

(xxiii) On 6.12.2019, the trial court concluded the arguments and on 13.12.2019 conviction order was passed followed by pronouncement of sentence on 18.12.2019.

FINDINGS RETURNED BY TRIAL COURT

3. The trial court, after considering the evidence brought on record, concluded that from the testimony of PW-1 and PW-2 it is proved that, the victim Zoya, aged 6 years, was to go

with her elder sister (PW-2) to fetch curd in between 12.15 and 12.30 hrs of 07.05.2019. But, she did not go with her sister, rather her sister went alone and the victim sat with the appellant on an E-Rickshaw parked outside her house; that, the appellant and informant party are neighbours and knew each other therefore, there was no reason to be suspicious about the appellant; that, on that day, there was a fire in the colony hence there was lot of commotion and confusion; that, when victim's elder sister (PW-2) was returning, after getting curd, she saw the appellant and the deceased moving together towards *Tashka Talaab*; that, PW-3 also saw them together as seen by PW-2; that, thereafter, about an hour later, the appellant was seen returning alone and when he was asked about Zoya, he gave no clear reply; that, Zoya was not seen alive thereafter; that, her body was found on 22.06.2019; that, the autopsy report disclosed fracture of skull, suggesting a case of homicide; that, on arrest the appellant confessed his guilt; that, on his disclosure statement, there was recovery of hair and oil bottle from the spot which, when read with forensic evidence, confirms appellant's presence at the scene of crime thereby, completing the chain of circumstances and, in absence of plausible explanation from the appellant, pointed towards his guilt of having committed the offences for which he had been charged by ruling out all other exculpatory hypothesis. The trial court thus, convicted the appellant as above and upon finding that it was a case where a minor girl, aged 6 years, was raped and murdered, awarded death sentence. As a death sentence requires confirmation by the High Court, a reference has been made to the High Court, which has been registered as Reference No.1 of 2020.

4. We have heard Sri N.I. Jafri, learned Senior Counsel, assisted by Ms. Nasira Adil, for the appellant; Sri J.K. Upadhyay, learned A.G.A., for the State; and have perused the record.

SUBMISSIONS

5. Assailing the judgment and order of conviction and sentence, learned counsel for the appellant submitted as follows:-

(i) The trial court has not tested the prosecution evidence and, without putting the same to scrutiny, accepted the prosecution evidence as gospel truth. Such a decision is no decision in the eyes of law.

(ii) The evidence of the deceased being last seen alive with the appellant is unacceptable and completely unreliable for the following reasons:

(a) Admittedly, the missing report (Ex. Ka-1), lodged on 07.05.2019, and the written report (Ex. Ka-2) given on 22.06.2019, after discovery of body, suspects none. Even the written report (Ex. Ka-3) given by the informant (PW1) on 23.06.2019 does not put forth the theory of last seen;

(b) From the testimony of prosecution witnesses PW-1; PW-2 and PW-3, it appears that they were fully aware from 7.5.2019 itself, that is even before lodging the missing report, that the deceased had been with the appellant when she was last seen alive. If it was so, that is had the deceased been last seen alive with the appellant, in a span of 45 days, appellant's name would have definitely surfaced as a suspect. More so, because the appellant was known to the informant party from before, being a neighbour of the informant.

Thus, the last seen story is bogus and a figment of imagination, developed on police pressure, after the encounter, to save the police from searching questions and to give them a medal of having solved the case. Even otherwise, the last seen evidence is not of much consequence because no body saw the appellant entering the house (place where the body was found) with the deceased or leaving that house on or about the time of incident. Further, proximity between the place where the deceased

was last seen alive with the appellant and the place from where the body was recovered has not been established. Consequently, this evidence by itself can not form basis of conviction.

(iii) That the investigation is tainted and destroys the credibility of the prosecution case. In this regard following circumstances are relevant:

(a) No effort was made to test the credibility of information as to whether the appellant had any involvement in the crime and straight away the appellant is subjected to arrest by use of force. Notably, inquest was completed at 20.35 hrs on 22.06.2019, during which, according to police witnesses, oral information was received with regard to the appellant having a hand in the crime, immediately thereafter, without testing that information, the police by constituting a team proceeds to arrest the appellant even though nothing is there to suggest that the appellant was absconding. And, at 21.10 hrs on 22.06.2019, the appellant is arrested, after an encounter, as a suspect, even though, by that time, there is no entry in the police records with regard to the appellant being a suspect. This casts a serious doubt on the bona fides of the investigation and taints the investigation with an indelible scar;

(b) All stages of the investigation, though by different officers, were from the same police station and, therefore, discredits the alleged disclosure statement as well as the alleged recovery. More so, when there is no public witness to support the same;

(c) Another aspect that casts serious doubt on the bona fides of the investigation is that the report of the night encounter is not made till 06.18 hours of 23.06.2019. All of this indicates that the police, to save themselves from searching questions in respect of the alleged encounter, contrived a story that, during the course of inquest, the police were orally informed that the appellant had a hand in the murder of Zoya. To support this false story, a written report (Ex. Ka-3) was obtained, vide G.D. No.27 (Ex. Ka-18), in the morning of 23.06.2019, at 10.57 hrs, from PW-1, confirming that he gave oral information during the course of inquest proceeding. Importantly, in this written application (Ex. Ka-3) too, it is not disclosed that the deceased was last seen with the appellant by any person, at a specified place and time, on 07.05.2019. All of this suggests that the author of that application (Ex. Ka-3) had no conviction in the statement made therein and that the police wanted a free hand to develop the story as per its convenience;

(d) The taint in the investigation gets amplified with what happened thereafter. Notably, no disclosure statement leading to discovery of a material fact is made on 22.06.2019 when the appellant allegedly confessed his guilt to the police, which was video-graphed by the I.O. from his mobile phone but, immediately thereafter, when a new I.O. (PW-8), from the same police station, steps in, he allegedly records a disclosure statement on 25.06.2019, while the appellant is in District Jail Hospital, which is not witnessed by a member of public, or any independent person, and, three days later, on 28.06.2019, effects recovery, which again is not witnessed by a member of public or any independent person. All of this demonstrates that the investigation was not fair and was only with a view to nail the appellant;

(e) From the testimony of prosecution witnesses it appears that when the body was discovered at the spot there were bottles, etc. No recovery memo of that was made and no effort was undertaken to test whether there could be involvement of any other person;

(f) That the place from where the body was recovered is an open semi-built house having access to all but no effort was made to find out as to who all were entering and leaving that house over the relevant period;

All these circumstances confirm that the investigation was not fair and either, it was with a view to nail the appellant by solving the

case some how, or, to save the police from searching questions in respect of the encounter that allegedly took place in the night of 22.06.2019.

(iv) That the alleged recovery of hair and the bottle of oil from the spot at the pointing out and on the basis of disclosure statement of the appellant is all cooked up and has no support of a public witness. The disclosure statement has been obtained from the appellant on gun-point to build the prosecution case and justify illegal police action, which was nothing short of gross misconduct on the part of the police. The disclosure statement becomes highly doubtful also for the reason, that in the earlier confessional statement made to the police, immediately after encounter, video-recorded from mobile, nothing is there with regard to the presence of hair or bottle of oil at the place of the incident therefore, no sanctity could be attached to the subsequent disclosure statement as well as to the recovery, not witnessed by any member of public. More so, when the appellant was injured with gunshot injuries on his leg and was scared for his life. Otherwise also, it would not be prudent to accept that strands of hair of the appellant would be lying on the spot of a semi-built house, having access to all, particularly from where the body has been found and where inquest was held, that too, after 50 days of the incident. Recovery story is therefore completely unbelievable and has been thoroughly explained by the appellant.

(v) That the trial court has not considered the explanation of the appellant in his statement recorded under Section 313 Cr.P.C. wherein he stated that his hair were pulled out from his head and sealed to show that they were recovered from the spot; and that the entire exercise was carried out on paper and he was forced to sign at gun point. It has been submitted that the aforesaid explanation fits perfectly with the string of circumstances emanating from the prosecution evidence and appears logical and believable, inter alia, for the following reasons:-

(a) That scene of crime from where hair were recovered, is a spot already discovered as there the body was found on 22.06.2019; the police had already scanned the spot to find out incriminating material, if any, therefore, there remained no possibility of presence of any further incriminating material;

(b) That the circumstance of finger prints found on the oil bottle matching with that of the appellant is of no consequence because, firstly, the bottle was planted and false recovery was shown and, secondly, admittedly, in the seizure memo it is recorded that the bottle was lifted by the appellant and given to the police. Thus, if it was lifted and handed over by the appellant to the police, the existence of finger prints on the bottle stood explained from the seizure memo itself.

(vi) That there is no forensic or medical evidence to confirm rape; and the confessional statement made before the police, in that regard, being not admissible, conviction under section 376AB IPC and section 6 Pocso Act has no basis.

(vii) That even if the appellant is considered guilty it is not a case for capital punishment.

6. **Per contra**, learned A.G.A. submitted that the prosecution evidence is reliable; that there is no specific material elicited during cross-examination, or produced, to demonstrate that the police or investigating officer was inimical to the appellant; that, admittedly, the appellant and the victim were neighbours and there was no occasion to draw suspicion against him therefore, delay in naming the appellant is not fatal to the prosecution case; that the time since when the deceased went missing gets fixed from the missing report and, from the prosecution evidence, shortly before that, the deceased was seen in appellant's company, and was not seen thereafter therefore, the burden was on the appellant to explain as to when he parted company. The appellant instead of giving an

explanation made a false denial, therefore, this should be read as an incriminating circumstance against the appellant. Otherwise also, merely because the appellant was arrested after an encounter, in which he might have suffered injuries, is not a valid reason to doubt the recovery. Hair of the appellant falling on spot, on being pulled by the victim, is quite natural and, therefore, it cannot be said that the recovery is bogus. Further, the DNA profile of the recovered hair matches with the DNA profile of the blood sample obtained from the appellant. Thus, the presence of the appellant on the spot is proved, which, in absence of explanation, is sufficient to record conviction. Learned A.G.A. further submitted that absence of independent public witness is not always fatal to recovery as the police witnesses have proved the recovery. Moreover, the appellant has disclosed no personal enmity with the police personnel. He also submitted that the presence of finger prints of the appellant on the bottle of oil is also an incriminating circumstance. Even though the seizure memo reflects that the bottle of oil was lifted and provided by the appellant to the police but, from the testimony of PW-8, it is clear that the bottle was lifted from cap/crown and therefore, the presence of finger prints on the bottle existed from before and were not imprinted on account of the bottle being lifted at the time of preparing the seizure memo. He submitted that, under the circumstances, the prosecution has been successful in proving the charges framed against the appellant and since, it is a case of brutal rape and murder of a six years old girl, the death penalty awarded by the court below is liable to be confirmed.

7. Having considered the rival submissions, before we proceed to examine the weight of the respective submissions, it would be useful to notice the oral testimony of the prosecution witnesses, which is as follows:-

PROSECUTION EVIDENCE

8. **PW-1 (Sharif) (informant) -the father of the victim.** He states that he had four children, now, only three remain, after death of Zoya. On 07.05.2019, at 12.30 hours, he saw his elder daughter Rahima (PW-2) and victim Zoya coming downstairs to go to fetch curd. At that time, Nazil (the appellant) was sitting in front of the house on a rickshaw. When he saw the girls, Nazil called Zoya. At that stage, PW-1 went upstairs. 15-20 minutes later, Rahima (PW-2) returned alone with the curd. When he asked Rahima (PW-2) as to where Zoya is, she told him that Zoya is with Nazil Bhai near Tashka Talab. When Zoya did not return, thinking that she may be nearby, his wife Huma (not examined) started calling for Zoya. But when she did not respond, they started inquiring about Zoya. As, despite search, she could not be found, they lodged missing report (Ex. Ka-1) on the next day. He stated that the police also searched for Zoya but she could not be found. On 22.06.2019, when he was in his house, 2-3 persons came from near Tashka Talab and told him that a girl child's body has been discovered. On receiving information, they went to that place, which is a semi built house. On its upper floor, in a small room, body was noticed. From body structure, clothes and slippers he could gather that it was Zoya's body. On information, the police arrived. A written report (Ex. Ka-2) was given by him to the police. The police conducted inquest proceedings, of which, he was one of the witnesses. He proved his signature on the inquest report (Ex. Ka-8). He stated that near the body of his daughter a packet of oil, one cigarette, Chappal of Zoya was seen. Zoya's body had clothes, namely, knickers and vest (*Baniyan*). He states that on the next day, he gave a written report (Ex. Ka-3) scribed by Guddu (PW-3). He stated that he suspected Nazil from before. But, now, after recovery of the body, he was convinced that the culprit is Nazil and nobody else. He stated that he says so because his daughter Rahima (PW-2) had seen Nazil with Zoya.

In his cross examination, he stated that he had been residing in the colony for the last 10-12 years; below his quarter is the quarter of Guddu Bhai; Nazil with his family resides just in front of his quarter in another quarter; that he saw Nazil (the accused) sitting on an e-rickshaw at about 12.15 hours and thereafter, he went inside the house; that, on that day, there was a fire in the colony, as a result, there was a lot of commotion; that he searched for his daughter and must have searched 17-18 quarters; in the night also, he searched with the aid of a torch and the search continued till 1.30 AM in the night. He also searched for his daughter in fields as well as Talaab (pond) and when there was no success, he reported the matter to the police on the next day. The report was written by Fazil on his dictation. He stated that on the same day the police inquired from him. He told the police that she had gone to fetch curd. He stated that he had inquired from the shopkeeper selling curd but he does not remember the name of the shopkeeper. He stated that the police had also scanned the pond to find out whether Zoya had drowned. He denied the suggestion that he received information from a lady named Seema that his daughter has been sold to *Banjaras* (nomadic tribe). He stated that, on 22.06.2019, the children of Kashiram Colony had discovered the body first, and then, three persons from village Tashka, informed him with regard to discovery of the body and by the time he reached the spot, a number of persons had gathered there. Later, the police also arrived and there were media men as well. The media persons had also photographed him but they had not recorded his statement. He stated that the police had inquired from him as to whom he suspected and on that day when the body was discovered, he gave a written report (Ex. Ka-2). He stated that that report must have been given at 7.30 pm. Thereafter, the police conducted the inquest proceeding and after inquest, they took his statement and prepared site plan. He stated that from the place where the body was found, the police had also lifted a packet of yellow oil and cigarette; and they had lifted all articles from near the spot. He stated that he had recognised the body with the help of clothes and slippers. He stated that inside the house, there was darkness but, things were recovered in the light of a torch. Apart from those two articles, nothing else was recovered from the (*Kothri*). However, on search of *Kothri*, as well as the house, from where the body was recovered, liquor bottles were found outside that room. He stated that on the next day of recovery of the body, he had given another written application (Ex. Ka-3). He stated that inference with regard to the involvement of Nazil was drawn from the circumstance that Nazil was with his daughter on that day, which information came to him from his elder daughter Rahima (PW-2). On further questioning, he stated that he had got information on 07.05.2019 itself that Zoya had gone with Nazil; and that he asked Nazil on 07.05.2019 about Zoya. But Nazil replied by saying that he does not know. He stated that he had suspected Nazil but was not sure till recovery of Zoya's body. He admitted that he never expressed his suspicion against Nazil to the police before. He stated that his quarter is about 400-500 paces away from the spot where the body was found. He stated that Nazil was arrested by the police on the same day when the body was recovered though, he did not know from where the arrest was made. He admitted that Nazil has a taxi. He denied the suggestion that on 22.06.2019 when the accused (Nazil) was in lockup, he had gone to serve him dinner. He stated that in his presence, after inquest proceedings, the body was sealed by the police. The police queried him then as well as on the next day. Thereafter, on the following day, police recorded the statement of his wife and daughter (Rahima). In his cross examination, upon suggestion of motive for false implication, he admitted that Azam is his brother-in-law and a driver. He, however, denied having knowledge about his brother-in-law taking taxi of Nazil and

getting it involved in an accident, resulting in a fight between Nazil and Azam. He also denied knowledge of threat extended by Azam to Nazil in that connection. He also denied the suggestion that the fight had taken place just below his quarter. He denied the suggestion that he is telling lies in collusion with the police to provide support to the police case.

9. **PW-2 (Rahima) - Elder daughter of Sharif (PW-1), aged 9 years, and is elder sister of the deceased Zoya.** The court recorded her statement after putting questions to her to ascertain whether she understands the gravity of speaking the truth. Upon finding her competent, the court proceeded to record her statement. The witness stated that on the date when Zoya went missing, it was a fasting day *(Roza)*. Her mother asked her and Zoya to get curd (Dahi). It must have been noon when she and her sister came down. Nazil was sitting on a rickshaw. He called Zoya. Zoya started talking to him whereas, she (PW-2) proceeded to fetch curd. When she was returning after getting curd, she saw Nazil with Zoya near Talaab (pond). When she called Zoya, Nazil told her to go and that Zoya will come. When she (PW-2) went upstairs to her quarter, her mother asked her about Zoya and she informed her mother that Zoya is with Nazil Bhai near Talaab. PW-2 stated that when her sister did not return, her mother and father went in search for Zoya. Within one hour, Nazil Bhai was seen returning alone. But Zoya was not with him. Her mother and father inquired from Nazil about Zoya. To which, Nazil responded in a mumbling tone that he does not know.

In her cross examination, she stated that the police had been visiting her house daily, morning and evening, and they had been taking her including her parents in a Jeep. Her father had told the police not to come till *Teeja* but the police did not agree and they have brought them for their statement and therefore, she is here to give her statement. She further stated that Nazil's quarter is just in front of her quarter. The rickshaw was parked on the side, which was visible and Nazil Bhai was sitting on the rickshaw. Her mother had given her Rs.10/- to go with Zoya to get curd. She had gone to a new shop at the *Puliya* (culvert). She did not remember the time taken by her to get the curd. She stated that when she was returning after getting curd, she saw Nazil Bhai going towards *Maidan Talaab.* When her mother asked her about Zoya, she told her that she has gone with Nazil Bhai near Maidan Talab. At that time, her father was present in the house. She stated that her mother and father had gone in search of Zoya immediately thereafter, though she does not know the place they visited. It must be an hour later, that her father and mother met Nazil Bhai. On being queried about Zoya, Nazil Bhai stated that he does not know. She stated that this question was put to Nazil in her presence. She further stated that, thereafter, her parents did not take Nazil to search for Zoya as, at that time, Nazil was intoxicated. On being questioned, she stated that she does not know whether Nazil has any addiction of any kind of intoxication. On being questioned further, she stated that she does not know about intoxication. She stated that body of her sister was found about one and one-half months later and information of that was given by one vegetable vendor Babu Bhai. She also stated that one Mulla had told her father that his daughter has been sold by one Seema. She admitted that Nazil has a car which belongs to his father (Nazim). She also stated that Nazil was not searching for Zoya. She stated that, at 12 noon, in the colony there was fire. She stated that by the time she returned after taking curd, it must have been 1 pm. She stated that she does not remember as to when police had inquired from her about the incident. She also stated that from her quarter to *Tashka Talaab*, there are houses on both sides, where people reside. She stated that she does not know the distance between Tashka Talab and the spot from where the body was recovered. She denied the

suggestion that the police had tutored her to state what she has stated. She stated that she is aware that in court after taking oath, one has to state the truth. She also denied the suggestion that she is lying.

10. **PW-3 (Guddu Khan) -a resident of Kashi Ram colony.** He stated that on May 7, 2019, at about noon, there was a fire in Kashiram Colony. Hearing the noise, he came out of his house and saw Nazil sitting with Sharif's daughter Zoya on an e-rickshaw and talking to her. Thereafter, he left to see where the fire was. He took 10 minutes to return and saw Nazil and Zoya going towards *Tashka Talaab*. Thereafter, he got busy in his own work. One hour later, he saw mother and father of Zoya standing below *Puliya* (culvert) searching for Zoya. At that time, he also came out of his house to see Nazil returning from near the Talaab. Zoya's mother questioned Nazil about Zoya to which he hurriedly replied by saying that he does not know. At that time, Nazil was under influence of some intoxicant. After body was found from the vacant house near *Tashka Talaab*, they all suspect that Nazil is the perpetrator of the crime.

In his cross examination, he stated that he saw Zoya going with Nazil at around 12-12.30 hours. Later, within an hour or so, he saw Nazil returning alone. PW-3 stated that he does not know whether Nazil's mother and father inquired from Nazil about Zoya. He stated that he saw Sharif's wife asking from Nazil about Zoya near *Puliya* (culvert), which is just 4-5 paces from Sharif's house. He could not remember whether Zoya's mother and father had inquired from Nazil's mother and father. He stated that he also did not ask Nazil's mother and father about Zoya. On return, Nazil went upstairs to his quarter whereas Zoya's parents kept searching for her. He had also searched for Zoya and got an announcement made in the Masjid. He however did not remember the time spent by Nazil with Zoya sitting on the rickshaw. He stated that the curd shop is quite far from Zoya's house though, he does not know the distance. He stated that he had not gone to see the body when it was found. But when he had reached the spot, the police were stopping people from entering the house. He stated that he has not signed any paper on the spot where the body was found but, two or more times, the police had come and got his signature though, the police did not put any question to him. He denied the suggestion that he has settled in the colony only since last one or one and half months. He stated that his quarter is next to Nazil's quarter. He denied the suggestion that he had broke open the lock and forcibly occupied the house and is therefore, lying. He also denied the suggestion that he entered into a fight with Nazil under influence of liquor and had threatened him. He, however, admitted the suggestion that he has given a report that Nazil was threatening him not to give statement. He denied the suggestion that because he is *Bahnoi* (sister's husband) of Sharif he is lying.

11. **PW-4 (Dr. O.P. Rai).** He had conducted the autopsy he proved the postmortem report and its contents, which have already been noticed above. He stated that it is possible that death could have occurred on 07.05.2019 at about 12.30 hours on account of injury on the head and neck. He stated that no evidence of any acid on the body was found. He, however, made no disclosure with regard to the possibility of the deceased being subjected to sexual assault.

12. **PW-5 (Constable Kuldeep Kumar)**. He proved the G.D. Entry of the first information report made on 08.05.2019.

13. **PW-6 (S.I. Rohit Yadav) - the first I.O.** He stated that upon receipt of missing report on 08.05.2019, he visited the spot, recorded statement of Sharif Khan (PW-1) and

prepared site plan (Ex. Ka-7) showing the location of the house from where Zoya went missing. He searched for the victim; took the photographs of the victim from the informant, circulated the same in the media; recorded the statement of Constable Kuldeep Kumar; on 09.05.2019 inquired from Ali Ahmad, curd shop owner; took the statement of independent witnesses Amit Kapoor and Ashok Babu and distributed pamphlet; and on 10.05.2019, checked CCTV footage from Max Hospital located in front of Kashiram Colony but could get no information. On 10.05.2019, the statement of neighbour Nazil was also recorded. The information of the missing girl child was also uploaded on the website. On 11.05.2019, statement of informant's neighbours was recorded but no information could be collected. On 12.05.2019, again, search operation was carried out at various places. Similarly, on 13.05.2019, search was carried out but no information could be gathered. This process of search continued. On 22.06.2019, at 7.07 PM, information was received from the informant about recovery of his daughter's body from a semi built house at village Tashka. On receipt of information, he, with his team, went to the spot for inquest and prepared inquest report. He proved various papers in connection with inquest proceedings and with regard to sealing and forwarding the body for autopsy. He stated that during inquest proceeding, he recorded a clarificatory statement of the informant and, thereafter, he left in search of Nazil and when he reached Ambedkar Park Crossing, he received information from an informer that the person responsible for the death of Zoya is near the Mazhaar, close to Ashram Paddhati School. On receiving that information, he and his team reached the spot and, in the light of the vehicles, spotted Nazil. When the vehicle reached near Nazil, he started to walk fast and when he was requested to stop, he fired at the police. The police returned fire. After which, the police heard him crying. Consequently, firing was stopped and Nazil was arrested with a country made pistol and two live cartridges. On being inquired, he disclosed his name as Nazil son of Nazim, a resident of 112/12 Kashiram Colony. He stated that as Nazil was arrested in an injured condition, he was brought to District Hospital, Rampur. On interrogation, Nazil admitted to having killed Zoya. He proved G.D. Entry No.71 (Ex. Ka-15), dated 22.06.2019, return G.D. Entry No.9 (Ex. Ka-16), dated 23.06.2019, at 6.18 hours, and also the arrest memo (Ex Ka-17).

In his cross examination, he admitted that after lodging the missing report, the informant had told him that Zoya had gone to fetch curd. He admitted that at that time the informant had not told him that Zoya was seen with Nazil on a rickshaw or was seen with Nazil at *Tashka Talaab* or that Nazil was seen coming alone. He admitted that no suspicion was expressed by the informant against Nazil and the site plan was prepared by him on the pointing out of the informant. He stated that at a marble shop, there is a CCTV camera and there is a CCTV camera at Max Hospital. Both the cameras had not captured anything material. He stated that on 10.05.2019, he had recorded the statement of Nazil and, on 11.05.2019, he had recorded the statement of Tabassum. Tabassum had told him that Zoya was seen playing at about 12 noon. The statement of Nusrat was also recorded who had seen Zoya at 8 am of that morning. He admitted that the case diary from 08.05.2019 up to 30.05.2019 has been prepared under his signature. He stated that *Tashka Talaab* is towards south of Block No.112 and people going towards *Tashka Talaab* will not be captured in the CCTV camera. He stated that the inquest proceedings had started at 7.30 pm and culminated by 8.35 pm. The body was found in the bathroom in a decomposed condition. Light on the spot at the time of Inquest was provided by mobile phone torches and there was sufficient light on the spot. He could not remember

whether near the body, inside the *Kothri*, a yellow oil packet and a cigarette was found. He could not remember whether it was lifted and a seizure memo was prepared. He stated that he had not lifted the hair from near the body nor he remembers noticing them. He stated he reached Ambedkar Park at 8.45 pm and within 2-4 minutes, the informer came and soon thereafter, the Inspector Ramveer Singh came with his team and, immediately thereafter, Rishipal Singh (PW-7) arrived at 8.50 pm. He stated that by the time the informer had given the information, Rishipal Singh (PW-7) had not arrived. After getting information from the informer, the entire team proceeded towards Ashram Paddhati School, there were, in all, nine police men in Jeeps. In the encounter that followed, the accused was arrested and was sent to the hospital without *Chitthi Majrubi*. He denied the suggestion that the police had fired on both knees of the accused to threaten him and under threat that he would be killed, got his confessional statement. He stated that initially the accused was taken for primary care to Hospital, Rampur from there he was referred to Meerut. He stated that the entire night he was at the hospital and returned at the police station at 6.18 hrs. He denied the suggestion that the entire case has been falsely framed just to support the police case.

14. **PW-7 (Inspector Rishipal Singh)**. He stated that on 23.06.2019, on account of Inspector Incharge Radhey Shyam being on leave, he was the Inspector (Incharge) at Police Station, Civil Lines, Rampur. The case, at that point in time, was being investigated by Rohit Yadav. After the encounter, on getting evidence of murder, the case was converted to one punishable under Section 302 IPC. On 23.06.2019 he took over the investigation. On 23.06.2019, vide G.D. Entry No.27, at 10.57 hours, Sharif Khan gave a written application (Ex. Ka-3) about the incident in which it was stated that during the course of inquest proceedings, he had disclosed to the police regarding involvement of Nazil son of Nazim in the rape and murder of Zoya and, therefore, section 376AB IPC and section 5 (m) / 6 Pocso Act were added. This GD Entry No.27 was marked Ex. Ka-18. He proved preparation of the site plan from where the body was recovered, which was marked Ex. Ka-19. He stated that the accused on his arrest had confessed to the police and that confessional statement was video-graphed with the help of mobile of which a compact disc has been prepared and sealed (Ex. Ka-20).

In his cross examination, he stated that when the investigation was taken over by him, the informant had given written report following which, his clarificatory statement was recorded wherein he stated about the involvement of Nazil as also that the information in that regard was passed on during the course of inquest proceeding. He, however, admitted that he did not ask the informant as to what was the basis of his suspicion against Nazil and as to why he gave no information to that effect earlier. He stated that the site plan (Exhibit Ka-19) from where the body was recovered was prepared by him on the next day at about 1.15 pm. He also stated that on the spot (near *Kothri*), half burnt cigarette butts and hair lying scattered were noticed by him but he had not disclosed their presence in the map prepared by him because he did not consider it to be necessary. He had also seen an oil packet in the *Kothri* though he did not disclose it in the site plan. He stated that he had scanned the upper floor of the house but did not scan the ground floor. He also tried to inquire from the neighbours of that house but they were not found. He denied the suggestion that the accused had not voluntarily confessed and that he was shot on the knees to forcibly extract a confession from him in police custody. He also denied the suggestion that the entire exercise was done to fortify the police case.

15. **PW-8 (Inspector Radhey Shyam)**. He stated that he is the Inspector Incharge of P.S. Civil Lines, Rampur. He took over investigation

of the case on 25.06.2019 under the orders of Circle Officer, City. After taking over the investigation, he went to record the clarificatory statement of Sharif Khan (informant), who stated that he is in mourning and is not in a position to get his statement recorded. On the same day, after obtaining permission of the Court, he went to Hospital of District Jail, Rampur where Nazil was in judicial custody and at 14.25 hours recorded his disclosure statement wherein Nazil confessed his guilt by stating -- *that on the date of incident there was a fire in the colony. When everybody got busy in the fire, he took Zoya, in between 12 and 1 pm, to a semi built house in Gram Tashka and took her to the upper floor of the house. At that time he had a bottle of oil because he had intention to have intercourse with her. Upon entering the Kothri, he pounced on Zoya and after lubricating his organ with oil had intercourse. Zoya attempted to scream and pulled his hair. At that time, he strangulated her. He stated that his hair pulled from his head by Zoya, must be lying on the spot. He also stated that he had hidden the bottle of oil in that part of the house which he alone can tell. He stated that he can get the hair lying on the spot and the bottle of oil recovered.* PW-8 stated that on 26.06.2019 an application for police custody remand was moved before the court to effect recovery of hair and bottle of oil. On 27.06.2019, police custody remand for 28.06.2019, from 10 am to 5 pm, was allowed. On 28.06.2019, PW-8 with his team took the accused from jail to the place of occurrence after informing the Field Unit Team Incharge Sri Shiv Kumar Chaudhary to be present at the place of occurrence. On reaching the spot, the accused Nazil pointed towards the place of occurrence. The accused was taken out of the vehicle on a stretcher and on his gestures, he was taken to the upper floor of the house where there was a bathroom shaped *Kothri*. The accused pointed that it was that very place where he raped the victim and it is here that the victim had pulled his hair from his head, which are lying on the spot and after collecting the hair lying on the spot, they were handed over to the Field Unit Incharge Shiv Kumar Chaudhary, who sealed them in a transparent plastic jar. Thereafter, Nazil took them to the lower floor and took out a bottle of oil from the electricity board of that *Kothri*. The bottle was held by the accused from its crown/cap. The bottle had some oil. The bottle was sealed for finger prints. He proved the recovery memorandums as well as the material exhibits produced before the court. He also proved various dispatches to forensic laboratory as well as forensic reports including collection of blood sample etc and papers and material exhibits in connection therewith. He also proved various stages of the investigation including collection of finger print, dispatch of sample, etc to the forensic laboratory and the reports obtained in pursuance thereto as well as submission of charge sheet.

In his cross examination, he stated that he had not obtained statement of Dr. Dashrath Singh who had examined the appellant. He stated that no certificate of the doctor was obtained while recording the statement of Nazil. He stated that at the time of recovery, Nazil was in a position to speak and gesticulate. He stated that he had failed to transcribe as to what the accused stated at the time of recovery. He stated that at the time when Rohit Yadav was investigating, the accused had made no confessional disclosure. He stated that on 23.06.2019, Inspector Rishipal Singh had recorded confession of which CD was prepared. He stated that the previous I.O. Rishipal Singh had only entered two case diary parchas. He came back from leave on 25.06.2019. He denied the suggestion that he had gone on leave just to save his skin from the fall out of the encounter. **During cross examination, he stated that in the site plan prepared by the previous I.O. Rishipal Singh, no hair was shown lying on the spot i.e. *Kothri* where the offence was committed. Whereas in the map which he**

prepared on 28.06.2019 he had shown hair lying on the spot i.e. the same *Kothri*. He denied the suggestion that liquor bottles were found but not disclosed by him**. He admitted that at the time of recovery and preparing the seizure memo there was no public witness of the recovery because when they were requested, they refused to be a witness. He, however, admitted that at the time of making seizure memo he had not incorporated that no public witness came forward despite request though he claimed that this omission in making a note was an inadvertent mistake. During his cross examination, on 15.10.2019, at internal page 15, bottom paragraph, he stated that the first statement of Sharif (the informant) was recorded on 08.05.2019 by Rohit Yadav and thereafter Rishipal Singh, Inspector, recorded the clarificatory statement of Sharif (informant) on 23.06.2019.** He stated that he had recorded the statement of Guddu; the informant; informant's wife Huma; and informant's daughter Rahima on 31.07.2019 and their statements were taken at the door of their house at one go. He stated that inadvertently the name of informant's wife Huma was left out from the list of witnesses to support the charge sheet. In his cross examination, on 15.10.2019, he reiterated that the accused had lifted the bottle of oil from its cap but the finger prints of his palm and fingers were obtained to ensure that they could be compared with the finger prints available on the bottle. On being questioned with regard to the other case registered against the accused Nazil, he admitted that the accused had to be admitted in hospital at Meerut but the medical papers in respect of treatment offered to the accused at Meerut are not there in the records, as they may be part of that case. He denied the suggestion that he had pulled the hair from the head of the accused to show a false recovery. He denied the suggestion that the accused had made no disclosure in respect of hair and bottle of oil present on the spot. He denied the suggestion that public witness was not roped in to effect recovery because the recovery is bogus and fictitious. He denied the suggestion that at the spot, liquor bottle was seen. He denied the suggestion that the statement of prosecution witnesses was recorded in the police station while sitting at the table. He denied knowledge of Guddu being *Bahnoi* of Sharif. He denied the suggestion that the samples collected for forensic examination were not properly secured. He denied the suggestion that the X-ray report and supplementary report have deliberately not been produced to hide the gravity of injury suffered by the accused. He denied the suggestion that the investigation was carried out in a fraudulent manner. He denied the suggestion that the witnesses were forced to depose against the accused. He denied the suggestion that the accused was lifted in the evening of 22.06.2019 from a taxi stand and taken to a secluded place where he was shot at on his knees after putting wet *Taat Ki Patti* (Bandage) so as to threaten and coerce him into making a disclosure statement. At this stage, on the application of the prosecution, he was examined to prove site plan that was prepared at the time of the alleged recovery of hair and the bottle of oil, which, on his statement, was marked as Ex. Ka-37. On this statement, he denied the suggestion that all this was prepared while sitting at the police station.

16. The incriminating circumstances appearing in the prosecution evidence was put to the accused for recording the statement under Section 313 Cr.P.C. The Statement made under Section 313 Cr.P.C. has already been noticed above. In addition to the explanation given in the statement under Section 313 Cr.P.C., the accused examined DW-1 Nizam as a defence witness.

17. **DW-1 (Nizam)**. He stated that Guddu Khan is Sharif's real *Bahnoi*. He produced the voter list showing entry of the name of Guddu

Khan in the voter list to demonstrate that he had been a resident of another colony.

ANALYSIS OF THE EVIDENCE

18. Having gone through the entire evidence brought on record, in our view, in the prosecution evidence, following features stand out:

(i) Missing report lodged by Zoya's father (PW-1) on 08.05.2019, stating that Zoya went from home to fetch curd at 12.30 hours on 07.05.2019 and has gone missing, suspects none. Further, from the statement of PW-2, it is clear that Zoya did not go to fetch curd rather, she was with the accused-appellant and this fact was brought to the notice of PW-1, yet, PW-1 in his missing report mentions that Zoya had gone to fetch curd.

(ii) For as long as 45 days neither PW-1, nor any other person, informs the I.O. in respect of Zoya not having gone to fetch curd but having stayed with the accused-appellant even though, the I.O. had been in regular touch with the informant to get further information about the missing girl.

(iii) Even on recovery of the body on 22.06.2019, when the police is informed by the informant (PW-1) at 17.09 hrs on 22.06.2019, through a written report (Ex. Ka-2), regarding discovery of the body in a semi-built vacant house, of which GD Entry No.71 (Ex.Ka-15) is made on 22.06.2019, no suspicion of any kind is expressed against the accused-appellant.

(iv) Inquest proceeding starts within half an hour of receipt of information and culminates by 20.35 hrs (8.35 pm). The informant, amongst others, is a witness of the inquest and the first I.O. Rohit Yadav (PW-6) prepares the inquest report (Ex- Ka 8). The entry in the inquest report with regard to the opinion of the inquest witnesses is that Zoya has been killed by some unknown person even though, PW-6 states that during inquest the informant had given information with regard to the involvement of the appellant in the crime.

(v) Written application (Ex- Ka-3) is given by Sharif on 23.06.2019, by way of G.D. Entry No.27 (Ex. Ka-18) at 10.57 am, wherein, for the first time, the informant (PW-1) makes a statement with regard to his suspicion against the appellant (Nazil) and also makes a disclosure therein that he had given information with regard to the involvement of Nazil (the appellant) during the course of inquest proceedings. But, interestingly, Radhey Shyam (PW-8), the third I.O., in his cross examination, on 15.10.2019, at internal page 15, makes a significant statement, which is extracted below:-

''सीडी में वादी शरीफ का पहली बार ब्यान दिनांक 08.05.19 को श्री रोहित यादव विवेचक द्वारा लिया गया था। तत्पश्चात श्री ऋषिपाल सिंह इन्सपैक्टर द्वारा वादी शरीफ का मजीद बयान दिनांक 23.06.19 को लिया गया।''

This indicates that no formal statement of Sharif (PW-1 - the informant) with regard to the involvement of Nazil (the appellant) in the crime was there in the case diary till 23.06.2019.

(vi) Written application (Ex- Ka-3) given by the informant on 23.06.2019 though refers to the satisfaction of the informant (PW-1) with regard to the involvement of Nazil (the appellant) in the crime but gives no basis for such satisfaction or reason for his suspicion. The written application (Ex. Ka-3) fails to disclose that the victim (the deceased) instead of having gone to fetch curd, as had been the story thus far, had actually remained with the appellant and was seen going towards *Tashka Talaab* with the appellant on that fateful day.

(vii) The place from where the recovery of the body was made is an open, semi-built vacant house. It is not demonstrated in the evidence that it had limited or restricted access. This implies that it had access to all. The Inquest was carried out in presence of torch light on 22.06.2019 thereafter, on the next day (23.06.2019), the second I.O. (PW-7 - Rishipal Singh) prepared site plan (Ex. Ka-19) after again

visiting the spot with the informant and mentioned nothing substantial in the site plan with regard to presence of any incriminating material or article on the spot. Whereas, the place from where recovery of hair of the appellant on 28.06.2019 is shown, is the same *Kothri*, on the first floor of that semi-built house, where the body was discovered, inquest was held on 22.06.2019 in the presence of witnesses and the second I.O. (PW-7) visited it to prepare the site plan (Ex. Ka-19) on 23.06.2019.

19. Before we proceed further, considering that we are dealing with a case which is to be decided on the basis of circumstantial evidence, it would be useful to notice the legal principles to be borne in mind when a criminal trial is to be decided on the basis of circumstantial evidence. 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 circumstances 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 **(vide Hanumat Govind Nargundkar & Anr. V. State of Madhya Pradesh, AIR 1952 SC 343; Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116). In Vijay Shankar V. State of Haryana, (2015) 12 SCC 644,** the Supreme Court following its earlier decisions in **Sharad Birdhichand Sarda (supra) and Bablu V. State of Rajasthan, (2006) 13 SCC 116,** in respect of a case based on circumstantial evidence, held that *"the normal principle is that in a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of hypothesis other than that of the guilt of the accused and inconsistent with their innocence"*. Further, (vide paragraph 153 of the celebrated judgment in **Sharad Birdhichand Sarda's case)** the circumstances from which the conclusion of guilt is to be drawn should be fully established meaning thereby they 'must or should' and not 'may be' established. In addition to above, we must bear in mind that the most fundamental principle of criminal jurisprudence *is 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* **(vide Shivaji Sahabrao Bobade & Another v. State of Maharashtra, (1973) 2 SCC 793)**. These settled legal principles have again been reiterated in a three-judge Bench decision of the Supreme Court in **Devi Lal v. State of Rajasthan, (2019) 19 SCC 447** wherein, in paragraphs 18 and 19 of the judgment, it was held as follows:-

"18.On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in

law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

20. Having noticed the prosecution evidence and the legal principles governing decision of a criminal trial on circumstantial evidence, we notice that in the instant case, the prosecution seeks to bring home the guilt of the accused appellant by proving following circumstances: (a) that the deceased was last seen alive with the accused-appellant on or about 12.30 or 13.00 hrs on 07.05.2019 going towards *Tashka Talaab* and, thereafter, the deceased was not seen alive; (b) that on 22.06.2019 the body of the deceased was recovered from a *Kothri* on the first floor of a semi-built house; (c) the autopsy report suggests that the deceased died a homicidal death; (d) that the autopsy report confirms that death could have been caused on or about the time when the deceased was last seen with the accused-appellant; (e) that on the disclosure made by the accused-appellant and at his pointing out hair strands were recovered from that *Kothri* which, upon DNA matching, were confirmed to be of the appellant; (f) likewise, a bottle of oil bearing finger prints of the appellant was also recovered at the instance of the appellant from another place of that house, which confirms the presence of the appellant at that place.

21. Now, we shall examine as to whether the prosecution has been able to successfully prove all the circumstances narrated above. Before we proceed further, we may observe that the prosecution has been successful in establishing the following circumstances in respect of which there is hardly any dispute even in statement of the accused-appellant recorded under section 313 CrPC. These circumstances are: (i) that informant's daughter went missing since the afternoon of 07.05.2019; (ii) that on 22.06.2019 her mummified body (with all organs and orifices missing) was discovered lying in a *Kothri* on the first floor of a semi-built house; and (iii) that from the autopsy report dated 23.06.2019 it appeared that her death could be homicidal and could have occurred a month and a half back that is on or about 07.05.2019. Therefore, what we have to carefully examine is whether the circumstance of the deceased being last seen alive with the accused on or about 12.30 hrs on 22.06.2019 has been proved beyond doubt; and whether there was a recovery of incriminating material, noticed above, on the disclosure, and pointing out, of the accused-appellant.

Circumstance of the deceased being last seen with the appellant

22. First, we shall analyse the evidence in respect of the circumstance of the accused-appellant being last seen with deceased on or about noon time of 07.05.2019. Before we dwell on this issue we may observe that, ordinarily, the circumstance of the deceased being last seen alive with the accused may alone not be sufficient to record conviction **(vide Nizam V. State of Rajasthan, (2016) 1 SCC 550; Navneetakrishnan V. State, (2018) 16 SCC 161; and Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715)**. But, it is an important link in the chain of circumstances that could point towards the guilt of the accused with some certainty. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last

seen alive and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is long gap and possibility of other persons coming in between exists **(vide State of U.P. V. Satish, (2005) 3 SCC 114)**. Similar is the view taken in **Ramreddy Rajesh Khanna Reddy & Another V. State of A.P., (2006) 10 SCC 172,** where, following the decisions in **State of U.P. V. Satish (supra) and Bodhraj V. State of J & K, (2002) 8 SCC 45,** in paragraph 27 of the judgment, it was held that *"the last seen theory, furthermore, comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. Even in such cases the courts should look for some corroboration."* Here, no doubt, the time-gap between the deceased being last seen alive with the appellant and recovery of the body is so large that last seen theory by itself would not be sufficient to nail the accused but the prosecution has put forth evidence of recovery as well, therefore, we would have to meticulously examine each of the two circumstances.

23. In so far as the evidence of the deceased being last seen alive with the accused on 07.05.2019 around noon time is concerned it does not inspire our confidence for the following reasons:

(i) In the missing report which was lodged on 08.05.2019 by PW-1, the father of the deceased, it is specifically stated that the deceased had gone to fetch curd on or about noon time of 07.05.2019 but she did not return thereafter whereas, in the testimony of both PW1 and PW2 (elder sister of the deceased), during trial, the story is that though the deceased was to go to fetch curd with her elder sister (PW-2) but she did not go as she was called by the appellant, who was sitting on an e-rickshaw and, thereafter, they (i.e. the deceased and the appellant) were seen going towards *Tashka Talaab*. Importantly, from the testimony of PW-2 it is clear that she had informed her mother (not examined) in the presence of her father (PW1) that day itself that the deceased did not go with her to get curd but was with the accused-appellant. The question that now arises is that, if it was so, where was the occasion to mention in the missing report that she (Zoya) had left her house to fetch curd. This improvement in the prosecution story to introduce the theory of last seen, which was not there initially, shrouds the last seen theory with grave suspicion.

(ii) The last seen theory was developed too late. For 45 days, that is till the discovery of body, there was no last seen theory. Even when the body was discovered, in the written information (Ex. Ka-2), given on 22.06.2019, no last seen theory is there. Importantly, even in the written application (Ex. Ka-3), given on 23.06.2019, though suspicion against the accused-appellant is expressed but the basis of such suspicion, including the last seen theory, is conspicuous by its absence. In fact, this last seen theory is developed only after the police arrests the accused-appellant in the alleged police encounter. This inordinate delay in making a disclosure of highly incriminating circumstance, even though, the police had been regularly inquiring from the informant party, seriously dents the credibility of the last seen theory. In ***Kali Ram v. State of Himachal Pradesh, (1973) 2 SCC 808,*** the apex court had observed that :

"If a witness professes to know about a gravely incriminating circumstance against a person accused of the offence of murder and the witness kept silent for over two months regarding the said incriminating circumstance against the accused, his statement relating to the incriminating circumstance, in the absence of

any cogent reason, was bound to lose most of its value."

No doubt, the aforesaid observations may not have application where the knowledge of the witness with regard to the incriminating circumstance against the accused of murder is inchoate and the witness is waiting for some material to convert his suspicion into belief. But here the accused and the informant party are next door neighbours therefore, if an incriminating circumstance had come to the notice of the informant it sure would have reached the police more so when it relates to a minor daughter, who has gone missing. Further, here, the informant had already approached the police with a missing report therefore, having knowledge of a gravely incriminating circumstance against a person yet, not bringing it to the notice of the police for as long as 45 days, seriously dents the credibility of the last seen theory. Unfortunately, the trial court overlooked this vital aspect of the matter.

(iii) The last seen theory does not get corroboration from the conduct of the appellant, as could be elicited from the prosecution evidence. Noticeably, in the testimony of both PW1 and PW2, the accused-appellant though, had left with Zoya on or about noon time of that fateful day but had returned back within an hour. Further, it is not the case of the prosecution that the appellant went hiding for some time or was not seen for a few days as is expected of a person having a guilty mind. Ordinarily, when a person commits a heinous crime, his natural reaction would be to avoid those who would be putting questions to him. But, here, the accused-appellant returned back within an hour and never hid himself or absconded.

(iv) In addition to what we have noticed above, there is an additional circumstance which dents the last seen theory and gives us an impression that it is an after thought, probably, at the suggestion of the police. This is so, because the last seen theory gains momentum only after police arrests Nazil (the appellant) after an alleged encounter. The question that immediately arises is whether at the time of effecting arrest there existed some cogent material/ evidence against the appellant that may convince the police to effect arrest with such promptitude, or was the arrest effected only to show good work to ward off media pressure. This question assumes importance because of what happened thereafter. Admittedly, a simple action of effecting arrest turned into an ugly encounter, in which gun shots had to be fired at the appellant resulting in gun shot injuries on the body of the appellant for which he had to be admitted in the Hospital in the night of 22.06.2019 and had to be referred to District Hospital Meerut. As the police admittedly suffered no injury in the encounter, naturally searching questions would come. Therefore, the question that crops up is whether to avoid searching questions in respect of the encounter, the police forced the informant to set up this story. Notably, it is the specific case of the appellant in his statement under section 313 CrPC as also by way of suggestion to the prosecution witnesses that the police shot the accused on both his legs from a close range to extract a confession and, in furtherance whereof, to save themselves from searching questions, took application from informant and staged a false recovery by pulling his hair. No doubt, no evidence in respect of that allegation has come nor could come because it is the accused alone who could say so, but it is well settled in law that the prosecution has to prove its case beyond the pale of doubt whereas, the accused would succeed if he, by his explanation, manages to create a reasonable doubt with regard to the correctness of the prosecution case ***(vide Hate Singh Bhagat Singh v. State of M.B., AIR 1953 SC 468; Reena Hazarika v. State of Assam, (2019) 13 SCC 289)***. When we examine the matter in that light, we find that till 22.06.2019, starting from the missing report dated 07.05.2019, there is no major development in the case. On discovery of body on 22.06.2019,

the police swings into action and effects arrest within two hours. In **Joginder Kumar V. State of UP, (1994) 4 SCC 260,** it was observed: *no arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest.* These observations of the Supreme Court in Joginder Kumar's case have been noticed with approval in a recent three-judge Bench decision of the Supreme Court in **Social Action Forum For Manav Adhikar And Another V. Union of India, (2018) 10 SCC 443.** Therefore, now the question that arises is whether by evening / night of 22.06.2019 was there any such cogent material / information available with the police as against the appellant to warrant appellant's arrest forthwith. In this regard, Rohit Yadav (PW-6), who prepared the inquest report, states that during inquest proceedings he got information from the informant regarding involvement of the appellant in the murder of Zoya and immediately thereafter, he left in search of Nazil (the appellant) and reached Ambedkar Park crossing. This statement does not appear in sync with the statement of PW-8 who, as we have already noticed above, disclosed that the case diary indicates that after 08.05.2019 the clarificatory statement of the informant was recorded on 23.06.2019. Assuming that what Rohit Yadav (PW-6) stated related to oral information. But, inquest proceeding got over at 8.35 pm and till then, as appears in the inquest report, the opinion of the inquest witnesses, including the informant, was that the perpetrator of the crime was an unknown person. Whereas, from the statement of Rohit Yadav (PW-6), it appears, PW-6 was at Ambedkar Park Crossing, looking for the accused, immediately after the inquest, and effected arrest, after an encounter, at 21.10 hrs or 9.10 p.m. Relevant portion of the statement of Rohit Yadav, made during his cross examination on 19.09.2019, is extracted below:-

''अम्बेडकर पार्क पर मैं करीब आठ पैतालिस पर पहुंचा था। मुखबिर दो चार मिनट बाद आ गया था, इन्सपेक्टर रामवीर सिंह अपनी टीम के साथ पहुंच चुके थे। इन्सपेक्टर ऋषिपाल सिंह करीब आठ पचास के करीब आ गये थे। मुखबिर ने सूचना जब सभी को दी तो इन्सपेक्टर ऋषिपाल सिंह नही आये थे। इन्सपेक्टर ऋषिपाल सिंह के आने के बाद फिर हम लोग मुखबिर से सूचना प्राप्त करने के बाद आश्रम पद्धिति स्कूल के सामने दो जीपों से नौ पुलिस कर्मी पहुंचे''

From the above, it appears, within 10 minutes, PW-6, after completing the inquest proceedings, reaches Ambedkar Park, gets information from an informer regarding the location of Nazil (the appellant), and follows it up with an encounter with Nazil (the appellant) at 9.10 pm on 22.06.2019 itself. But, information of this encounter report is entered at the police station only in the morning of 23.06.2019 at 6.18 hours. When we notice the above sequence of events and the contents of application (Ex. Ka-3) given by the informant, wherein no material is disclosed as to the basis of suspicion against Nazil (the appellant), a reasonable doubt arises as to whether the Investigating Officer to show his good work and to justify his action i.e. the alleged encounter, took the written application from Sharif (PW-1) next day, just to put his record straight so as to demonstrate that his action was not mala fide but bona fide, and a consequence of receipt of credible information with regard to Nazil's (appellant's) involvement in the crime. The haste shown in the matter of arrest is inexplicable. More so, when nothing has come on record that the accused-appellant was hiding himself or was absconding.

When we take notice of all these circumstances, coupled with the fact that for nearly 45 days the informant and his family

remained silent, expressing no suspicion against Nazil's (appellant's) involvement, and then, after the encounter, all of a sudden the last seen theory emerges, renders the last seen evidence completely unreliable and unworthy of credit.

24. In addition to above, from the statement of PW-2 (Rahima), a child, during her cross examination, it appears that the police had been visiting informant's house on a daily basis to ensure that these witnesses get their statement recorded. Notably, PW-2 makes a statement, the import of which she does not know, which is, that the accused on that fateful day (i.e. the day of incident) appeared intoxicated. When she was asked about the meaning of the word intoxicated, she states that she does not know. All of this not only suggests that the police was coming on regular basis to the house of the informant to create pressure that the informant and her daughter make their deposition in court but also that PW-2 could be tutored. In addition to above, the appellant has also given a reason for his false implication, which is, that his taxi was taken by a close relative of the informant who got it involved in an accident, resulting in a fight between the appellant and that close relative of the informant, giving rise to animosity. Although these few factors on their own might not be sufficient to discredit the last seen theory but when we take a conspectus of all the circumstances and reasons recorded above, we come to a definite conclusion that the evidence of the deceased being last seen alive with the accused-appellant, on or about noon time of 07.05.2019, is not reliable and trust worthy and is liable to be discarded. We are, therefore, of the considered view that the prosecution has failed to prove the circumstance of the deceased being last seen alive with the appellant beyond reasonable doubt.

Circumstance of Recovery

25. Now, we take up the issue whether the prosecution has been able to prove the circumstance of recovery beyond reasonable doubt. Notably, recovery of strands of hair and the bottle of oil is alleged to have been made on 28.06.2019 from the same semi-built house from where the body of deceased Zoya was recovered on 22.06.2019. Hair strands are allegedly recovered from the same *Kothri* from where the body was lifted and where the Inquest was held on 22.06.2019 by the first I.O. (P.W.-6) and, thereafter, on the next day i.e. 23.06.2019 the second I.O. (PW-7) prepared site plan (Ex-Ka-19). The first I.O. (PW-6) in his cross examination stated that he does not remember seeing any hair there. The second I.O. (PW-7) states in his cross-examination that though he noticed hair, cigarette butt and packet of oil on or about the site where the body was found on the upper floor but he did not consider it necessary to notice them in the site plan. Importantly, existence of any incriminating material lying on spot is not reflected in the site plan prepared by the second I.O. even though he stated that he scanned the entire first floor but not the ground floor. At this stage, it be noticed that hair of Zoya had got detached from her skeleton and therefore it could be possible that some of her hair might have been noticed by him. Be that as it may, in ordinary course, it is expected that the investigating agency would first look for incriminating material lying on the spot. It is quite unbelievable that the place from where body of a girl child is recovered, particularly, in suspicious circumstances, would not be thoroughly scanned by the I.O. to look out for incriminating material. In **Mani V. State of Tamil Nadu, (2009) 17 SCC 273,** a recovery was shown to have been made after 10 days from a place near to the place from where the body was recovered earlier, discarding the said recovery, in paragraph 24 of the judgment, the Supreme Court observed that it would be impossible to believe that the Inspector did not search the nearby spots and that all the articles would remain in the open, unguarded. The Supreme Court held such a recovery to be

completely farce. Here also, it is completely unacceptable that the I.O. would not have scanned the place to search for incriminating material. Moreover, hair strands lying for 50 days on a floor of a vacant semi built house which has access to all and sundry and, that too, where inquest proceeding has taken place, is highly improbable, if not impossible.

26. Further, this recovery has been explained by the appellant in his statement recorded under section 313 CrPC by stating that he had been inflicted with two gun shot injuries, one on each leg, from a close range to extract his confession and to force him to sign recovery memorandum when, in fact, there was neither any disclosure made by him nor any recovery from the spot, rather, his hair were pulled to show them as hair strands recovered from the spot; and that the entire exercise is a paper work of the police to build a case against him as he was unnecessarily shot at in a false encounter. It is well settled that an explanation under section 313 CrPC, though not evidence, has to be considered by the court and if it fits in the scheme and nature of the prosecution evidence and serves as a material to create reasonable doubt in the prosecution case, it may well be accepted. In the instant case, indisputably, the prosecution admits that Nazil (the appellant) was arrested in an encounter and that he had suffered injury for which he had to be admitted in the hospital. Admittedly, that encounter was by police personnel of P.S. Civil Lines, Rampur and the recovery is also made by a team headed by PW-8 who is the Incharge Inspector of P.S. Civil Lines, Rampur though he was on leave at the time of encounter. Interestingly, in the prosecution evidence it has come that to effect recovery the appellant was brought at the spot on a stretcher, which suggests that the injury was serious and he was not in a position to walk. In these circumstances, to ensure that the exercise is free from doubt, the minimum that was required from the I.O. was to arrange for independent witnesses to comply with the provisions of sub-section (4) of section 100 CrPC so as to lend credence to the alleged recovery, which, otherwise, appeared farcical. But, interestingly, neither public witnesses were present at the time of recovery nor in the recovery memorandum it is stated that an effort to rope in public witnesses failed, as none came forward. Such a recovery therefore, in our view, is nothing but farce and no sanctity can be attached to such a recovery. More so, when the accused has put the police on the dock for the alleged encounter by stating that he was picked up from a taxi stand and was shot at on both legs from a close range to force him to confess. The defence also cross-examined the Investigating Officer in respect of the mode in which he was shot at. Thus, though the prosecution suppressed the injury report but it was clearly established on record that the appellant was seriously injured in the encounter and was immobilised. The appellant has also specifically stated in his explanation that the police framed him to save themselves from the embarrassing questions in the false encounter case. No doubt, it may not be appropriate for us to record a finding in respect of the genuineness of the encounter as that is a matter of another trial but we can always take this circumstance to doubt the recovery, particularly, when we find from the evidence on record that the police might have been under pressure to show good work because media persons had arrived at the spot when the body was recovered. This pressure on the police is also evident from the circumstance that they venture out to arrest the appellant on 22.06.2019 itself when, by that time, no credible information was available against the appellant as already noticed above while discussing the last seen circumstance.

27. In addition to above, from the testimony of PW-1 it appears that at the place from where, on 22.06.2019, the body was recovered cigarette butts and a packet of oil was noticed but neither the cigarette butt nor the packet of oil was collected. There is no seizure memorandum of that on record (at least not shown to us nor is part of the paper book); and the site plan prepared in the afternoon

of the next day i.e. 23.06.2019 also does not disclose presence of any hair or of any other incriminating material on the spot. Further, it is admitted by the I.O. that earlier, though the appellant had confessed his guilt but had not made any disclosure with regard to the presence of any incriminating material on the spot. It is only when the third I.O. (PW-8) takes over, obtains permission of the court to record clarificatory statement of the appellant, who is in jail hospital, having suffered two gun shot injuries, one on each leg, the disclosure statement is allegedly recorded on 25.06.2019 with regard to the presence of hair and a bottle of oil at the place from where body has been recovered. Now, we have to test whether this disclosure statement is (a) voluntary; and (b) truthful.

28. In so far as it being voluntary is concerned, nothing much can be said, particularly, when, according to the accused, he was shot on both legs and was threatened to make disclosure or be killed. In that kind of a situation, once gun-shot injuries on the body of accused-appellant are not disputed it would be anybody's guess that, in absence of cogent evidence coming through the mouth of independent witnesses, it would be difficult to accept it as voluntary. In so far as it being truthful, that is whether it led to discovery, is concerned, importantly, except the police witnesses there is no other independent or public witness to demonstrate that such a statement was made and that it led to recovery. Thus, on the basis of such an alleged disclosure statement, where the spot from where recovery is made being already known, the Field Unit, as per PW-8 testimony, already there, and the appellant is brought there on a stretcher to lift hair strands and bottle of oil, makes the entire exercise of recovery, in absence of public or independent witness, a mock drill, unworthy of any credence. Notably, the recovery has no support from a public witness and the memorandum of the recovery does not even record that an effort was made to rope in public witness but none, despite request, came forward. Interestingly, in the statement of PW-8, it has come that an effort was made to rope in a public witness. But, this appears an after thought as recital to that effect is not there in the recovery memorandum. No doubt, a recovery cannot be discarded merely for absence of public witness but each case has to be judged on its own fact. Here, absence of public witness is detrimental to the evidence of recovery for the following reasons: (a) the recovery is from a place which is already discovered; where inquest was held and site plan was prepared but nothing incriminating was found; (b) the person on whose disclosure recovery is stated to have been made is one who has been shot at on both legs by the police giving rise to a controversial situation therefore, the burden is on the police to inspire confidence in the whole situation of recovery; and (c) in the first confessional statement allegedly recorded immediately after encounter, there is no such disclosure. Thus, one way to inspire confidence is to ensure presence of a public or independent witness to clear the doubts that shrouds the entire exercise of recovery.

29. In addition to above, a question that would naturally arise is whether it could be considered probable that a six year old girl would be able to offer so much resistance, that she would be able to pull out hair from the head of her offender. No doubt, such possibility can not be ruled out but to lend credence to such possibility, the burden is heavy on the prosecution. Here, presence of an independent/public witness might have helped the prosecution to clear the doubt whereas, absence of it renders the circumstance of recovery unworthy of acceptance, particularly, in the facts of this case.

30. There is another circumstance which renders the exercise of recovery a mock drill and strikes at the value of finger prints found on the bottle of oil recovered. Interestingly, according to the prosecution evidence, the police took the

appellant to the place where he had hidden the oil bottle and allowed him to pick up the bottle and give it to the investigating officer. If the bottle of oil was allowed to be picked up by the appellant, the appearance of his finger prints on the bottle would be of no consequence. Here also, there is a deliberate attempt on the part of PW-8 to justify that, by stating that the accused picked up the bottle from its crown (cap). But that is not mentioned in the seizure memorandum. Thus, seen from any angle and for all the reasons discussed above, the circumstance of recovery of hair and bottle of oil from the spot on the disclosure statement of the appellant is not proved beyond reasonable doubt. Rather, the explanation offered by the appellant that he was forced to make a disclosure statement and his hair were pulled to show recovery appears probable and casts an insurmountable doubt on the recovery. Once the recovery is rendered doubtful, the DNA profiling report is of no consequence and so is the finger print report.

31. At this stage, we may observe that unfortunately the trial court has failed to test the reliability and credibility of the prosecution evidence and has accepted the prosecution evidence as gospel truth, which is not the requirement of law. For a proper decision in a trial, the prosecution evidence, if admissible, has to be tested on broad probabilities emerging from the facts of a case to find out whether it is reliable. Only after the evidence is tested and found reliable, that it can form the basis of conviction.

32. In the present case, we find that the prosecution evidence has failed to prove the incriminating circumstances of the deceased being last seen alive with the appellant and the recovery beyond the pale of doubt, and there is no medical / forensic evidence to demonstrate that there was presence of semen or blood stain of the appellant on the clothes of the deceased or on her body. Importantly, all orifices and organs of the body were missing hence, except for confessional statement which, being made before police, was not admissible, there was no evidence to come to the conclusion that an offence of rape was committed. As all these incriminating circumstances from which the prosecution sought to prove its case against the appellant have not been proved beyond the pale of doubt, the appellant is entitled to be acquitted.

33. We, therefore, have no hesitation in rejecting the reference for affirmation of the death sentence and in allowing the appeal of the appellant against the order of his conviction and sentence. The appeal of the appellant is **allowed.** The reference sent by the trial court to confirm the death penalty is rejected. The judgment and order of the trial court is set aside. The appellant is acquitted of all the charges for which he has been tried and convicted. The appellant shall be released from jail forthwith, unless wanted in any other case, subject to compliance of the provisions of Section 437-A Cr.P.C. to the satisfaction of the trial court.

34. Let a copy of this order along with the record of the court below be sent back to the court below for information and compliance.

(2021)12ILR A39
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.12.2021

BEFORE

THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Jail Appeal No. 73 of 2020

Pramod Kumar **...Appellant**

Versus

State of U.P. **...Opposite Party**

Counsel for the Appellant:

From Jail, Sri Shyam Kumar Verma

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 363, 366, 376 & ¾ POCSO Act-challenge to-conviction-victim statement u/s 161 and 164 Cr.P.C. are inconsistent-she recovered by the police and she stated that she had solemnized marriage with the appellant-Moreso, she exonerated the involvement of other co-accused-she found to be major as per medical report-she continued living with the accused as husband and wife for 20 days-she was a consenting party who left her house on her own-when the custody given to her parents, she changed her stand under the changed circumstances-In her examination-in-chief she stated different story that she went to market and three persons committed rape by administering her juice and later they gave her in custody of appellant-evidence of prosecutrix found to be totally unreliable, untrustworthy, hence the accused cannot be convicted of the charges levelled against him-Learned lower court misconstrued the evidence produced by the prosecution.(Para 1 to 36)

The appeal is allowed. (E-6)

List of Cases cited:

Wahid Khan Vs St. of M.P. (2010) 68 ACC 266

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. This jail appeal has been preferred by the appellant Pramod Kumar against the judgment and order dated 13.11.2018 passed by Special Judge, (POCSO Act)/ 8th Additional Sessions Judge, Agra in Special Case No. 2446 of 2017, case crime no. 441 of 2017 State Vs. Pramod Kumar, under sections 363, 366 and 376 I.P.C. and 3/4 POCSO Act, police station Atmadpur District Agra.

2. By the impugned judgment and order dated 13.11.2018 the learned lower court convicted the present accused Pramod Kumar under section 363, 366 and 376 I.P.C. and acquitted under section 3/4 POCSO Act, whereby the accused persons Dinesh, Choota @ Atendra and Tinchu @ Sarvesh were acquitted of all the charges levelled against them by the same judgment passed in the connected Special Sessions Trial No. 821 of 2018, State Vs. Tinchu and others under the same sections.

3. The facts germane to this appeal are that on 4.9.2017 on 18.10 hours Mannu son of Niroti Lal lodged a first information report at case crime no. 0441 of 2017 under sections 363 and 366 I.P.C. against Lakhan and Chhotu, both sons of Suresh with the allegation that he is a peace loving and law abiding poor person belonging to scheduled caste. He works as a labourer in Ballabhgarh Faridabad and his family members reside in village Siktara police station Atmadpur District Agra. On 1.9.2017 his wife Smt. Ranno Devi had gone to graze animals at about 4.00 p.m. His daughter Pooja aged about 16 years was alone at the house. Lakhan and Chhotu sons of Suresh r/o house no. 83 lane no. 2, police station and District Firozabad enticed her daughter away and her whereabouts are not known till now so the steps be taken against them.

4. After lodging the first information report, Sub Inspector Jai Prakash recorded necessary statements, prepared site plan, made attempt to recover the girl and ultimately the girl was recovered by him on 22.9.2017. Her statements were recorded under sections 161 and 164 Cr.P.C. and she was given in supurdagi of her parents as per her wish. The girl was medically examined. Her statement against sexual violence was recorded by the concerned doctor. According to the report of C.M.O. she was found to be about 18 years of age. All the necessary endorsements were made in case diary and following the due procedure chargesheet no. 284/2017 dated 14.12.2017 was submitted

against the present accused Pramod Kumar under sections 363, 366, 376D I.P.C. and 3/4 POCSO Act and charge sheet no. 284A/2017 dated 15.3.2018 was filed against Chhota @ Atendra, Dinesh and Tinchu @ Sarvesh under the same sections 363, 366, 376D I.P.C. and 3/4 POCSO Act. After receiving the chargesheets, learned Magistrate took cognizance against the accused persons and under due procedure of law the cases were committed to the court of Sessions.

5. On 10.5.2018 and 20.4.2018 charges under section 363, 366, 376-D I.P.C. and 3/ 4 POCSO Act were framed against accused Pramod Kumar, Dinesh and Tinchu @ Suresh respectively. The accused persons denied of the charges and pleaded not guilty.

6. The prosecution produced as many as 7 witnesses in support of their case. P.W.-1 Mannu is the father of the victim. P.W.-2 Ranno Devi is mother of the victim, P.W-3 Shivnath is the Principal of the school where victim is said to have studied, P.W.-4 is the victim herself, P.W.-5 Jai Prakash Singh is the first Investigating Officer, P.W.-6 Dr. Sunita Kumari has proved the medical report of the victim. P.W.-7 Vijay Kumar is the second Investigating Officer.

7. As documentary evidence, the prosecution has produced chik FIR as exhibit K-1, School leaving certificate of the victim as exhibit K-2, statement of victim under section 164 Cr.P.C. as exhibit-K-3, siteplan as exhibit-K-4, Supurdaginama as exhibit K-5, Chargesheet no. 284 of 2017 against the accused Pramod Kumar as exhibit K-6. Medical report exhibit K-7, pathologist report exhibit K-8, X-ray report and report of C.M.O. as exhibit K-9. Charge sheet no. 284-A of 2017 against Tinchu @ Sarvesh, Dinesh and Chhota @ Atendra as exhibit K-10.

8. On 23.10.2018 statements of accused persons were recorded under section 313 Cr.P.C. wherein they denied of their charges and claimed their implication to be false. No defence evidence has been adduced by accused persons.

9. As per x-ray report and the report of C.M.O. exhibit K-9 the age of victim is determined about 18 years and regarding rape it is opined that no definite opinion regarding rape can be given. As per finding of the lower court record, the girl was found to be about 18 years of age at the time of incident and the date of birth of the victim mentioned in the school leaving certificate 8.7.2000 is disbelieved by the trial court. There is no dispute regarding the same and because the age of girl is determined as about 18 years at the time of incident so the lower court on the application for custody of the girl ordered to let the girl go as per her own wish. As per supurdaginama exhibit K-5 the girl consented to go with her parents so the Sub Inspector Jai Prakash gave the girl in the custody of her parents.

10. As per the judgment of learned lower court dated 13.11.2018, the three accused persons namely Dinesh, Choota @ Atendra and Tinchu @ Sarvesh have been acquitted of all the charges levelled against them under section 363, 366, 376 D I.P.C. and section 3/4 POCSO Act. The accused Pramod Kumar has also been acquitted of the charge under section 3/4 POCSO Act but he has been convicted under section 363, 366 and 376 I.P.C. as noted above.

11. The present appeal has been preferred on behalf of Pramod Kumar only with the contention that the impugned judgment is against the law and facts on record. The accused has been illegally convicted and undue weightage has been given to the prosecution evidence. The version of the accused has been illegally rejected. The sentence awarded is excessive. The prosecution has utterly failed to prove its case beyond reasonable doubt. No benefit of doubt has been given to the accused.

The accused is innocent and has committed no offence. He has been falsely implicated in the present case. He has been illegally convicted, so judgment is prayed to be set aside.

12. From perusal of the lower court judgment it is clear that the present accused has been convicted under section 363, 366, 376 I.P.C. If we go through the finding of the lower court on page "13' of the judgment it has reached at the conclusion that on the basis of C.M.O. report the girl was found to be of age of 18 years at the time of occurrence so the accused Pramod Kumar is acquitted of the charges under section 3/4 POCSO Act. In my opinion, the finding of lower court is self contradictory. If the court has found the girl to be of 18 years of age at the time of occurrence then the accused could not be convicted under section 363 I.P.C. For the offence under section 363 I.P.C. In this regard section 361 of I.P.C. is to be looked into which can be reproduced as under;

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

13. The punishment of kidnapping is given in section 363 I.P.C. Thus, if any person who entices away any minor girl under age of 18 years out of keeping of the lawful guardianship of such minor without the consent of such guardian will said to have kidnapped such minor from the lawful guardianship and such person shall be punished under section 363 I.P.C. As per finding of learned lower court at page 13 of its judgment the age of victim girl has been decided to be 18 years at the time of occurrence. So in my opinion, if the girl is found to be of 18 years i.e. major on the date of occurrence then the person who is said to entice away her cannot be held guilty under section 363 I.P.C. so finding of the judgment of learned lower court to the extent of section 363 I.P.C. is erroneous and against the law.

14. So far as conviction under section 366 I.P.C. is concerned it is to be proved that the girl was induced with the intent that she may be compelled or knowingly it to be likely will be compelled to marry any person against her will or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse.

15. For the offence under section 376 I.P.C. the word rape has been defined under section 375 I.P.C. wherein a man is said to commit rape on a female if the act is done against her will, without her consent, if it is with her consent it has been obtained by putting her or any person in whom she is interested in fear of death or of hurt with or without her consent when she is under 18 years of age or if she is unable to communicate her consent.

16. Here it is not the case that the girl was unable to communicate her consent. It has been decided by the lower court that at the time of occurrence the girl was 18 years of age i.e. she was major. So the conviction under section 363 I.P.C. becomes against the law.

17. Now it is to be seen whether the girl was abducted with the intend that she may be compelled or likely to be compelled to marry against her will or she may be forced or seduced to illicit intercourse or likely to be forced or seduced to illicit intercourse and physical relations are made with the girl against her will or consent.

18. If we go through the medical report exhibit K-6, the opinion of doctor is that no

definite opinion regarding rape can be given. P.W.-6 Dr. Sunita has proved this report by her statement. If we go through the report, it is mentioned therein that the girl had changed clothes under-garments, she had washed her clothes and under-garments, she had passed urine and stool, rinsed her mouth. The girl is said to be recovered on 22.9.2017 and is said to have been examined next day i.e. on 23.9.2017. Hon'ble Apex Court in the case of **Wahid Khan Vs. State of Madhya Pradesh, 2010 (68) ACC 266** held that rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

19. So the physical assault on the victim was a rape or not is to be decided by the court on the basis of evidence on record. Whether the said victim was abducted or kidnapped with the intent of compelling her to marry any person against her will or that she may be forced or seduced to illicit intercourse and whether the physical assault on the victim comes under section 375 of I.P.C. is to be looked into and the evidence is to be scrutinized to come to a definite conclusion.

20. As per first information report Lakhan and Chhotu both sons of Suresh were said to have enticed away the victim. During investigation the involvement of these two persons was found wrong. When the girl was recovered by the police on 22.9.2017 she was found in the company of the present accused Pramod Kumar. When her statement under section 161 Cr.P.C. was recorded on 22.9.2017 she stated that on the missed call of accused Pramod they started conversation with each other and at the last on the call of Pramod Kumar she left her home. In the way she met Chhotu who take her to Atmadpur where she met Pramod Kumar and Pramod Kumar took her NOIDA Mamura by bus. There they solemnized marriage and started living like husband and wife. Next day on 23.9.2017 when she was produced before the doctor there she narrated the incident that on 1.9.2017 Dinesh, Tinchu and Chhota lifted her from her home to some unknown place. They kept her for 3-4 days there then they left her with Pramod Kumar and Chhota. Pramod Kumar committed rape upon her. She lived for 6-7 days along with Pramod after that police recovered her.

21. On 4.10.2017 her statement under section 164 Cr.P.C. was recorded before the Magistrate wherein she stated that on 1.9.2017 at 4.00 p.m. she went alone to Admadpur to purchase vegetables. She met there Dinesh,Tinchu and Chhota who administered her juice and after having juice she felt dizziness. She was taken away from there by a roadways bus. When she boarded on bus she became unconscious. When she gained her conscious she found herself in a room in Mamura. Chhota put off her trouser and Tinchu and Dinesh caught hold her hands and legs. Chhota committed rape on her. After Chhota, Dinesh and Tinchu also raped her and then they handed over the victim in custody of a boy named Pramod Kumar who took her to his house by auto rickshaw and next day he also committed rape on her. During traveling in auto rickshaw she did not raise any alarm as Pramod Kumar had given threat to kill her brother.

22. On 6.10.2017 the Investigating Officer recorded her additional statement wherein she stated that she is not familiar with Chhotu. Chhotu is the nephew of Tinchu. Chhota, Tinchu and Dinesh administered her juice, raped her and then gave her in custody of Pramod Kumar.

23. If we go through the evidence on record of p.w.-1, the father of the girl, he has

proved the complaint wherein he has mentioned that on 1.9.2017 her daughter was enticed away by Lakhan and Chhotu. The only statement regarding the present accused, the witness has made is that on 21.9.2017 her daughter was recovered with Pramod and Pramod was arrested.

24. P.W.-2 mother of the victim has also stated that on 1.9.2017, she had gone to house of her parents. Her husband informed her in the evening that Lakhan and Chhotu have enticed away their daughter Pooja. Pooja came back on 21.9.2017 and on being asked she did not name Dinesh, Chhota and Tinchu. She also admitted that her daughter was recovered along with Pramod Kumar. Pramod Kumar was arrested by the police. Both these witnesses have not mentioned the name of the present accused in committing the rape on their daughter. They have only stated that the girl was recovered along with Pramod.

25. The most important and the only witness of the occurrence is the girl herself who has appeared as P.W.-4 in the court. In her examination-in-chief she stated that on 1.9.2017 in the evening she went alone to Atmadpur for purchasing vegetables, Pramod Kumar met there along with his friends. Pramod Kumar administered her juice after that she felt dizziness and then they took her by a bus and kept her in a room. Pramod Kumar raped her and on 21.9.2021 when he was bringing her to Agra she was recovered by the police at Taj Expressway. She was medically examined and Pramod was arrested. She specifically denied the involvement of Dinesh, Chhota and Tinchu in enticing her away or committing rape on her. She was declared hostile and in the cross examination by the learned Government Advocate she denied of her statement under section 161 Cr.P.C. and stated that she is not aware of the said statement. She has no knowledge how this statement has been recorded by the police and in cross examination again she stated that Pramod Kumar committed rape on her. He kept her in his house and gave threat to kill her brother. In the cross examination by the counsel on behalf of Tinchu, Chhota and Dinesh she again denied of rape committed by Tinchu, Chhota and Dinesh.

26. It is noteworthy that only three witnesses of fact have been produced on behalf of the prosecution wherein p.w.1 and 2, the parents of the victim are neither the eye witnesses of the incident nor have made allegation against Pramod of enticing the girl away or that he committed rape on their daughter. They have only admitted the fact that their daughter was recovered with Pramod Kumar, however, the victim has in her examination-in-chief and also in cross examination stated that Pramod Kumar committed rape on her. It is true that the victim the PW-4 has not been cross examined by the learned counsel of accused Pramod Kumar rather none of the witnesses have been cross examined by the counsel of accused Pramod Kumar. It is found that on 29.10.2018 when the statement under section 313 Cr.P.C. of the accused persons had been recorded and the arguments were heard in part an application on behalf of the accused Pramod Kumar was moved that his counsel be permitted to cross examine the witnesses. This application was rejected on the ground that it was moved at a very belated stage. However, the judgment on the basis of uncontroverted evidence of the victim was passed which resulted into conviction of accused Pramod Kumar. The evidence of the victim only is enough to hold the accused guilty but for holding a person guilty of offence, it is necessary that the statement of only witness i.e. prosecutrix must be convincing, reliable and trustworthy. Now we have to see whether the uncontraverted statement of victim is reliable enough to bring home the guilt of accused.

27. It is true that when the first information report was lodged by the father of the victim he

had no knowledge that with whom his girl has eloped. Only on the basis of suspicion the names of Chhotu, Lakhan were mentioned therein and the implication of these two persons was found wrong by the police, they were not even chargesheeted.

28. When the girl was recovered on 22.9.2017 she stated in her statement under section 161 Cr.P.C. that she went along with Pramod Kumar on her own on the phone call of Pramod Kumar. They went to Noida Mamura. Pramod Kumar kept her in his house. They both solemnized their marriage and lived like husband and wife. It is noteworthy that in the bail application also the same ground was taken by Pramod Kumar that both had solemnized marriage and were living as husband and wife. A photocopy of marriage certificate was produced, then the accused Pramod Kumar was released on bail on 28.10.2017.

29. After admitting the fact of marriage with Pramod Kumar in statement under section 161 Cr.P.C., the girl was produced before the doctor for her medical examination. There she named Dinesh, Tinchu and Chhota that they lifted her from her house and she was kept with them and afterward she was left with Pramod Kumar by them. Chhota and Pramod committed rape upon her. Thus on the next day of her recovery along with Pramod Kumar she implicated Dinesh, Tinchu and Chhota also in the offence and alleged that they lifted her from her house. After the statement before the doctor which has been proved by the doctor as P.W. 6 in the court, on 4.10.2017 in her statement under section 164 Cr.P.C. she cooked up a fresh story that on 1.9.2017 at 4.00 p.m. she had gone to buy some vegetables to Atmadpur where Tinchu and Chhota administered her juice and took her in a bus to Mamura. In the bus she got unconscious and when she gain her conscious Tinchu, Dinesh and Chhota committed rape on her one by one. After that they gave her in the custody of Pramod Kumar who took her in his house and there he also committed rape on her. On 6.10.2017 her additional statement was recorded by the police wherein she again named Chhota, Tinchu and Dinesh for administering her juice, committing rape on her and transferring her in custody of Pramod Kumar and when she was produced in the court as P.W.-4, she clearly refused the involvement of Chhota, Dinesh and Tinchu in enticing her away and committing rape on her. Here she only implicated Pramod Kumar and made allegations against him of committing rape on her.

30. Though on single testimony of the prosecutrix the accused can be convicted but her evidence must be convincing and reliable as the Hon'ble Apex Court in **Santosh Prasad Vs. State of Bihar (2020) 3 Supreme Court Cases 443 and Sudhansu Shekhar Sahoo Vs. State of Orisa, 2003 AIR SCW 154** has opined that there can be a conviction solely based on the evidence of the prosecutrix however the testimony of the prosecutrix must be trustworthy and convincing and reliable. Non-examination of other witnesses cannot be ground to reject the prosecution case. In the judgment of **Abbas Ahmad Choudhary Vs. State of Assam, 2010 (12) SCC 115,** the Apex Court held that the statement of prosecutrix must be given primary consideration but at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that the prosecutrix would always tell entire story truthful. Here the statement of prosecutrix is the only evidence produced in support of charges levelled by the prosecution but the evidence of the prosecutrix cannot be said to be reliable. It is completely shaky. The girl has changed her stand every time.

31. At one place, when she has been recovered by the police she admits in the statement under section 161 Cr.P.C. the present

accused Pramod Kumar to be her husband and stated that they had solemnized marriage and were living as husband and wife and very next day in her statement before the doctor she implicated Chhota, Dinesh and Tinchu and blamed them of committing rape upon her and transferring her custody to Pramod Kumar by these three persons. She also stated that these three persons lifted her from her home. On 4.10.2017 in her statement under section 164 Cr.P.C. she again changed her stand that on the date of incident she had gone to Atmadpur to buy some vegetables and there Tinchu, Dinesh and Chhota administered her juice. She felt dizzy and she was taken away by a bus where she got unconscious and these three persons committed rape on her and gave her in custody of Pramod Kumar. On 6.10.2017 in her additional statement under section 161 Cr.P.C. again she repeated this statement. When she was produced in the court as P.W.-4 she totally exonerated Chhota, Dinesh Tinchu and denied the involvement of the other persons in the offence except Pramod Kumar.

32. It is noteworthy that after her recovery and recording her statement under section 161 Cr.P.C., she was living with her parents. These changed circumstances changed her stand also.

33. As the girl has been found to be major on the date of incident, so her consent makes a difference in the commission of the offence. It is admitted fact that girl was recovered from the custody of Pramod Kumar and her statement that after committal rape by Chhota, Tinchu and Dinesh they handed over her to Pramod Kumar next day means after eloping on 1.9.2017 till her recovery on 22.9.2017 at least for 20 days she was with accused Pramod Kumar and if she was taken forcefully she could have raised alarm, she could have come out from his house and report the matter to police but she did not do so rather she continued living with him and when she was recovered by the police she was in the company of Pramod Kumar. There also she did not state before the police that she was being taken forcefully by the accused Pramod Kumar rather in her first statement of the recovery under section 161 Cr.P.C. she accepted that she had solemnized marriage with accused Pramod Kumar which makes it clear that she was a consenting party who left her house on her own and went to meet Pramod Kumar and both solemnized marriage and lived as husband and wife together. Later on, she was recovered by the police and started living with her parents and then she changed her stand implicating Pramod Kumar in the offence punishable under sections 363, 366 and 376 I.P.C. The lower court has held the prosecutrix major on the date of occurrence on the basis of the above discussion, the evidence of the prosecutrx with regard to the offence committed with her is found to be totally unreliable, untrustworthy and unconvincing, hence the accused cannot be convicted of the charges levelled against him.

34. The finding of lower court convicting the accused Pramod Kumar under section 363 Cr.P.C. after holding the victim major is completely erroneous and against the law. The conviction of Pramod Kumar under other sections is also based on unreliable and shaky evidence. The sexual intercourse in question is not proved amounting to rape and no offence is brought home to Pramod Kumar appellant. Learned lower court has misconstrued the evidence produced by the prosecution in recording perverse finding regarding conviction of the accused. Hence the judgment of lower court is liable to be set aside.

35. For the reasons mentioned above, the impugned judgment and order cannot be upheld and it is set aside.

36. Accordingly, the appeal is allowed.

37. The appellant Pramod Kumar is acquitted of the charges levelled against him and he be set at liberty forthwith if not required in any other case.

(2021)12ILR A47
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.12.2020

BEFORE

THE HON'BLE VIPIN CHANDRA DIXIT, J.

Jail Appeal No. 485 of 2018

Baba Kuberanand @ Kalu Ram ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Lalji Chaudhary

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 363, 366, 376(2) I, 376(2) J & Section 4 POCSO Act, 2012 -challenge to-conviction-no external injury and victim denied for her internal medical examination, therefore commission of rape could not be proved-Chief Medical Officer assessed her age as 17 years and as per migration certificate her age was 16 year 5 months-she stated on oath as PW-1 that she went with the appellant on motorcycle with her own will-other witnesses stated the version of F.I.R.-sentence awarded to the appellant is modified and is reduced to the period already undergone.(Para 1 to 18)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Sattan Sahani Vs St. of Bih. & ors.. (2002) 45 ACC 1134 SC

2. Uthem Rajanna Vs St. of A.P. (2005) 11 SCC 531

3. Neelam Bahal & anr. Vs St. of U.K. (2010) 2 SCC 229

4. B.G. Goswami Vs Delhi Administration (1973) AIR 1457

(Delivered by Hon'ble Vipin Chandra Dixit, J.)

1. The present jail appeal has been preferred by the appellant Baba Kuberanand @ Kaluram from jail against the impugned judgment and order dated 18.3.2016 passed by Special Judge, POCSO Act/Additional Sessions Judge, Court No.4, Ghaziabad in Sessions Trial No.17 of 2014 (State of U.P. Vs. Baba Kuberanand alias Kaluram). The accused-appellant has been convicted and sentenced with rigorous imprisonment for 5 years with fine of Rs.5,000/- under Section 363 I.P.C. and in default thereof he shall undergo additional imprisonment for two months, sentenced with rigorous imprisonment for 7 years and fine of Rs.10,000/- under Section 366 I.P.C. and in default thereof he shall undergo additional imprisonment for three months, sentenced with rigorous imprisonment for 10 years and fine of Rs.10,000/- under Sections 376(2) J of I.P.C. and in default thereof he shall undergo additional imprisonment for three months, sentenced with rigorous imprisonment for 7 years and fine of Rs.10,000/- under Section 4 of POCSO Act and in default thereof he shall undergo additional imprisonment for three months. All these sentences have been directed to be run concurrently.

2. Factual matrix of the case are that the F.I.R. (Exhibit Ka-5) was lodged by complainant Pratap Singh (P.W.-2) in Police Station Dhaulana, District Hapur that her daughter, age 15 years, was missing since evening of 13.1.2014 and he suspects Baba Kuberanand, Harish, Rinku and Sushil for the same. The case was registered as Case Crime No.21 of 2014,

under Sections 363 & 366 I.P.C. The case was investigated by S.I. Vinod Kumar Sharma (P.W.-5) who submitted the charge-sheet (Exhibit Ka-8) on 8.2.2014. Learned trial court had framed charges against appellant on 3.5.2014 under Sections 363, 366, 376(2) I, 376(2) J of I.P.C. and Section 4 of POCSO Act. The appellant-accused has denied the charges and pleaded for trial.

3. So as to hold the accused-appellant guilty, the prosecution had produced six witnesses which are as follows:-

1. P.W.-1 victim
2. P.W.-2 Pratap, informant (father of victim)
3. P.W.-3 Bhujveer, nephew of informant
4. P.W.-4 Constable Kamal Singh, scriber of F.I.R.
5. P.W.-5 S.I. Vinod Kumar Sharma, Investigating Officer
6. P.W.-6 Dr. Tina Khanuja

4. The statement under Section 313 Cr.P.C. of accused-appellant was recorded in which he denied the allegations and pleaded that he has been falsely implicated in this case on account of enmity with informant. It is stated that a quarrel took place on 4.1.2014 with father of victim and other villagers and as such for that reason he has been falsely implicated in this case. He has denied to produce any witness in support of his defence.

5. The victim was medically examined and as per medical report there was no external injury on any part of the body of victim and the victim had denied for her internal medical examination. The age of the victim was assessed as 17 years by Chief Medical Officer, Hapur.

6. The victim appeared as P.W.-1 before trial court and stated on oath that she went with accused-appellant to Himachal Pradesh from Meerut on motorcycle but she has not stated that she was enticed or forcibly took away by appellant-accused. The informant has appeared as P.W.-2 who is father of victim and has stated the same story as stated in F.I.R. The other witness of fact produced by prosecution was Bhujveer who appeared as P.W.-3 and supported the prosecution case. Constable Komal Singh appeared as P.W.-4 and proved the F.I.R. Investigating Officer Vinod Kumar Sharma appeared as P.W.-5 and proved the filing of charge-sheet. Dr. Tina Khanuja appeared as P.W.-6 and proved the medical report (Exhibit Ka-10). P.W.-6 had stated that victim denied for her internal medical examination and therefore commission of rape could not be proved.

7. The learned trial court on the basis of evidence adduced by the prosecution had recorded the findings that as per migration certificate the age of victim is 16 years 5 months as her date of birth is mentioned as 15.8.1997. As per report of Chief Medical Officer, Hapur dated 4.2.2014 the age of victim was 17 years and as such she was minor on the date of incident, therefore, the charges against accused-appellant were established and convicted the accused-appellant under Sections 363, 366 and 376 (2) J of I.P.C. and Section 4 of POCSO Act.

8. Heard Sri Lalji Chaudhary, learned counsel for appellant, Sri R.K. Srivastava, learned A.G.A. for the State and perused the impugned judgment and order as well as record of the present case.

9. Learned counsel appearing for appellant states that he does not propose to challenge the judgment and order of trial court on its merit. He, however, submitted that there are contradictions in the statements of witnesses produced by prosecution and the trial court has ignored the evidence of doctor who appeared as P.W.-6 that internal medical examination was

refused by the victim thus commission of rape could not have been proved. It is further submitted that from the evidence adduced by the prosecution it is apparent that victim went to Himachal Pradesh with accused-appellant on motorcycle without raising any alarm and lived there till 24.1.2014 which itself proved that she was consenting party and went with appellant with her own will but on account of enmity with informant the appellant has been falsely implicated in this case.

10. Learned counsel for appellant has submitted that maximum sentence awarded by learned trial court is 10 years and the appellant has already undergone more than 6 years 10 months and as such the matter be considered sympathetically and the order of sentence may be reduced to the period already undergone by the appellant. It is next submitted that appellant is not a previous convict. Learned Additional Government Advocate has no objection if the Court reduces the quantum of punishment.

11. The findings of fact has been recorded by trial court that on the date of incident the victim was minor and that findings have not been challenged by the appellant, hence, the conviction of appellant stands affirmed.

12. Learned counsel for appellant pleads that appellant is in jail for last about 7 years whereas the maximum punishment awarded to the appellant is 10 years and as such the appeal may be decided sympathetically and the sentence may be reduced to the period which had already undergone by the appellant.

13. In the case of ***Sattan Sahani vs State of Bihar*** and others, 2002 (45) ACC 1134 (SC), accused were sentenced to three years' rigorous imprisonment under section 326 IPC. In appeal, the Apex Court reduced the sentence to the period already undergone on the ground that the incident took place two decades back and parties have also compromised.

14. In the case of ***Uthem Rajanna vs State of Andhra Pradesh,*** 2005 (11) SCC 531, accused was convicted and sentenced to six months' simple imprisonment under section 304-A IPC along with fine of Rs. 500/- and three months' simple imprisonment under section 338 IPC and also to pay a fine of Rs. 500/- under section 337 IPC. The Apex Court in appeal has reduced the sentence to the period already undergone.

15. In the case of ***Neelam Bahal and another vs State of Uttarakhand***, 2010 (2) SCC 229, the accused was convicted and sentenced to undergo seven years' rigorous imprisonment under section 307 IPC. The Apex Court has convicted the accused under section 326 IPC and reduced the sentence to the period already undergone, i.e. almost one year.

16. The Hon'ble Supreme Court has reduced the sentence of accused to the period already undergone in the case of ***B.G. Goswami Vs. Delhi Administration***, 1973 AIR 1457. The relevant paragraph of the judgment is reproduced as under:

"Now the question of sentence is always a difficult question, requiring as it does, proper adjustment and balancing of various considerations, which weigh with a judicial mind in determining its appropriate quantum in a given case. The main purpose of the sentence broadly stated is that the accused must realise that he has committed an act, which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as an individual and as a member of the society. Punishment is designed to protect society by deterring potential offenders as also

by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining this question. In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. Too lenient as well as too harsh sentences both lose their efficaciousness. One does not deter and the other may frustrate thereby making the offender a hardened criminal. In the present case, after weighing the considerations already noticed by us and the fact that to send the appellant back to jail now after 7 years of the annoy and harassment of these proceedings when he is also going to lose his job and to earn a living for himself and for his family members and for those dependent on him, we feel that it would meet the ends of justice if we reduce the sentence of imprisonment to that already undergone but increase the sentence of fine from Rs- 200/- to Rs. 400/-. Period of imprisonment in case of default will remain the same."

17. In the present case the appellant is in jail since 25.1.2014 and had served the sentence for 6 years 10 months. In view of aforesaid facts the sentence awarded to the appellant is modified and the sentence is reduced to the period already undergone by the appellant in this case.

18. The present jail appeal is partly allowed. The appellant is in jail. He shall be released forthwith if not wanted in any other case. It is further directed that the appellant shall furnish bail bonds with sureties to the satisfaction of the court concerned.

(2021)12ILR A50
APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: LUCKNOW 13.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Criminal Appeal No. 1588 of 2021

Indra Pratap Tiwari ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Dhirendra Kumar Mishra

Counsel for the Respondent:
G.A., Anuj Pandey, Sushil Kumar Singh

A. Bail - Objectors - The Court held that such objectors, as in the present case, can only be allowed to interject under the supervision of AGA/Public Prosecutor. The objectors brought forth the criminal antecedents of the appellant which is necessary fact to be looked into at the time of grant of bail to the appellant post Conviction by the Trial Court. (Para 70)

B. Criminal Law - Joint Trial - Joint Trial can be held as the college where the three accused were studying was one, its Principal had lodged First Information Report regarding the similar interpolations in mark sheets by the three accused on the basis of same record of results maintained by it in its ordinary course of business and the very same evidence was to be produced to bring home the charge in the case of each of the accused and the prosecution witnesses who were examined to prove the charges were also the same. (Para 72)

The Court rejected the bail application of the applicant on finding that he had submitted fake proof of identity and residence for procuring arms license, and in taking the Courts for a ride in submitting bail papers and sureties on the basis of fake residential address and also removing Court records of criminal case pending against him. (Para 73)

Bail Application Rejected. (E-10)

List of Cases cited:

1. Ashwini kumar Upadhyay Vs U.O.I . & ors. Writ Petition Civil No. 699 of 2016

2. A.R. Antulay Vs R.S. Naik AIR 1988 SC 1531

3. Ratan Lal Vs Prahlad Jat & ors. Criminal Appeal No. 499 of 2014

4. Naveen Singh Vs St. of U.P. AIR Online 2021 Supreme Court 138

5. Manohar Lal Vs Dinesh Anand & ors. 2001 (5) SCC 407

6. Arunachalam Vs PSR Sadananantham & ors. 1979 (2) SCC 297

7. Thakur Ram & ors. Vs St. of Bihar 1966 (2) SCR 740

8. Shivakumar Vs Hukum Chand & anr. 1999 (7) SCC 467

9. NHRC Vs St. of Guj. 2004 (8) SCC 610

10. Anand Sen Yadav Vs St. of U.P. Criminal Appeal No. 1061 of 2011

11. People's Union for Civil Liberties Vs CBI Criminal Revision No. 339 of 1996

12. Kuldeep Singh Vs St. of Har.Criminal Revision No. 1030 of 1979

13. Prisoners Rights Forum Vs St. of Tamil Nadu 2019 SCC Online Madras 2476

14. Maulana Mohammad Aamir Rashidi Vs St. of U.P. & anr. 2012 (2) SCC 382

15. Prabhakar Tiwari Vs St. of U.P. & anr. 2020(11) SCCC 648

16. Vijai kumar Vs Narendra & ors. 2002 (9) SCC 364

17. Preetpal Singh Vs St. of U.P. & ors. 2002 (8) SCC 645

18. Kashmira Singh Vs St. of Punjab 1977 (4) SCC page 291

19. Babu Singh Vs St. of U.P. 1978 (1) SCC 579

20. Kalyan Chandra Sarkar Vs Rajesh Ranjan & anr. 2004 (7) SCC page 528

21. Chaman Lal Vs St. of U.P. & ors. 2004 (7) SCC 525

22. Mauji Ram Vs St. of U.P. & anr. 2019 8 SCC 17

23. Ajay Kumar Sharma Vs St. o f U.P. & ors. 2005 (7) SCC 507

24. Lokesh Singh Vs St. of U.P. & anr. 2021 (6) SCC 753

25. Data Ram Singh Vs St. of U.P. & anr. 2018 (3) SCC 22

26. Kishori Lal Vs Roopa & ors. 2004 (7) SCC 638

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

(C.M. Bail Application No. 137168 of 2021)

1. This First Bail application has been filed along with Criminal Appeal No.1588 of 2021 by the appellant Indra Pratap Tiwari against the judgement and order dated 18.10.21 passed by the III Additional Sessions Judge Faizabad/Ayodhya in Special Case number 3012/2018; for suspension of sentence and conviction.

The facts of the case in brief are that on the basis of a letter sent by the Principal of Saket Postgraduate Degree College Ayodhya Sri Yaduvansh Ram Tripathi, to the Superintendent of Police, the Superintendent of Police directed PS Ram Janmabhoomi, Ayodhya, to register FIR and investigate. The FIR 24/1992 was registered on 18.02.1992 under Sections 420, 467, 468 and 471 I.P.C., against three accused of which we are concerned only with facts of the present case. Charge Sheet was submitted after investigation. The allegation in the FIR was that the appellant had submitted forged marksheet of BSc. part II and was promoted in BSc. part III in the said College on the basis of such forged mark sheet. Three prosecution witnesses were examined. PW1 was the Office

Superintendent in Saket Degree College and he stated on the basis of documentary evidence i.e. Register maintained of marks obtained by all students in examinations held in the College that the appellant had failed in BSc. part II examination in 1990 but had taken admission BSc. part III on the basis of mark sheet showing him to have passed. PW2 was the Senior Assistant (Confidential) in the Faizabad University, and on the basis of documentary evidence available in the University proved that the appellant had failed in BSc. part II examination held in the College. P.W.3 was the Head Moharrir of the Police Station concerned and had proved the handwriting of the then Head Moharrir who had noted the F.I.R. and Investigating Officer who had submitted the charge sheet. The learned Trial Court gave opportunity to the appellant under Section 313 Cr.P.C. to submit his evidence. Except for statement on oath that he had not taken the help of any forged mark sheet to take admission in BSc. part III in Saket Degree College no documentary evidence was produced by the appellant to disprove the prosecution charge that despite having failed in BSc. part II the appellant had shown himself to have passed in the said examination, and on the basis of forged mark sheet had taken admission in BSc. part III in the said College. The learned Trial Court having found all three accused guilty of forging their mark sheets of different years while studying in Saket Degree College and taking admission in the next class on the basis thereof found the charge of Sections 420, 468 and 471 I.P.C. proved. After hearing the counsel for the accused on the quantum of punishment, the learned Trial Court directed them to serve three years imprisonment along with fine for being guilty under Section 420 IPC, five years imprisonment along with fine for being guilty under Section 468 IPC, and two years Imprisonment along with fine for having been found guilty under Section 471 IPC all the three sentences were to run concurrently.

2. I have heard learned Senior Advocate, Shri I.B. Singh assisted by Sri Dharmendra Misra for the appellant, learned A.G.A. Shri S. P. Tiwari, for the State, and Shri H.G.S. Parihar, learned Senior Advocate assisted by Sri Ashish Kumar Singh for the objector Junaid Ahmad (hereinafter referred to as Objectior-1) and Shri Sushil Kumar Singh, Advocate for another objector Brijendra Pratap Singh (hereinafter referred to as Objector-2).

3. Learned counsel for the appellant has mentioned three grounds mainly for challenge to the order under appeal . Firstly, it has been argued that the Trial of the case is vitiated on the ground that it was tried and decided by an incompetent Court. The charge against the applicant was for offences under Sections 420, 468, 471 I.P.C., which are triable by a Magistrate. Appeal against such order is maintainable before before the Sessions Court. In the light of orders passed by the Supreme Court in the case of **Ashwini Kumar Upadhyay versus Union of India and Others,** Writ Petition Civil No. 699 of 2016, the Allahabad High Court proposed the formation of one special MP/MLA Sessions Court at Allahabad for which notification was issued on 21.08.2018. Later on the Allahabad High Court circulated two letters dated 26.09.2018 and 19.10.2018, whereby all District Judges were directed to transfer all pending cases relating to MPs and MLAs to Special Sessions Court at Allahabad. On 4.12.2018 the Supreme Court directed all States to create one Special Sessions Court and one Special Magisterial Court in each district in order to dispose of all pending criminal cases relating to sitting and former legislators on a priority basis. In the State of U.P. till date no Special Magisterial Court for MP / MLAs has been formed. This fact was noticed by the Supreme Court in its latest order dated

24.11.2021 passed in writ petition filed by Mohammed Azam Khan challenging his Trial by the Special Sessions Court instead of by a Magistrate at Rampur.

4. The learned counsel for the appellant has argued about the prejudice caused to the Appellant due to Trial conducted by the Additional Sessions Judge. It has been argued that the appellant 1) has lost the opportunity of one appeal before the Sessions Judge. 2)The procedure for warrant Trial by a Magistrate is given in chapter XIX, Section 238 -250 of the Cr.P.C. 3) Under chapter XVIII Sections 225 - 237, provide for Trial by Sessions Court. Therefore wrong procedure has been adopted for prosecution of the appellant. 4) It has been submitted that the appellant cannot be treated as a separate class, because of an illegal Notification issued by the High Court, which has already been set aside by the Supreme Court And he cannot be discriminated against in the matter of his Trial, as opposed to other similarly situated persons. 5) It has been submitted that the Supreme Court has already expunged the proceedings before the Sessions Judge, while directing the matter to be decided by the Magistrate from the stage from which the file was sent to the Additional Sessions Judge.

5. It has been argued that the case of the appellant being triable by the Court of Magistrate, it's Trial was transferred to a DJ/Special Judge MP/MLA Court in September 2019 by an order of the High Court dated 22.08.2019. The learned counsel for the appellant has placed reliance upon judgement rendered in ***A.R. Antulay versus R.S. Naik,*** AIR 1988 SC 1531 where the Supreme Court had quashed the proceedings because the Trial was not conducted by the competent Court although such Trial had been ordered by the Supreme Court itself.

6. The Supreme Court had observed in A.R. Antulay (supra) that *"having regard to the enormity of the consequences of the error to the Appellant and by reason of the fact that the directions were given Suo Moto,We do not find there is anything which can detract from the power of the Court to review its judgement Ex Debito Justitiae. "In case injustice has been caused. No Court, however high, has jurisdiction to give an order unwarranted by the Constitution"* and therefore, the order dated 16.02.1984 was recalled by the Supreme Court in order to rectify that injustice in the peculiar facts and circumstances of the case.

7. The learned counsel for the appellant read out para 8,9, and 10, And 11 of the order dated 24.11.2021 passed by the Supreme Court in Ashwini Kumar Upadhyay case. The observation- *"we further direct the cases triable my Magistrates which are pending before the Sessions Court in view of the circular dated 16 August 2019 shall stand transferred to the Court of competent jurisdiction. However, the entire record and proceedings shall be transferred to the Court of the designated Magistrate and the proceedings shall commence from the stage which has been reached prior to the transfer of the proceedings, as a consequence of which the Trial shall not have to commence afresh."*; has been read out by the learned counsel for the appellant to argue that the Supreme Court had expressed an opinion that *"the proceedings shall commence from the stage which has been reached prior to the transfer of the proceedings"* should be read in isolation by this Court to mean that the Supreme Court has expunged all the proceedings which have taken place in the Sessions Court and the Trial would commence from the stage it had reached in the Court of the Magistrate prior to the wrong transfer of the proceedings by the notification of the High Court.

8. This Court cannot interpret the phrase as pointed out repeatedly by the learned counsel for the appellant in the manner in which it has been sought to be interpreted as it would render the later phrase *"as a consequence of which the Trial shall not have to come in afresh"* redundant and otiose.

9. Secondly, it has been submitted that registration of one single FIR for three different offences, against three different persons for offences committed at three different times was not maintainable. It has been argued that the allegation of the complainant, the Principal of Saket Degree, College related to three different alleged occurrences where three different students at three different points of time, studying in three different courses run by the College, had allegedly forged the mark sheet for admission/promotion to the next class. There was no allegation of conspiracy or abetment among the three Persons. They were not even distantly related. None of the occurrences were connected to each other or a part of the same transaction. As per Section 154 of the Code of Criminal Procedure the FIR should relate to the commission of *"an offence"* and not many offences which are not correlated to each other.

10. It was argued that an F.I.R. was lodged on 18.02.1992 under Section 420, 467, 468, 471 I.P.C. at PS Ram Janma Bhumi Ayodhya Faizabad by the Principal of Saket Degree College against three students referring to earlier letter sent by him to the Superintendent of Police, Faizabad. The F.I.R. stated that three persons had forged their marksheets and taken admission in the next year of their degree courses although they had failed. The first such person was Phoolchand Yadav who had taken B.Sc. part I examination in 1986 with Roll number 60999, his result showed him failed. He took back paper and then made interpolation in the back paper mark sheet to show himself, as passed. As a result, he took admission in B.Sc. Part II in the following year. Similarly, Indra Pratap Tiwari, the appellant herein, had taken B.Sc. Part II examination in 1990 with Roll number 4263. He failed but showed himself as passed and took admission in B.Sc. Part III in the following session on the basis of a forged mark sheet. He was also elected Secretary of the Students Union. When this fact came to the knowledge of the University he was sent a notice to which he failed to reply. Consequently, the University struck off his name as a student and also cancelled his Election as Secretary of the Students Union. Shree Krupa Nidhan Tiwari took LLB first year examination in 1989 with Roll number 91570, he was declared failed but he showed himself to be passed by forging the mark sheet and took admission in LLB second year in academic year 1990-91.

11. It has been further submitted that Code of Criminal Procedure defines how a Court should exercise its power in such a case where one single FIR are has been lodged. Under Section 221 and 223 of the Cr.P.C. it is provided that separate charges shall be framed against separate accused persons and the Trials should be conducted separately. The accused however were tried jointly in violation of such procedure. It has been argued that under Section 464 Cr.P.C. if the Court of appeal finds that the charge framed against the accused person had some irregularity or error in it, then it may direct a new Trial to be conducted.

12. Thirdly, it has also been submitted that conviction of the appellant is based upon allegedly forged document that is photocopy of a mark sheet. The marksheet was never produced in the original before the learned Trial Court, it was never proved by any witness in accordance with the provisions of the Indian Evidence Act. The learned Trial Court convicted the appellant on the basis of Secondary Evidence in gross violation of Section 65 of the Indian Evidence Act. The appellant had been tried and convicted

in violation of the procedure established by law which vitiates the entire proceedings. It has been argued by the learned counsel for the appellant that three persons were tried together for different offences and convicted. One of these three persons had approached this Court in Criminal Appeal No. 1761 of 2021, where after admitting the Appeal and calling for lower Court record, a coordinate bench observed that there were inconsistencies in the statements of prosecution witnesses and that the appellant had not misused his liberty when he was on bail during Trial, and has granted bail to the appellant Krupa Nidhan Tiwari by its order dated 15.11.2021.

13. The objections filed by the State to the application moved by the appellant has stated besides the facts of the case as noticed in the judgement under Appeal; that against the appellant I.P. Tiwari a total of 35 criminal cases are pending. The criminal history of the appellant has been filed as Annexure to the said objections showing cases under various Sections including Sections 307 and 302 pending since 1986, 1991 ,1992 and 1993 up to 2012 at Various stages in different Courts. Cases under Section 3 of the U.P. Control of Goondas Act and Sections 2 & 3 of the U.P. Gangsters Act have also been repeatedly instituted by the police in various years.

14. The objector-1 Mohammad Junaid, has filed an application praying for appropriate orders to be passed for prosecuting the appellant. It has been submitted that Objectior-1's Sumo Jeep was looted on 14.03.1997. F.I.R. was lodged in Case Crime No.77 of 1997 at P.S. Singramau at Jaunpur. On 03.06.1997 the appellant Indra Pratap Tiwari was arrested in Sonebhadra in Case Crime No. 142 of 1997, under Sections 302 and 506 I.P.C. The looted jeep of the objector-1 was recovered from his possession. Thereafter the police submitted charge-sheet against the appellant in Case Crime No.77 of 1997 at Jaunpur. While being arrested in Case Crime No.142 of 1997 at Sonebhadra, the appellant claimed to be resident of Village Gauhaniya P.S. Haraiyya, District Basti, and was released on bail giving the said fake address. He could not be traced later on as his residence was actually in village Baraipara, P.S. Maharajganj, District Faizabad. The appellant never appeared in Case Crime No.77 of 1997. Non bailable warrant was issued and process under Section 82 and 83 was also issued by the Trial Court in District Jaunpur. The appellant thereafter managed the loot of Court records from the office of the Judicial Magistrate-IInd, at Jaunpur for which FIR was registered as case Case Crime No.117 of 2016 at P.S. Line Bazar, District Jaunpur under the signature of the Judicial Magistrate-IInd, Jaunpur. When the file of case Crime number 77 of 1997 could not be traced, the objector-1 filed a petition under Section 482 Cr.P.C. No.29263 of 2018, *Mohammad Junaid Versus State of U.P.* and this Court directed reconstruction of the record and to conclude the Trial proceedings of the concerned case within a period of six months without granting any unnecessary adjournments. The then Judicial Magistrate-IIIrd, Jaunpur, reconstructed the file and summoned the accused through order dated 22.06.2019. Despite best efforts of the police, the legislator I.P. Tiwari could not be produced before the Trial Court at Jaunpur. Later on news was received that he was incarcerated in jail on being convicted on 18.10.2021. The Additional Chief Judicial Magistrate-IIIrd, Jaunpur thereafter issued Bailable warrant against I.P. Tiwari to facilitate the hearing of Case Crime No.77 of 1997 at Jaunpur.

15. It has been submitted by Objector 1 that the Appellant has been absconding from the Trial proceedings for last 25 years and thus the Objector 1, had locus to file application objecting to the prayer for grant of bail made by the appellant in this appeal as per law settled by

the Supreme Court in **Ratan Lal Versus Prahlad Jat and Others** Criminal Appeal No.499 of 2014 decided on 15.09.2017, and **Naveen Singh Versus State of U.P.** AIR Online 2021 Supreme Court 138. It has further been submitted by Shri H.G.S. Parihar that in Case Crime No.24/1992, in which he has been ultimately convicted, the appellant misused his position and moved repeated applications under Section 70 (2) Cr.P.C. and never appeared before the Trial Court. He moved applications on 26.07.2005, 17.11.2011 and 05.05.2017, true copies of which have been filed as Annexures to the objections. In all three applications the appellant stated that he had no information about pendency of the case relating to his fake marksheet. It has been pointed out by Shri H.G.S. Parihar that the appellant contested U.P. Assembly Elections thrice, in 2007, 2012 and lastly in the year 2017, and in all the three affidavits filed by him before the Election Commission Case Crime No.24 of 1992 was mentioned, but in the application submitted by him under Section 70 (2) in 2011 and 2017, he showed that he was unaware of the Case relating to fake marksheet being pending.

16. It has been argued by Sri H.G.S. Parihar that the appellant never sought regular bail but only filed applications under Section 70 (2) for recall of non-bailable warrants issued by the learned Trial Court to ensure his presence. Each time he succeeded also in getting Non bailable warrants recalled. In **Naveen Singh Versus State of U.P. and Others,** the appellant had approached the Supreme Court against grant of bail by the High Court to Respondent No.2 who was accused of forging Court records and showing himself as acquitted in Sessions Trial. The appellant was opposed by the Respondent No.2 on the ground that he had no locus to oppose the grant of bail secured by the Respondent No.2. It was submitted that he was neither the complainant nor the affected person from the alleged offence in Case Crime No.433 of 2019. On the contrary he had a personal motive in keeping the accused behind the bars. The application was politically motivated as the appellant was a third person who was not connected with the matter under consideration and had a personal axe to grind. The Supreme Court having heard the appellant on the merits of the order passed by the High Court granting bail to the Respondent No.2 and also the counsel for the Respondent No.2 objecting to such appeal being filed, observed that the Respondent No.2 is facing Trial for offences under Sections 420, 467, 468, 471, and 120-B IPC in which FIR was lodged by the District and Sessions Judge, Unnao, at the directions of the High Court in another case. It observed in Paragraph 8.4 that so far as submissions on behalf of the accused regarding locus of the appellant is concerned the Court had considered the fact that it was the appellant who approached the High Court alleging tampering of Court record by the Respondent No.2 accused and thereafter the Court had directed the learned Additional Session Judge, Unnao, to submit his comments. The Session Judge submitted his enquiry report on the basis of which FIR was lodged therefore it could not be said that the appellant had no locus to file the present application for cancellation of bail. It further observed: *"Even otherwise in a case like this, allegations of tampering with Court order and for whatever reason the State has not filed the cancellation of bail application, locus is not that much important and it is insignificant."*

17. In **Ratan Lal Versus Prahlad Jat and others** Criminal Appeal No.499 of 2014 decided on 15.09.2017, the Supreme Court was considering an appeal filed by a private person seemingly not the affected person, against an order passed by the High Court under Section 482 Cr.P.C. setting aside order passed by the Additional Sessions Judge rejecting the application of the accused filed under Section 311 Cr.P.C. The locus of the appellant was

challenged by the respondent alleging that the High Court"s order could have been challenged by the State and not by private appellant. The Supreme Court referred to the Blacks Law Dictionary and the meaning assigned to the term "*locus standi*" and then observed that the orthodox rule of interpretation regarding *locus standi* of a person to reach the Court has undergone a sea change with the development of Constitutional law in India, and the Constitutional Courts have been adopting a liberal approach in dealing with cases and rejecting objections raised merely on hyper technical ground of *locus standi*. It was observed thus:-

"It is now well settled that if a person is found to be not merely a stranger to the case, he cannot be non-suited on the ground of his not having locus standi." The Supreme Court observed that, "in criminal Trial the locus standi of the complainant is a concept which is completely foreign. Anyone can set the criminal law in motion except where the statute enacting or creating an offence indicates to the contrary." Supreme Court referred to the Constitution Bench judgment in the case of ***A.R. Antulay Versus Ramdas Srinivas Naik*** *1984 (2) SCC 500*, where the Supreme Court had observed that the general principle regarding criminal law being set in motion by any person is founded upon a policy that an offence, that is, an act or omission made punishable by law for the time being in force, is not merely an offence committed in relation to the person who suffers the harm but it is also an offence against the society. The society for peaceful development is interested in the punishment of the offender. Penal statutes are enacted for the larger good of the society, and the right to initiate proceedings cannot be whittled down or circumscribed or fettered by putting it into a straitjacket formula of *locus standi* unknown to criminal jurisprudence.

18. The Supreme Court also referred to judgement rendered by it in **Manohar Lal Versus Dinesh Anand and Others** 2001 (5) SCC 407 and **Arunachalam Versus PSR Sadananantham and Others** 1979 (2) SCC 297 that although it is the duty of the State to get the culprit booked for the offence committed by him, if the State fails in this regard and the party having bona fide connection with the cause of action, who is aggrieved by the order of the Court, cannot be left at the mercy of the State and without any option to approach the appellate Court to seek justice. The Supreme Court granted special leave to appeal and also allowed the appeal thereafter.

19. Sri Brijendra Pratap Singh the Objector 2 has taken almost common grounds to challenge the bail application moved by the appellant. His *locus standi* disclosed in his affidavit is only that he is a student of Kamta Prasad Sunderlal Saket Postgraduate College, and that he was worried that the practice adopted by the appellant shall be followed by other students also thus lowering the standards of education and morals in the society. He came to know on enquiry that the appellant and two other students had forged their mark sheets and an F.I.R. was lodged by the Principal of the College in 1992, but Trial could not be concluded expeditiously. He preferred a Criminal Miscellaneous Case Number 5762 of 2018 under Section 483 Cr.P.C., praying for early disposal of the Trial. This Court by its order dated 20.09.2018 directed the learned Trial Court to decide the case within a period of six months.

20. It has been argued by Sri Sushil Kumar Singh that *Locus standi* in criminal jurisprudence is of no relevance. The appellant was wanted in Trials pending in Basti, SoneBhadra, Jaunpur, Faizabad and many other districts of U.P., and he was a sitting legislator of the ruling political party and he could not be allowed to make a mockery of the judicial process by not only managing to snatch and loot

Court records but to place false information before the district Court and before the High Court as well.

21. The counsel for the Objector 2 referred to the appellant managing to get a rifle license number 54 from district Basti by giving a fake address. On this fake identity bail applications were filed by him but presence of the appellant could not be ensured by the Court concerned later on because of deliberate misrepresentation regarding his identity and true address. Sri S.K. Singh has also pointed out how in case crime number 142 of 1997 under Section 302 and 506 I.P.C. in Sonebhadra on 03.06.1997, the weapon of attack was the same rifle which was issued from district Basti. After gaining knowledge of fake identity being used to obtain the arms license, the District Magistrate Basti has cancelled the arms license but this rifle license has not yet been surrendered till date by the appellant.

22. Almost the same facts have been mentioned in the application of the Objector 2, as have been mentioned by Objector 1 regarding filing of repeated applications for recall of non-bailable warrant orders before the Trial Court at Faizabad. Also, it has been submitted that after bailable warrants were issued by the learned Trial Court in Jaunpur on 22.10.2021 in Case Crime NO. 77 of 1997, the jail authorities have not yet produced the appellant before the learned Trial Court at Jaunpur though the date fixed was 9.11.21. It has been argued that the reason for this is not far to seek. The Appellant is in jail since 18.10.2021 and his Bail application is pending before the High Court. As soon as he is released on bail, he shall again abscond and Trial pending at Jaunpur since 1997 in Crime Nos. 77 and at Sonebhadra in Case Crime No. 142 of 1997 will again remain pending. The objector 2 has disclosed a criminal case history of 40 cases instead of 35 as mentioned in the counter affidavit filed by the State of UP.

23. The learned counsel for the appellant has objected vehemently to the Court entertaining objections by the said Objectors 1 and 2, Mohammed Junaid and Brijendra Pratap Singh. It has been submitted that the Court is considering a criminal appeal filed under Code of Criminal Procedure, and it is neither a Public Interest Litigation nor a Section 482 Petition, wherein inherent power of the High Court can be exercised to secure the ends of justice. It has been argued that in the Cr.P.C. one amendment has been carried out in 2019 giving the right to the victim only to file an appeal and to be heard through Public Prosecutor in Trial or appeal. No right to be heard has been extended to any stranger who is not even claiming to be a victim in criminal appeal. The applications of two objectors should be rejected by this Court outrightly.

24. It has been submitted by the learned counsel for the appellant that Mohammad Junaid is a close associate and a gang member of renowned mafia who is presently in jail at Banda where he was transferred from Punjab on the directions of the Supreme Court. The bail application is being contested vehemently by such Objectors only to ensure that the right of the appellant to contest the upcoming Legislative Assembly elections is prejudiced.

25. It has been argued that such Objectors do not have any locus as they do not fall within the definition of victim as per Section 2(wa) of the Code. Section 2(wa) defines a victim *"as a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged,"* and the expression victim includes his or her legal heir. None of the Objectors can be said to be victims and thus they have no right to be heard. The Supreme Court has observed in many cases that victim shall be a person who has suffered any "loss or injury" due to the alleged crime and some element of personal injury must

be involved. Since the Objectors have no *locus standi*, their affidavits filed in support of such objections should be ignored by this Court. Objecting to the locus of Brijendra Pratap Singh, the learned counsel for the appellant submitted he is only 25 years of age and was not even born at the time when the appellant was studying in Saket Degree College and had allegedly forged his mark sheet to get promoted from BSc. part II to BSc. part III. Only because Brijendra Pratap Singh is a student of Saket Degree College, he cannot claim any locus to oppose the bail application of the appellant. Both the Objectors have been set up by the political rivals of the appellant namely Mukhtar Ansari and Abhay Singh respectively.

26. The learned counsel for the appellant has placed reliance upon **Thakur Ram and others versus state of Bihar 1966 (2) SCR 740,** and has read out paragraph 9 thereof, with regard to the observations regarding right of third-party to be heard in a criminal Trial. The Supreme Court observed that in a case which has proceeded on a police report a private party has really no *locus standi* . The criminal law is not to be used as an instrument of wreaking private vengeance by an aggrieved party against the person who, according to that party, has caused injury to it. Barring a few exceptions, in family matters the party who is treated as the aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interests of the community to book."

27. The counsel for the appellant has placed reliance upon judgement rendered in ***Shivakumar versus Hukam Chand and another 1999 (7) SCC 467*** where it was observed that *"it is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable to that of a Junior advocate conducting the case of a senior in a Court, on behalf of the Public Prosecutor albeit the fact that he is engaged in the case for a private party. If the role of the public prosecutor is allowed to shrink to a mere supervisory role the Trial would become a combat between the private party and the Accused which would render the legislative mandate in Section 225 of the Code a dead letter".*

28. Learned Counsel for the appellant has placed reliance upon judgement of a Full Bench of Delhi High Court rendered in Ramphal versus State in Criminal Appeal No.1415 of 2012 on 28.05.2015. The Full Bench was considering the scope of the term "victim" and whether it would mean only legal heirs entitled to the property of the victim under the law applicable of inheritance, or would embrace any person who has suffered any loss or injury caused by reason of the act or omission for which the accused person had been charged. The Court considered the definition given of the term victim Under Section 2 (wa) of the Cr.P.C. and also the terms "loss "or "injury "which have not been defined under the Cr.P.C. but have been defined by the I.P.C. Under Section 44 "injury "is defined as *"any harm whatever illegally caused to any person in body, mind, reputation or property" "loss "is defined in terms of wrongful loss and refers to "loss by unlawful means of property to which the person losing it is legally entitled."* It was observed by the Bench that injury as defined, does not only include physical harm resulting from the offence as there can be direct and proximate emotional injuries equally resulting from the crime. It referred to judgement rendered by a Constitution Bench in PSR Sadanantham Versus Arunachalam 1980 (3) SCC 141 on the "standing" of a private person other than a complainant under Section 191 (a) to appeal against an acquittal. The

question faced by the Supreme Court in the said case was *"whether a private citizen (the brother of the deceased victim) could appeal by way of special leave under Article 136 of the Constitution of India against an order of acquittal of the petitioner in that case."* The Supreme Court granted leave, allowed the appeal and restored the conviction and sentence of the Trial Court. The convicted petitioner approached the Supreme Court invoking its Writ jurisdiction contending that the Supreme Court"s order was a nullity as it lacked jurisdiction. The Supreme Court observed in Paragraph-24 that *"in India the criminal law envisages the State as the prosecutor. Under the Cr.P.C., the machinery of the State is set in motion on information received by the police or on a complaint filed by a private person before a Magistrate. If the case results in an acquittal the right to appeal against the acquittal is closely circumscribed. Under the old Code of Criminal Procedure the State was entitled to appeal to the High Court. The complainant could do so only if granted special leave to appeal by the High Court."* The right of appeal was not given to other interested persons. After referring to the Law Commission of India's recommendation the Supreme Court observed *"We think that the Court should entertain a special leave petition filed by a private party, other than the complainant, in those cases only where it is convinced that the public interest justifies an appeal against the acquittal and that the State has refrained from petitioning for special leave for reasons which do not bear on the public interest but are prompted by private influence, lack of bona fide and other extraneous considerations. We would restrict accordingly the right of a private party, other than the complainant, to petition for special leave against an order of acquittal. It is perhaps desirable to keep in mind that what follows from the grant of special leave is an appeal and that jurisdiction must, therefore, be invoked by the petitioner possessing a locus standi recognised in law."*

29. The Delhi High Court referred to the judgement rendered by the Supreme Court in the case of **NHRC Versus State of Gujarat 2004 (8) SCC 610** where it had been observed that *"it needs to be emphasised that the rights of the accused have to be protected. At the same time the rights of the victims have to be protected and the rights of the victims cannot be marginalised. Accused persons are entitled to a fair Trial where their guilt or innocence can be determined. But from the victim's perception the perpetrator of a crime should be punished. They stand equally poised in the scales of justice."*

30. The said judgment of the Delhi High Court in fact supports a wide interpretation of the term "Victim" and the terms "loss" and "injury" and held that even those persons who were not directly in the line of inheritance as legal heirs of the victim/deceased, could also approach the Court in Appeal.

31. The learned counsel for the appellant also placed reliance upon **Anand Sen Yadav versus State of U.P.,** Criminal Appeal No.1061 of 2011 and connected matters decided on 18.10.2012, where this Court considered Section 24 of the Cr.P.C. which defines Public Prosecutor and on the basis of judgment rendered by the Supreme Court 1999 (7) SCC 467, it observed That a public prosecutor is not expected to show eagerness to reach the case in the conviction of the accused somehow or the other, irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be to speak out in fairness not only to the Court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during Trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to bring it to the fore and make it available to the accused even if the defence counsel overlooked it. *"Public Prosecutor has the added*

responsibility of bringing it to the notice of the Court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the public prosecutor."

32. The learned counsel for the appellant has also placed reliance upon an order passed by the Delhi High Court in **People's Union for Civil Liberties versus CBI;** Criminal Revision Number 339 of 1996, decided on 10/04/1997; and an order passed by the High Court of Punjab and Haryana in **Kuldeep Singh versus State of Haryana Criminal Revision Number 1030 of 1979,** decided on 4 September 1979 ; and **Prisoners Rights Forum versus State of Tamil Nadu 2019 SCC online Madras 2476;** however, such cases as have been cited only reiterate the position in law regarding *locus Standi* of third party in criminal Trial and role of Public Prosecutor and are therefore not being considered individually by this Court.

33. In the Supplementary Rejoinder Affidavit of the Appellant details regarding the Objector2 being set up by one Abhay Singh, a hardened criminal who had lost the elections against the appellant in the year 2017 from Gosain Ganj constituency at Ayodhya, have been mentioned giving photographs of the Facebook page of Brijendra Pratap Singh showing his proximity to the said Abhay Singh; the appellant's political rival and also a history sheeter. The learned counsel for Appellant has also referred to the argument raised by the Objectors us that the appellant never applied for regular bail before the learned Trial Court. In response, he has submitted that as is evident from the Court record, in the Case Diary at Parcha number 045765 dated 26 September 1994, it has been noted by the Investigating Officer that all the accused persons including the appellant, are on bail.

34. In regard to the argument regarding criminal history of 35 cases shown against the appellant, the learned counsel has submitted that only one case against the Appellant is pending under Section 323, 5046IPC in which he has been released on bail. In all cases against the Appellant he had been acquitted or Final Report had been submitted or the proceedings were dropped. In paragraph 21 of the Rejoinder Affidavit filed by the Appellant mention has been made of 35 cases which were listed in the Counter Affidavit filed by the State of UP. In some cases Final Report had been filed, in others the appellant had been Acquitted. In still others, the proceedings were dropped and only one criminal case was pending against him. It has been argued that Criminal record for the purpose of grant of bail can only be seen for such offences where Trial was pending.

35. This Court has perused the list of cases filed in the Rejoinder Affidavit by the Appellant. It is apparent that case crime no.77 of 1997 and case number 142 of 1997, pending at Jaunpur and Sonebhadra, have not been mentioned.

36. The learned counsel for the appellant has place reliance upon paragraph 10 of the judgement rendered by the Supreme Court in **Maulana Mohammad Aamir Rashidi versus State of UP and another 2012 (2) SCC 382,** where the Supreme Court was considering the case of the appellant who was opposing the grant of bail by the High Court to a sitting member of Parliament who was arrested and was in jail for a long time during the course of Trial. The appellant had contended that the accused was a criminal with more than three dozen criminal cases involving serious offences against him. The High Court had observed that merely on the basis of criminal antecedents, the claim of the accused to bail cannot be rejected. The

Supreme Court observed that the relevant Consideration for grant of bail order would be 1) the accused has been in jail for a long time, 2) the Trial had commenced and as assured by the State that the Trial will not be prolonged and would be concluded within a reasonable time, and 3) the High Court while granting bail had imposed several conditions for strict adherence during the period of release on bail.

This case is not of much help to the appellant as it related to an accused who was still facing Trial and the presumption of innocence was in his favour.

37. The learned counsel for the appellant has also placed reliance upon **Prabhakar Tiwari versus State of UP and another 2020(11) SCC648** and paragraph 7 thereof where the factors that are to be kept in mind For cancellation of an order granting bail have been mentioned i.e. whether there has been a non-application of mind on the part of the Court granting bail or that the opinion of the Court granting bail is not borne out from a prima facie view of evidence on record.

Principles for Grant of Bail Post Conviction

38. This Court having gone through the case laws on grant of bail post conviction finds numerous instances where the Supreme Court has observed that suspension of sentence should be done in extremely rare cases. In **Vijai Kumar versus Narendra and others 2002 (9) SCC 364,** the Supreme Court has observed that the Court must take into account relevant factors like nature of accusation made against the accused, manner in which the crime was alleged to have been committed, gravity of the offence, desirability of releasing the accused on bail after they have been convicted for committing serious offence. The Supreme Court observed that Section 389(1) of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant. It was observed in para 20 thus- *"There is a distinction between bail and suspension of sentence. One of the essential ingredients of 389(1) is the requirement of the appellate Court to record reasons in writing for ordering suspension of execution of the sentence or the order appealed against. If the appellant is in confinement, the Court can direct that he be released on bail or on his own bond. The requirement of Recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects, and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine".*

39. In **Preetpal Singh versus State of U.P. and others** 2002 (8) SCC 645, the Supreme Court was considering the question of suspension of sentence after conviction under Section 304B, 406 and 498 A of the I.P.C. and Section 3 and 4 of the Dowry Prohibition Act 1961. It was observed that in an Application for suspension of sentence the *"appellate Court was only to examine if there was such patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. Where there was evidence that has been considered by the Trial Court, it was not open to the appellate Court considering application under Section 389 to re-assess and/or re analyse the same evidence and take a different view, to suspend the execution of sentence and release the convict on bail."* At the stage of an application under Section 389 (1) the High Court found merit in the argument that the brother of the victim had not been examined ignoring the evidence relied upon by the Sessions Court, including the oral evidence of the victim's parents. The Supreme Court observed that under Section 389 (3) of the Code the principles are different in case of sentence not exceeding three years and/or in the case of bailable offences. The Supreme Court relied upon **Kashmira Singh**

versus State of Punjab 1977 (4) SCC page 291 and **Babu Singh and others versus State of UP** 1978 (1) SCC 579, to say that the appellate Court must consider whether any cogent ground has been disclosed giving rise to substantial doubts about the validity of the conviction and whether there is likelihood of unreasonable delay in disposal of appeal. The Supreme Court also relied upon observations made in **Kalyan Chandra Sarkar versus Rajesh Ranjan and another** 2004 (7) SCC page 528, where the Supreme Court had held in paragraph 11 that the Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. It was observed thus:-

"Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding innocence while bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind." Reference was made to **Chaman Lal versus State of U.P. and another 2004 (7) SCC 525,** and judgement rendered in **Mauji Ram versus State of U.P. and another 2019 8 SCC 17, Ajay Kumar Sharma versus State of UP and others 2005 (7) SCC 507, Lokesh Singh versus State of UP and another 2021 (6) SCC 753, and Data Ram Singh versus State of U.P. and Another 2018 (3) SCC 22;** where it was observed that reasons must be assigned while granting bail. The Supreme Court further observed in paragraph 36 -

"there is a difference between grant of bail under Section 439 of the Code of Criminal Procedure in case of pre-Trial arrest and suspension of sentence under Section 389 of the code of criminal procedure and grant of bail, post conviction. In the earlier case there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the Courts must be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in ***Data Ram Singh versus State of UP and another.*** *However in case of post conviction bail, by suspension of operation of sentence, there is a finding of guilt and the question of presumption of innocence does not arise nor is the principle of bail being the rule and jail an exception attracted, once there is a conviction upon Trial. Rather, the Court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction for by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389 (1) of the Code of Criminal Procedure."*

(emphasis supplied)

The Supreme Court further observed in paragraph 39 -*"In considering an application for suspension of sentence, the appellate Court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. Where there is evidence that has been considered by the Trial Court, it is not open to a Court "considering application under Section 389 to reassess and or re analyse the same evidence and take a different view, to suspend the execution of sentence and release the convict on bail. "* *(emphasis supplied)*

40. In **Kishori Lal versus Roopa and others, 2004 (7) SCC 638,** the Supreme Court was considering the informants' appeal against grant of bail under Section 389(1) Cr.P.C. by the High Court on the ground that during Trial, the accused respondents were on bail and had not misused the liberty granted to them. The Supreme Court observed that the High Court is

duty-bound to objectively assess the matter and to record reasons for the conclusion that warrants suspension of execution of sentence and grant of bail. Mere fact that during the period when the accused persons were on bail during Trial there was no misuse of liberties does not per se warrant suspension of execution of sentence.

41. In **Shyam Narayan Pandey versus State of U.P. 2014 (8) SCC 909,** the Supreme Court was considering the scope of stay of conviction under Section 389 (1) of the Code of Criminal Procedure. The appellant had been convicted and sentenced to life imprisonment and fine. The High Court had considered the application made by the petitioner for staying conviction and had declined the relief. It was the contention of the appellant that he was innocent. He had been working as a Principal and if his conviction was not stayed he would lose his job and would be denied of his livelihood and would not be able to participate in subsequent selection procedures conducted by U.P. Secondary Education Service Selection Board Allahabad. The Supreme Court rejected such contentions. The Supreme Court observed that, *"to be convicted means declared to be guilty of criminal offence by the verdict of the Court of law. That declaration is made after Court finds him guilty of the charges which had been proved against him. That is, in effect if one prays for stay of conviction, he is asking for stay of operation of the effects of declaration of being guilty. Unless there are exceptional circumstances the Appellate Court shall not stay the conviction and may not direct that the sentence be suspended. There are no hard and fast rules or guidelines as to what are those exceptional circumstances. However there are certain indications in the Code of Criminal Procedure 1973 itself as to which are those situations and a few indications are available in the judgements of the Supreme Court as to what are those circumstances."* (emphasis supplied)

42. The Supreme Court thereafter in paragraph 9 observed - *"it may be noted that even for suspension of the sentence, the Court has to record reasons in writing of which some indication are given in the Code of Criminal Procedure pursuant to the recommendations made by the Law commission of India, and the observations of the Supreme Court in various judgements as per Act 25 of 2005. It was regarding the release on bail of a convict where the sentences of death or life imprisonment or of a period not less than 10 years. If the appellate Court is inclined to consider release of a convict for such offences, the Public Prosecutor has to be given an opportunity for showing cause in writing against such release. This is also an indication as to the seriousness of such offences and circumspection which the Court should have while passing the order on stay of conviction. Similar is the case with offences involving moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction is also stayed , it would have serious impact on the public perception on the integrity of the institution. Such orders definitely will shake the public confidence in judiciary. That is why, it has been observed time and again that the Court should be very wary in staying the conviction specially in the types of cases referred to above, and it shall be done only in very rare and exceptional cases of irreparable Injury coupled with every possible consequence resulting in injustice.". (emphasis supplied)*

43. The Supreme Court observed further in paragraph 10 thus -

"In **Ravi Kant S Patil versus Sarvabhauma S Bagali 2007 (1) SCC 673** the Supreme Court has held that, *"the power to stay the conviction should be exercised only in exceptional circumstances where failure to stay the conviction would lead to injustice and irreversible consequences".*

44. In **Navjot Singh Sidhu versus State of Punjab and another 2007 (2) SCC 574,** following **Ravi Kant S Patil's (Supra)** case at paragraph 6, the Supreme Court held as follows:

(6) "the legal position is therefore, clear that an appellate Court can suspend or grant stay of order of conviction. But the person seeking stay of conviction must advert to the consequences that may arise if the conviction is not stayed. Unless the attention of the Court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

45. In **Sanjay Dutt versus State of Maharashtra 2009 (5) SCC 787** the petitioner appellant was found guilty under Sections 3 and Section 7 read with Section 251A and 1B of the Arms act 1959 and sentenced to 6 years rigourous imprisonment. The appeal against such judgement was pending consideration before the Supreme Court during which the petitioner was granted bail. The petitioner being desirous of contesting elections was disqualified in view of Section 8 subclause (3) of the Representation of People Act because of the aforesaid conviction and sentence. Therefore a petition was filed by him under Section 389 (1) praying that execution of the order of his conviction and sentence be suspended, pending final hearing of appeal, to enable him to contest elections. The Supreme Court held that the petitioner was convicted for serious offences challenge against which is still pending before the Supreme Court. The petitioner may be a senior artiste and son of a well-known film actor/politician and not a habitual criminal nor had been involved in any other criminal case, despite all these favourable circumstances, it was not a fit case where conviction and sentence could be suspended so that under Section 8 sub-clause (3) of the Representation of People Act the disqualification against the petitioner be removed. It was held that the power of the Court under Section 389(1) Cr.P.C. shall be exercised only under exceptional circumstances. In paragraph 10 and thereafter in paragraph 12 to 14 it was observed that Reliance placed on the judgement rendered and **Navjot Singh Sidhu V state of Punjab 2007 (2) SCC 574** by the Petitioner was misplaced. In that case the petitioner was a sitting MP and could have continued as an MP even after his conviction and sentence in view of Section 8 subclause (4) of the Representation of People Act. The petitioner in Navjot Singh Sidhu's case resigned and expressed his desire to contest the election. In fact, that was the case where the Trial Court acquitted the petitioner and the High Court, in reversal, found the petitioner guilty. It was in those circumstances that the Supreme Court granted stay of the order of conviction and sentence. The Court while expressing no views on the merits of the case which would have even a remote possibility to prejudice either of the parties in appeal, made observations that in view of the serious offences for which he has been convicted by the Special Judge, the petitioners' prayer for suspension of conviction and sentence awarded by the Special Judge could not be be granted

46. In ***State of Maharashtra through CBI Anti Corruption Branch, Mumbai versus Balakrishna Dattatreya Kumbhar 2012(12) SCC 384,*** *referring also to the two decisions cited above, it has been held in paragraph 15 that: "- - - the appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicants, in a*

judicious manner and examine whether the facts and circumstances involved in the case are such, that the warrant such course of action by it. The Court, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that appellant will lose his job, if the same is not done...".

47. In **Shakuntala Shukla versus State of UP and others AIR 2021 Supreme Court 4384,** the Supreme Court was considering challenge to order granting bail to the accused pending appeal. The Supreme Court observed in para 11,11.1,11.2,&11.3, that the judgement of the High Court releasing the accused on bail did not take into consideration the conduct of the accused during investigation and Trial giving threats to the complainant side and other witnesses are offences under Section 504 and 506 IPC and can be said to be very serious offences as the accused had tried to interfere in the fairness of the investigation and the Trial. Such conduct ought not to have been taken by the High Court very lightly. The Court set aside the order of the High Court observing that it had committed a grave error in releasing the accused on bail pending appeals against the judgement and order of conviction.

48. In **Somesh Chaurasiya versus State of Madhya Pradesh and others AIR 2021 Supreme Court 3563,** the Supreme Court was considering an application for cancellation of bail granted to the second respondent by the High Court under Section 389 (1) of the Cr.P.C. pending his appeal against conviction for murder. The Supreme Court observed that the High Court should not have dismissed the application for cancellation of bail moved by the appellant and the State of Madhya Pradesh without looking into the fact that the appellant had committed murder during the period he was on bail as a result of suspension of his sentence in the pending appeal.

49. The Supreme Court made a reference to the judgement rendered in **Atul Tripathi versus State of UP and others 2014 (9) SCC 177,** where the procedure regarding consideration of bail under Section 389 (1) has been discussed in detail. It referred to the observation made by the Bench in **Atul Tripathi** (supra) that the appellate Court had to give opportunity to the Public Prosecutor to file written objections against the bail application. Such a stringent provision is introduced only to ensure that the Court is the apprised of all the relevant factors so that the Court may consider *"whether it is an appropriate case for release having regard to the manner in which the crime is committed, the gravity of the offence, age, criminal antecedents of the convict, impact on public confidence in the justice delivery system et cetera. This procedure is intended to ensure transparency, to ensure that there is no allegation of collusion and to ensure that the Court is properly assisted by the State with true and correct facts with regard to the relevant considerations for grant of bail in respect of serious offences, at the post conviction stage".*

(emphasis supplied)

50. The Supreme Court observed in paragraph 34 - *"there are distinct doctrinal concepts in criminal law namely (1), the grant of bail before Trial or, what is described as pre-conviction stage; (2) setting aside an order granting bail when the principle must weigh in the decision on whether bail should be granted have been overlooked or wrongly applied; (3) the post conviction suspension of sentence under the provisions of Section 389 subclause (1) ; and (4) the cancellation of bail on the ground of supervening events, such as the conduct of the accused during the period of bail, vitiating the continuance of bail."*

51. In State of Delhi **Narcotics Control Bureau versus Lokesh Chadha 2021 (5) SCC 724** and **Preet Pal Singh versus State of UP**

(Supra), the Supreme Court observed that there is a difference between grant of bail under Section 439 of the Code of Criminal Procedure in case of Pre-Trial arrest and suspension of sentence under Section 389 (1) of the Cr.P.C. and grant of bail, post conviction. Under Section 389 (1) the High Court must be duly cognisant of the fact that a finding of guilt has been arrived at by the Trial judge at the conclusion of Trial. The High Court may stay the execution of the sentence but it should keep in mind that there are sufficient reasons to do so which must have a bearing on the public policy.

52. In **B.R. Kapoor versus State of Tamil Nadu 2001 (7) SCC 231** the Court had observed that an order of the appellate or original Court suspending the sentence of imprisonment had to be read in the context of Section 389(1) of the Code of Criminal Procedure and that under the provision, what is suspended is only the execution of the sentence and not the sentence itself. The Constitution Bench made it clear that the suspension of execution of sentence would not alter or affect the conviction, and therefore such a person would remain disqualified under Section 8(3).

53. In fact, in **B.R. Kapoor** (Supra) a person whose nomination was rejected on the ground of disqualification, got elected as leader of a party which secured the majority in the elections and became the Chief Minister and hence Article 164 was pressed into service. But even such argument was rejected on the ground that a person who was disqualified from contesting the elections, cannot take the route of Article 164. The contention was further raised in **B.R. Kapoor** (Supra) that sitting Members of Parliament or legislators are granted protection against removal from office by Section 8(4) of the Act during pendency of their appeal or revision against conviction, and that it is violative of the guarantee of equality under the Constitution, if the class of persons getting convicted before elections are placed at a disadvantageous position than the class of persons who are convicted after getting elected to the Parliament or the state legislatures. The Constitution Bench rejected this contention in BR Kapoor on the ground that constitutional validity of sub-Section (4) of Section 8 was not in question.

54. A challenge was made to Section 8 (4) in **Lily Thomas Versus Union of India 2013 (7) SCC 653** on the ground of discrimination. While declaring the said provision to be unconstitutional, the Supreme Court held in Lily Thomas, that a Member of Parliament or state legislature who suffers a frivolous conviction, will not be remedyless. Taking note of decisions in **Rama Narang versus Ramesh Narang 1995 (2) SCC 513**, and **Ravi Kant S. Patil versus Sarvabhauma S. Bagali 2007 (1) SCC 673,** the Supreme Court held in Lily Thomas that the appellate Court had ample power under Section 389 (1) of the Code to stay the conviction as well as the sentence, and that whenever a stay of conviction itself has been granted, the disqualification will not operate.

55. In **Rama Narang versus Ramesh Narang others 1995 (2) SCC 513** Relied upon by the counsel for the appellant, conviction of Managing Director of a company for an offence involving moral turpitude was suspended. The Supreme Court considered Section 389(1) which empowered the Appellate Court to order the execution of the sentence or order appealed against to be suspended pending the appeal. The Supreme Court considered the question as to what can be suspended under this provision, and held that it was the execution of the sentence or order which could be suspended. An order of conviction by itself is not capable of execution under the Code. It is the order of sentence or an order awarding compensation or imposing fine or release on probation which are capable of execution, and would be required to be executed

by the authorities if not suspended. In certain situations the order of conviction can be executable in the sense that it will lead to the disqualification for example under Section 267 of the Companies Act from being appointed or to continue as a Director incharge of the affairs of a Company. Therefore when an appeal is preferred under Section 374 of the Code, the appeal is against both the conviction and sentence and therefore there is no reason to place a narrow interpretation on Section 389 (1) of the Code not to extend it to an order of conviction. In a fit case, if the High Court feels satisfied that the order of conviction needs to be suspended post conviction so that the convicted person does not suffer from a certain was disqualification provided for in any other Statute, it may exercise the power because otherwise the damage done cannot be undone; the disqualification incurred by Section 267 of the Companies Act and given effect to cannot be undone at a subsequent date if the conviction is set aside by the appellate Court eventually.

Whether trial vitiated due to subsequent observations of the Supreme Court.

56. Regarding the argument raised by the learned counsel for the appellant that the trial is vitiated as it was done by an incompetent Court; in **Gokaraju Ranga Raju Versus State of Andhra Pradesh 1981 (13) SCC 132**, the Supreme Court was considering the *"de facto doctrine"*. It was a case where while criminal revision and appeals were pending before the High Court, the Supreme Court quashed the appointment of the Sessions Judges, who had heard those cases, on the ground that their appointment was in violation of Article 233 of the Constitution. Thereupon, it was argued before the High Court that the judgements rendered by the judges were void and required to be set aside. The High Court rejected the contention. Dismissing the appeal the Supreme Court held that- *"a Judge, De facto is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority., Even though his appointment is defective And may later be found to be so. Whatever be the defect of his title to the office, judgements pronounced by him or acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgements pronounced or acts done by a judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he be a party, but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Hence the rule against collateral attack of validity of judicial appointments. To question a judge's appointment in an appeal against the judgement is such a collected attack. Therefore it is not possible to accept the contention is that a Trial by a Sessions judge who was appointed in violation of Article 233 was not a Trial by a Sessions Judge duly appointed to exercise jurisdiction under Section 9 Cr.P.C. and that the Fundamental Right of the appellants under Article 21 was violated as their liberty was being taken away otherwise than in accordance with the procedure established by law. It would be a different matter if the Constitution of the Court itself is under challenge, but that is not the case here."*

57. The Supreme Court in the said judgement referred to several English and American authorities right from 1431. The Supreme Court referred to observations made by Lord Denning relying upon American cases where observation was made that *"where an office exists under the law, it matters not how the appointment of the incumbent is made, so far*

as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, And exercises its powers and functions - - - the official acts of such persons are recognised as valid on the grounds of public policy, and for protection of those having official business to transact."

58. In **State of U.P. versus Rafiq Uddin and others** 1987 Supplement SCC 401, the Supreme Court was considering the appointment of certain judges in violation of U.P. Civil Service Judicial Branch Rules 1951. The Supreme Court observed that even though they had not been found suitable for appointment according to the norms fixed by the Public Service Commission, they had been working in the Judicial Service during all these years and some of them had been promoted and they had performed their functions and duties as de facto judicial officers. The Supreme Court relied upon judgement rendered in Gokaraju (supra) where it has been observed *"a person who is ineligible to judgeship, but who has nevertheless been duly appointed and who exercises the powers and duties of the office of is a de facto judge, he acts validly until he is properly removed. Judgement and orders of a de facto judge cannot be challenged on the ground of his ineligibility for appointment."*

59. The argument of the Learned Counsel for the appellant that his Trial was vitiated on the ground that it had been held by an incompetent Court cannot also be countenanced As is evident from the observations made by the Supreme Court in the case of Gokaraju (supra) and Rafiq Uddin (supra).

Joint Trial, if permissible

60. Regarding the argument raised by learned Senior Counsel for the appellant about joint Trial being impermissible, in a recent decision of **Nasib Singh versus State of Punjab** decided on 8.10.2021 reported in 2021 SCC Online SC 924; the Supreme Court was considering the question as to whether non-joinder of Trials in two FIRs itself had caused a miscarriage of justice, prejudicing the rights of the accused or the case of the prosecution such that it necessitated the order of the High Court directing a reTrial after clubbing the proceedings arising out of both the FIRs. The Supreme Court considered the judicial pronouncements on the issue as well as the statutory provisions relating to framing and joinder of charges, and after referring to Section 218, 219, 220, 221 and 223 of the Code of Criminal Procedure. The Supreme Court observed that the High Court ought not to set aside the conviction of the accused on the ground that inter-alia the joint Trial of two or more offences committed by each of them is illegal, the Supreme Court referred to a three-judge bench decision regarding Section 239 (d) of the old Code which corresponds to Section 223 (d) of the new Code and juxtaposing it with the provisions of Section 225 (1)of the old Code which is Section 219 (1) of the new Code . In that case the respondents along with two others were tried together for offences under the Penal Code. The High Court had set aside the conviction on the ground that joint Trial of two or more offences committed by each of them was illegal. The Bench observed that the phrase "offence committed in the course of same transaction "would mean offences that are committed in proximity of time or place or unity of purpose and design. It quoted paragraph 25 of the judgement in **State of Andhra Pradesh versus Cheemlapati GaneshVara Rao AIR 1963 Supreme Court 1850**, thus :- *"....indeed it would be always difficult to define precisely what the expression means. Whether a "transaction" can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be difficult task to undertake a definition of that which the legislature has deliberately left undefined. We have not come across a single decision of any Court which has embarked upon the difficult task of defining the expression. But it is*

generally thought that where there is a proximity of time or place or unity of purpose and design or continuity of action in respect of a series of facts, it may be possible to infer that they form part of the same series of acts, it may be possible to infer that they form part of the same transaction. It is, however not necessary that every one of these elements should coexist for a transaction to be regarded as the same. But if several acts committed by a person show unity of purpose or design that would be a strong circumstance to indicate that those acts form part of the "same transaction". The connection between a series of acts seems to us to be an essential ingredient of those acts to constitute the same transaction and, therefore, the mere absence of the words "so connected together as to form same transaction" in Section 239 would make little difference. Now a transaction may consist of an isolated act or may consist of a series of acts. The series of acts which constitute a transaction must of necessity be connected with one another and if some of them stand out independently they would not form part of the same transaction but would constitute a different transaction or transactions. Therefore, even if the expression same transaction alone has been used in Section 235 it would have meant a transaction consisting of either a single act or a series of connected acts. The expression "same transaction "occurring in clause (d) of Section 239 as well as that occurring in Section 235 (1) ought to be given the same meaning according to the normal rule of construction of statutes - - -".

61. In **Nasib Singh** (supra), the Bench observed that holding a separate Trial is the rule and a joint Trial is the exception. However, in case the accused persons commit different offences forming part of the same transaction, a joint Trial would be the rule unless it is proved that joint Trial would cause difficulty:

para 28 - - - ***"no doubt, as has been rightly pointed out in this case, separate Trial is the normal rule and joint Trial is an exception, but while this principle is easy to appreciate and follow where one person alone is accused and the interaction or intervention of the acts of more persons than one does not come in, it would, where the same act is committed by several persons, be not only inconvenient but injudicious to try all the several persons separately. This would lead to unnecessary multiplicity of Trials involving avoidable inconvenience to the witnesses and avoidable expenditure of public time and money. No corresponding advantage can be gained by the accused persons by following the procedure of separate Trials. Where, however, several offences are alleged to have been committed by several accused persons, it may be more reasonable to follow the normal role of separate Trials. But here, again, if those offences are alleged not to be wholly unconnected but as forming part of the same transaction, the only consideration that will justify separate Trials would be the embarrassment or difficulty caused to the accused persons in defending themselves."***

(emphasis supplied)

62. The Supreme Court thereafter held that the High Court was wrong in setting aside the order of conviction on the ground of misjoinder of parties. It was observed that the Court could have set aside the order of conviction only on the ground that such misjoinder caused a failure of justice to the accused and not merely because there is a misjoinder of parties:

para 31 ...."even if we were to assume that there has been a misjoinder of charges in violation of the provisions of Section 233 to 239 of the Code, the High Court was incompetent to set aside the conviction of the respondents without coming to the definite conclusion that misjoinder had occasioned failure of justice. This decision completely meets the argument based upon Dawson case (1961 All England reporter 558).Merely because the accused

persons are charged with a large number of offences and convicted at the Trial, the conviction cannot be set aside by the appellate Court unless it in fact comes to the conclusion that the accused persons were embarrassed in their defence with the result that there was a failure of justice. For all these reasons we cannot accept the argument of the learned counsel on the ground of mis-joinder of charges and multiplicity of charges."

This interpretation placed on Section 223(d) of the old Code was relied upon by the Supreme Court in **R Dinesh Kumar versus State 2015 (7) SCC 497.**

63. The Court also observed in **Chandrabhal versus State of U.P. 1971(3) SCC 983**, a case where the appellant was convicted of an offence under Section 302, while the two co-accused charged with offences under Section 302 read with Section 34 of the Penal Code were acquitted, that *"although Section 233 embodies the general mandatory rule providing for a separate charge for every distinct offence and for a separate Trial for every such charge, the broad object underlying the general rule seems to be to give to the accused a notice of the precise accusation and to save him from being embarrassed in his defence by the confusion which is likely to result from lumping together in a single charge distinct offences, and from combining several charges at one Trial. There are however, exceptions to this general rule and they are found in Section 234, 235, 236 and 239. These exceptions embrace cases in which one Trial for more than one offence is not considered likely to embarrass or prejudice the accused in his defence. The matter of joinder of charges is however in the general discretion of the Court and the principal consideration controlling the judicial exercise of this discretion should be to avoid embarrassment to the defence by joinder of charges."*

64. The Supreme Court observed further that the matter was required to be considered by the Trial Court at the beginning of the Trial and is not to be determined on the basis of the result of the Trial. The Court further observed that its attention was not drawn to any material on record suggesting that prejudice has been caused to the appellant as a result of a separate Trial.

65. The Supreme Court in ***Nasib Singh*** *(supra)* summarised the Principles laid down in Chandrabhal thus-*"A separate Trial is not contrary to law even if a joint Trial for the offences along with other offences is permissible. (1) The possibility of a joint Trial has to be decided at the beginning of the Trial and not on the basis of the result of the Trial; (2) and the true test is whether any prejudice has been sustained as a result of a separate Trial. In other words, reTrial with the direction of a joint Trial would be ordered only if there is a failure of justice."*

66. The Supreme Court in paragraph 39 summarised the principles on the basis of decisions of the Court on joint Trials and Separate Trials and observed thus.

Para 39 *"From the decisions of this Court on joint Trial and separate Trials, the following principles can be formulated:*

1) Section 218 provides that separate Trials will be conducted for distinct offences alleged to be committed by a person. Section 219-221 provide exceptions to this general rule. If a person falls under these exceptions, then a joint Trial for the offences, which a person is charged with maybe conducted. Similarly, under Section 223, a joint Trial may be held for persons charged with different offences, if any of the clauses in the provision are separately or in a combination satisfied;

2),while applying the principles enunciated in Sections 218-223 on conducting joint and separate Trials, the Trial Court should apply a two pronged test, namely, (i) whether conducting a joint/separate Trial will prejudice

the defence of the accused; and/or (ii) whether conducting a joint/separate Trial would cause judicial delay.

(3)the possibility of conducting a joint Trial will have to be determined at the beginning of the Trial and not after the Trial based on the result of the Trial. The appellate Court may determine the validity of the argument that there ought to have been a separate/joint Trial only based on whether the Trial had prejudiced the rights of the accused or the Prosecutrix ;

(4)since the provisions which engraft an exception use the phrase "may "with reference to conducting a joint Trial, a separate Trial is usually not contrary to law even if a joint Trial could be conducted, unless proven to cause a miscarriage of justice; and

A conviction or acquittal of the accused cannot be set aside on the mere ground that there was a possibility of a joint or a separate Trial. To set aside the order of conviction or acquittal, it must be proved that Rights of the parties were prejudiced because of the joint or separate Trial, as the case may be".

67. The Supreme Court in **Nasib Singh** (supra) further observed in paragraph 44 that the observations of the Supreme Court in Chandrabhal were reiterated in **State of M. P. Vs. Bhooraji 2001 (7) SCC 679;** and observed that a de novo Trial should be a matter of last resort only when such a course of action becomes *"so desperate and indisputable"*. Moreover, the Court emphasised that the appellate Court would do so in an extreme exigency to avert the failure of justice. While exercising its power as a Court of appeal under Section 386 Code of Criminal Procedure, the Court has to be conscious of the fundamental principle that the power to order a de novo Trial or *"that the accused to be retried or committed for Trial"* is of an exceptional nature which is intended to prevent a miscarriage of justice. The same principle is in fact embodied in Section 465(1) of the Code of Criminal Procedure.

68. Section 465 of the Code provides that-

"465. ***Finding or sentence when reversible by reason of error, omission or irregularity*** *- (1) subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, Proclamation, order, judgement or other proceedings, before or during Trial ,or in any enquiry or other proceedings under this Code, or any error, or irregularity, in any sanction for prosecution, unless in the opinion of the Court, a failure of justice has in fact been occasioned thereby.*

69. The learned counsel for the petitioner has argued also on the ground that the Trial is vitiated because it has been conducted and judgement delivered by Smt. Pooja Singh IIIrd ADJ who was not the designated Court/Special Sessions Court to try cases relating to MPs and MLAs in district Faizabad. This Court had summoned a report from the District Judge concerned on 29.11.2021. On the basis of such report/comments this Court had passed an order on 30.11.2021. Which is being quoted here in below: -

"In pursuance of the order passed by me earlier the District Judge, Faizabad has sent a report dated 30.11.2021 which has been placed by the office before the Court today itself.

In this report, it has come out that Smt. Pooja Singh was initially Additional District and Sessions Judge, Court No.1 and she was entrusted/designated to hear matters regarding MPs and MLAs. Later on, however due to certain intervening circumstances she became Court No.3 but the High Court sent a letter No. 6171 dated 03.06.2021 wherein it was stated that officers who were empowered to try the

criminal cases pending against the MPs and MLAs will try the said cases as long as they were posted in the concerned district. Therefore, some twenty cases which were being heard by Smt. Pooja Singh as designated District & Sessions Judge/Special Court for MPs and MLAs would assigned to her even though she became Court no.3 in Faizabad Judgeship. A list of such matters has also been filed alongwith the report as also the copy of letter dated 03.06.2021 sent by the Joint Registrar,Judicial(Services) High Court of the Allahabad to all District Judges concerned. The question of lack of jurisdiction is thus addressed insofar as Trial of the petitioner by Additional District and Sessions Judge, Smt. Pooja Singh is concerned.

Put up tomorrow i.e. 01.12.2021 at 02:15 PM."

The controversy regarding The IIIrd ADJ and not the Ist ADJ At Faizabad hearing and deciding the Special Case No.3012/2018 thus stands settled.

70. Having considered the arguments raised by the learned counsel for the appellant against giving hearing to the private counsel appearing on behalf of the Objectors, this Court is of the considered opinion that such Objectors can only be allowed to interject under the supervision of AGA/ Public prosecutor. The State having filed objections wherein the criminal history of the appellant has been given in detail in the form of a chart, the same can be considered by this Court even if it chooses to ignore the affidavits filed in support of the objections by the Objector 1 and 2. Practically the same objections have been taken by both the Objectors to the grant of bail to the appellant. They have referred to his criminal background and the fact that several criminal cases are pending against him in various Courts in various districts such as Jaunpur, Sonebhadra, Ayodhya and others. They have also referred to the Appellant managing to get a firearm licence on a fake identity proof and residential address. They have also referred to the appellant managing to get bail on the basis of fake identity proof and fake residential address. It has been submitted by the learned counsel for the appellant that the appellant has been acquitted, Or discharged Or the proceedings have been dropped or final report has been submitted in almost all such cases, but the Learned counsel for the appellant has failed to point out that at least two cases which are still pending in the Court at Jaunpur and Sonebhadra regarding theft of Court records and murder. These criminal antecedents form a necessary fact to be looked into at the time of grant of bail to the appellant post Conviction by the Learned Trial Court.

71. The learned counsel for the appellant has argued on the basis of order passed by the Supreme Court on 24.11.2021 in Mohammad Azam Khan's case whose Writ petitions were taken up along with the PIL by Ashwini Kumar Upadhyay (supra) that the observations of the Supreme Court have nullified and expunged the Trials that have been held by Sessions Courts in cases triable by Magistrates also does not appeal to reason as the Supreme Court has not mentioned in its order dated 24 November 2021 anything about cases where Trials have been concluded and judgement pronounced. Such Trials/judgements must be governed by the law settled by the Supreme Court in the case of Gokaraju (supra) and Rafiq Uddin (supra). At the time when Trial was being conducted by the Sessions Court a valid notification of the Allahabad High Court was in existence transferring the case to it. Subsequent observations of the Supreme Court regarding misinterpretation of its orders by the High Court would not nullify the judgement Under appeal before this Court.

72. The learned counsel for the appellant has raised a challenge to the judgement under appeal on the ground That a joint Trial was held.

In view of the law settled by the Supreme Court in the case of **Nasib Singh** versus State of Punjab 2021 SCConline Supreme Court 924 a joint Trial could have been held As the college where the three accused were studying was one, its Principal had lodged the FIR regarding similar interpolations in marksheets by the three accused on the basis of same record of results maintained by it in its ordinary course of business and the very same evidence was to be produced to bring home the charge in the case of each of the accused and the prosecution witnesses who were examined to prove the charges were also the same.

73. This Court having considered the law laid down by the Supreme Court for considering applications for suspension of sentence and conviction pending appeals by the appellant does not find merit in the submissions made by the learned counsel for the appellant that he will suffer irreparable loss if his conviction is not stayed as he will be disqualified under Section 8(3) of the Representation of Peoples Act for a period of six years from the date of his conviction till his release from participating in elections. The Supreme Court has time and again observed the need to maintain probity in public life. This Court cannot countenance the conduct of the appellant as brought out by the facts mentioned hereinabove in taking the Authorities for a ride by submitting fake proof of identity and residence for procuring an arms license, and in taking the Courts for a ride in submitting bail papers and sureties on the basis of fake residential address and also removing Court records of criminal case pending against him.

74. The application under Section 389 (1) of the Cr.P.C. therefore stands ***rejected.***

(2021)12ILR A74
APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 30.11.2021

BEFORE

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

Criminal Appeal No. 3879 of 2015

Rinka @ Jitendra ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Sudhir Kr. Kulshreshtha, Sri Noor Mohammad, Sri Ronak Chaturvedi, Sri Santosh Tripathi, Sri Umang Srivastava, Zia Naz Zaidi, Sri Ajay Kumar Pathak, Ms. Alka Upadhyay, Sri Krishna Deep Singh

Counsel for the Respondent:
Govt. Advocate

Evidence Law - Indian Evidence Act, 1872- Sections 3 ,101 , 145 & 155(3) – Only examination of interested witnesses- Major contradictions – Failure to prove injuries with weapon alleged – Perverse findings- Just because the F.I.R had named the accused it cannot mean that the site plan depicting the presence of the accused at a particular place is proved beyond reasonable doubt. There are several contradictions and these contradictions are not minor in nature- All interested witnesses have been examined by the prosecution. Not a single witness who can be said to be an independent witness has been examined. The finding of the learned Judge is not accepting the submission of the accused goes to through the perversity in the judgement. The F.I.R never stated that the accused had any altercation with the deceased girl, it was juvenile delinquent who had passed remarks-The accused should be granted what is known as benefit of doubt. One of the reasons been the manner in which the injuries was caused was not with the weapon which was alleged to be carried by the accused, the scribe also did not prove the time of the

incident. The manner of assault is also not been proved against the accused.

Settled law that the burden of proving its case beyond all reasonable doubt lies upon the prosecution. Where the prosecution has examined only interested witnesses whose testimony has major contradictions, the time, place and manner of the alleged assault has not been proved and the judgement of the trial court is perverse, then the accused is entitled for the benefit of doubt. (Para 12, 13)

Criminal Appeal Allowed. (E-3)

Judgements/ Case law relied upon:-

1. St. of Guj. Vs. Bhalchandra Laxmishankar Dave, 2021 (0) AIJEL-SC 66983

2. Awadh Ram Vs. St. of U.P, 2004 (48) ACC 365

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

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

2. The instant Criminal Appeal has been preferred on behalf of the sole appellant-convict Rinka alias Jitendra against the judgment dated 14.07.2015 passed by the Sessions Court in Sessions Trial No. 471 of 2013 (State Vs. Rinka @ Jitendra) arising out of Case Crime No. 342 of 2012, under Sections 376, 511 read with 302 of Indian Penal Code (I.P.C.), P.S. Palimukimpur, District Aligarh whereby the learned trial court convicted him for the offence under Section 376/511 of Indian Penal Code and sentenced appellant to undergo with rigorous imprisonment of 5 years and a fine of Rs. 5000/- and also ordered to undergo imprisonment of two months in default of payment of fine and for the offence under Section 302 of Indian Penal Code the appellant further undergo for life imprisonment and fine of Rs. 20,000/- and in default of payment of fine six months imprisonment.

3. The brief facts as culled out from the paper-book and the record are that Yadram Sharma has given a written information at police station Palimukimpur for commission of offence under Section 376, 302 and 511 I.P.C on the facts that on 27.12.2012 his daughter (prosecutrix) was aged about 14 years the accused wanted to have illicit relation with her and when she refused, he threatened to kill her with a knife. This fact was conveyed by prosecutrix to her mother. On 27.12.2012 at about 4:30 p.m when the prosecutrix was on the way to attend the call of nature, accused Gopal who was declared juvenile later on and whose case is pending before the Juvenile Justice Board, Aligarh to the mustard field so as to support this Gaurav the present accused in the appeal also came behind him and when the girl started yelling persons who were near her came running. At that point of time the accused drew out his pistol and conveyed that if anybody came near he would shoot them, on this there was a commotion. At that point of time as per the F.I.R version the accused took out a knife and did away with the prosecutrix and they went away. The girl was declared dead. On the basis of the complaint the investigation was started and it converted into laying of charge-sheet against both the accused. Lala @ Gaurav being juvenile, his case was send to Juvenile Justice Board and the case of present accused was committed to the court of Sessions.

4. On this written information case crime no. 342 of 2012 was registered under Sections 376/511 read with 302 I.P.C against Rinka @ Jitendra with the Police Station Palimukimpur, District Aligarh.

5. The I.O. after concluding the investigation filed charge sheet against the accused Rinka @ Jitendra and the concerned court took cognizance of the same. The trial court framed charges against the accused Rinka @ Jitendra under sections 376/511 read with 302

I.P.C. and the charges were read over and explained to the accused which was denied by him and claimed for trial.

6. The prosecution so as to bring home the charges examined seven witnesses, who are as under:-

1.	Yadram Sharma	P.W.
2.	Nannu	P.W.
3.	Dharmendra Singh	P.W.
4.	Satyawati	P.W.
5.	Dr. Sayeed Mohammad	P.W.
6.	S.I/I.O Udal Singh	P.W.
7.	Dr. Anil Kumar Purwani	P.W.

7. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	Written report
2.	Panchayatnama
3.	Recovery memo of 'Lota'
4.	Recovery memo of blood stained & plain earth
5.	F.I.R
6.	Letter to the C.M.O
7.	Site plan
8.	Site plan with index
9.	Charge Sheet Mool
10.	P.M Report

8. We have heard submissions made by the learned counsel for the appellant and also learned A.G.A. for the State, and perused the materials brought on record.

9. Shri Ajay Kumar Pathak, the learned counsel for the appellant has submitted written argument that the F.I.R was against two accused and it was Gaurav who has threatened the victim even before four days of the incident, there was no mention of the present appellant. It is submitted that the appellant had a country made pistol with him which was never used, how the persons saw him giving blow to the deceased is silent. It is submitted that the presence of the father is absolutely doubtful, the scarf was tied around the neck and there was bleeding of the victim which was never attributed to the accused. The site plan was prepared but neither pistol nor the knife was recovered. In postmortem report two injuries were found on the body namely injury no. 1 was a lacerated wound on the neck and injury no. 2 was abrasion on the face. The doctor who examined and conducted the postmortem opined that injuries were possible by a blunt object. The learned counsel further submits that entire evidence of all the seven people do not show that the accused was in any way attributed to have committed rape. It is submitted that leave apart of committing rape there was not a discussion even by the learned judge about how the accused can be said to have committed rape even there is no mention of attempt to commit rape. The oral testimony of P.W.-7 does not support prosecution story as far as it relates to commission of offence under Section 376 read with 511 read with 302 I.P.C. Grounds of the appeal is as follows:-

(i) There is no evidence against the appellant for using of country made pistol;

(ii) It is not believable that in presence of witnesses any person can kill the deceased and can cover the injury with dupatta;

(iii) The father of the deceased work at Delhi and Investigating Officer had also not shown his presence in the site plan and otherwise also P.W.-1 and P.W.-2 is 100 mtrs away from the place of incident;

(iv) Accused persons were not seen going towards the place of incident by the alleged witnesses but it is alleged that accused persons were seen while giving threat and running from the place of incident;

(v) There is no evidence of resistance or attempt of rape, in as much neither the clothes of the deceased was torn nor any injury was there on the whole body of the deceased;

(vi) None has corroborated the prosecution version other than P.W-1, father of

the deceased and P.W.-2, cousin of the deceased;

(vii) Both the alleged eye witnesses could not even told the name of any single witness who have reached the place of incident and Investigating Officer also did not mention the place in the site plan from where P.W.-1 and P.W.-2 have seen the incident;

(viii) The doctor who conducted the postmortem specifically stated that injury was caused by a blunt object while the appellant was alleged to have been armed with country made pistol, there is huge conflict between oral and medical evidence;

(ix) The appellant cannot be attributed the role of killing the deceased as stated by P.W.-1 himself that when he reached near the spot he seen appellant Rinka @ Jitendra showing country made pistol to the witnesses. The co-accused had shown armed with knife;

(x) The manner in which injury was caused was not proved by P.W.-7- the doctor and as per suggestion and also P.W.-7, doctor has accepted that incident took place in the night;

(xi) The conviction of the appellant under Section 376,511 and 302 I.P.C is against the weight of evidence on record;

(xii) Even the court below did not look into the contradiction in the prosecution evidence which makes the prosecution story doubtfu;

(xiii) Nothing has been recovered from the possession of the appellant;

10. Learned counsel for the appellant in his written submission has submitted that there was no evidence against the appellant of having used a country made pistol. There is no evidence that an attempt of rape with the deceased was made by the accused. It is submitted that the story put forth by the prosecution that in presence of appellant and co-accused the minor was done to death and then the injury was covered by a dupatta and had submitted that the timing of the accident is not properly mentioned. The site plan also belies the theories put forth by the prosecution. It is submitted that P.W.-1 and P.W.-2 are interested witnesses and there is no corroboration by any independent witnesses. It is submitted that the appellant had no motive. It is further submitted that accused had been alleged to have had pistol and not knife even if presence is proved even then it cannot be said that the appellant had committed the murder of the victim. The manner of assault and entangling the neck with dupatta is also going to show that it was not the accused but either the juvenile accused or any other person who had committed this offence.

11. The learned counsel for the State has submitted that the decision of the learned Judge cannot be interfered with as the evidence against the accused has been discussed in such a way that there is no other view which can be taken just because there was no recovery from the accused, it cannot be said that he was not involved in the incident. It is further submitted that the judgment of the court below goes to show that the death occurred of the girl and the accused was found present. The eye witness P.W.-2 has testified to the said effect. The injuries are two in number and there is no question of the accused not being involved in the said crime his statement under Section 313 Cr.P.C is also silent. He has not examined any witness so as to testify that he was not present. It is submitted that learned lower court has rightly not believed the decision cited by the accused.

12. Having heard the learned advocates the recent decision of the Apex Court in **"State of Gujrat Vs. Bhalchandra Laxmishankar Dave, 2021 (0) AIJEL-SC 66983** decided on 02.02.2021. Having heard learned counsel for the parties, three things emerge for our consideration, one the death occurred due to knife injury and not by injuries cause due to any gun fire. There is no

recovery of pistol from the present accused. The site plan also does not inspire confidence that the accused was present at the spot where the crime was committed. The decision of the Allahabad High Court in **Awadh Ram Vs. State of U.P, 2004 (48) ACC 365** will also come to the aid of the accused which has been misinterpreted by the learned Judge. Just because the F.I.R had named the accused it cannot mean that the site plan depicting the presence of the accused at a particular place is proved beyond reasonable doubt. There are several contradictions and these contradictions are not minor in nature. We have considered thread bear the facts. All interested witnesses have been examined by the prosecution. Not a single witness who can be said to be an independent witness has been examined. The finding of the learned Judge is not accepting the submission of the accused goes to through the perversity in the judgement. The F.I.R never stated that the accused had any altercation with the deceased girl, it was juvenile delinquent who had passed remarks.

13. We are convinced that this is a case where the accused should be granted what is known as benefit of doubt. One of the reasons been the manner in which the injuries was caused was not with the weapon which was alleged to be carried by the accused, the scribe also did not prove the time of the incident. The manner of assault is also not been proved against the accused.

14. In view of the facts and evidence on record, we are convinced that the accused has been wrongly convicted, hence, the judgment and order impugned is reversed and the accused is acquitted of charges levelled. The accused appellant **Rinka alias Jitendra** in case crime no. 342 of 2012 , if not wanted in any other case, be set free forthwith.

15. Appeal is allowed accordingly.

16. Record be sent to the trial court.

17. We are thankful to learned counsel for appellant and learned AGA for the State who has ably assisted the Court.

(2021)12ILR A78
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.10.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 4138 of 2018

Jasveer & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Santosh Tripathi, Sri Adesh Kumar, Sri Mandvi Tripathi, Pradeep Kumar, Sri Ram Suphal Shukla, Sri Vindeshwari Prasad

Counsel for the Opposite Party:
A.G.A., Sri Narendra Singh Chahar, Sri Ashutosh Singh

Criminal Law - Indian Penal Code , 1860 - Section 307- Allegation of use of firearm found to be false- All injuries simple and not dangerous to life- From the evidence of PW-1, PW-2 and also from the perusal of injury reports, it is crystal clear that no injured sustained any firearm injury and prosecution has failed to prove that any firearm was used in the occurrence. Informant/injured Prakashwati has tried to make exaggeration in her statement and use of firearm is brought into the picture just to exaggerate the case and for bringing it within the ambit of offence under Section 307 I.P.C. Dr. Azadveer Singh PW-3 has also given opinion that no injury was dangerous to life. Injured Pradeep sustained 12 injuries in all and out of these 12 injuries, 11 injuries were found simple in nature and only one injury i.e. injury no. 8 was found grievous in nature due to fracture in forearm of

the injured. Injured Prakashwati sustained five injuries and all the five injuries were found simple in nature. Hence with this analysis and scrutiny of evidence of witnesses on record, this court is of the considered view that no offence under Section 307 I.P.C. is made out against any of the appellants and learned trial court did not appreciate the evidence in this regard in right perspective and finding of trial court for convicting the appellants under Section 307 I.P.C. is perverse and liable to be set aside.

Where all injuries are simple and not dangerous to life and the allegation of the use of firearm is found to be false, which shows that the intention of the accused was not to commit murder, then the offence u/s 307 of the IPC is not made out.

Criminal Law - Indian Penal Code, 1860- Section 34 & 324- Prosecution has proved that all the appellants entered the house of informant with common intention to commit offence. They entered the informant's house together with *''Balkati'* and *''Lathi-danda'* in their hands. So it can be definitely opined that they were having common intention to commit the crime. Injured Pradeep sustained three injuries of incised wound as aforesaid, hence appellants are held guilty for offence under Section 324 I.P.C.Conviction and sentence awarded to appellants under Section 307 r.w.s. 34 I.P.C. is hereby set aside.

As the accused committed the offence with common intention whereby grievous hurt was caused with the use of dangerous weapons hence the offence would come within the purview of Section 324 read with Section 34 of the IPC.(Para 15, 16, 17, 19)

Criminal Appeal partly allowed. (E-3)

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred by appellants Jasveer, Rajan, Raju and Amit @ Guddu against the judgment and order passed by Learned Additional Sessions Judge [Fast Track Court No. 2] Muzaffar Nagar dated 20.07.2018 in Session Trial No. 735 of 2013 (State of U.P. Vs. Jasveer and others) arising out of Case Crime No. 240 of 2012, under Sections 452, 307/34, 323/34, 504 and 506 I.P.C., Police Station- Mansoorpur, District- Muzaffar Nagar by which learned trial court convicted and sentenced the appellants for 10 years rigorous imprisonment under Section 307/34 I.P.C., for seven years under Section 452 I.P.C., one year R.I. under Section 323/34 I.P.C., two years R.I. under Section 504 I.P.C. and seven years R.I. under Section 506 I.P.C. along with fine and imprisonment in default of fine. All the sentences were directed to run concurrently.

2. The brief facts giving rise to this appeal are that informant of this case Smt. Prakashwati W/o Late Peetam Singh submitted a written report Ex. KA-1 in P.S.-Mansoorpur, District-Muzaffar Nagar on 13.06.2012 with the averments that on that day she was sitting inside her house with her son Pradeep and daughter-in-law Sudha. At about 8:30 in the morning Jasveer, Amit @ Guddu, Rajan and Raju of her village entered her house with country made pistol *["Tamancha']*, *''Balkati'* [Sharp edged instrument] and *''Lathi-danda'* and started abusing. When her son Pradeep stopped them from abusing, all the accused persons/appellants fired with intention to kill and attacked on Pradeep with *''Balkati'* and *''Lathi-danda'* and beating him badly. When she tried to intervene, she was also attacked and her daughter-in-law Sudha was also attacked by appellants. Her son Pradeep and she herself sustained serious injuries. On her hue and cry Ashok, Vinod and other villagers came on the spot who saw the occurrence and saved them. While going back, the accused persons threatened them to kill him in the future.

3. Case Crime No. 240/2012 under Section 452, 307, 504, 506 I.P.C. was registered against all the appellants. After investigation, charge sheet against all the appellants was submitted by Investigating Officer. Learned trial court framed charges against all the appellants under Section

452, 307/34, 323/34, 504 and 506 I.P.C. After trial learned court convicted and sentenced all the appellants as aforesaid. Hence this appeal.

4. Heard Shri Vindeshwari Prasad, learned counsel for appellants, Shri Ashutosh Singh, learned counsel for the opposite party and Shri B.A. Khan, learned A.G.A. for State.

5. Learned counsel for appellants submitted that there are two injured in this case, one is informant Prakashwati and other her son Pradeep. All injuries of Pradeep are simple in nature except injury no. 8 which is fracture in his right arm. It is further submitted that there is no injury of fire arm and no fire arm was even used in entire incident as per prosecution witnesses themselves. Hence no case under Section 307 I.P.C. is made out and learned trial court wrongly convicted the appellants under this section. It is argued that the case maximum goes to the extent of offence under Section 325 I.P.C. although it is not clear from the prosecution evidence as to who had caused the injury no. 8, i.e. fracture to the injured Pradeep.

6. Learned counsel for appellant further argued that learned trial court wrongly framed the charge against the appellants under Section 307 I.P.C. because no intention to kill is emerged from entire prosecution story and injuries nor there was any firing by any appellants. Injured witnesses themselves and Investigating officer have said that no firearm was used and injury reports also suggest it. In this way there is no evidence for the offence under Section 307 I.P.C. In her statement informant/injured PW-1 Prakashwati has made so many improvements. She has stated in her statement that no fire was made by Jasveer although she has stated that Jasveer tried to make fire but it was missed but no such averment is made in first information report, hence her testimony should not be believed. Hence appeal be allowed.

7. Learned counsel for respondent and learned A.G.A. made rival submissions and argued that there are 12 injuries to Pradeep and four injuries to Prakashwati and maximum injuries of Pradeep have been inflicted on vital parts of the body. Pradeep has fracture in his right forearm also. No injury is superficial and injury report as well as supplementary medical report say that injuries were inflicted to the injured persons by hard and blunt object and by sharp edged weapon. As per prosecution version and evidence of injured witnesses, appellants were having *''Balkati'* and *''Lathi-danda'* in their hands, so in this way the evidence of injured witnesses is corroborated by medical evidence also.

8. It is next submitted by respondents that appellants entered the house of informant with intention to kill as is evident from injuries inflicted to Pradeep and informant also. Hence offence under Section 307 I.P.C. is made out. It is day light incident and F.I.R. was lodged promptly. It is also submitted that every appellant had active participation in crime. Hence learned trial court has rightly convicted and sentenced to the appellants. Appeal be dismissed.

9. Prosecution has brought the case that on 13.06.2012 at about 8:30 in the morning all the appellants entered the house of informant and had beaten the informant, her son and her daughter-in-law with *''Balkati'* and *''Lathi-danda'* and also made fire. In this occurrence informant Prakashwati and her son sustained injuries.

10. Prosecution has produced both injured persons as PW-1 Prakashwati and PW-2 Pradeep, no other witness of fact is produced. Injured witnesses are best witness to depose before the court. As per prosecution case, at the time of occurrence appellant Jasveer was having country made pistol *[''Tamancha']* in his hand,

Rajan and Raju were having *''Balkati'* and Amit @ Guddu was having *"Lathi'* but evidence of PW-1 and PW-2 shows that no firearm was used in the incident. In this regard PW-1 Prakashwati has stated in her statement that all the accused persons entered her house and made fire. Further it is said by her that fire was missed. This witness has admitted in her statement that it was correctly mentioned in F.I.R. by her that accused persons opened fire with intention to kill and also admitted that she did not mention in F.I.R. that Jasveer fired from "Tamancha' and it was missed. This statement of missing the fire was not given by the witness to Investigating Officer. Later on before trial court PW-1 distracted from her statement that Jasveer fired and it was missed rather she has specifically stated in cross examination that no fire was made by Jasveer in entire occurrence and it is also correct to say that no accused person made any fire. PW-2 Pradeep, another injured witness has stated in his examination-in-chief that Jasveer fired from "Tamancha' but bullet was not discharged. Both the witnesses PW-1 and PW-2 have accepted in their statements that Jasveer did not try to make second fire. Hence the evidence of PW-1 and PW-2 is not at all reliable on the point of making fire by any of the appellants. This fact is corroborated by injury reports also. Medical examination of both the injured persons were conducted by Dr. Azadveer Singh who produced by prosecution as PW-3. He has proved the injury report of injured Pradeep as Ex. KA-2. In Ex. KA-2 following injuries are shown to be sustained by inured Pradeep:-

(i) Incised would size 5cm x 0.5 cm x Bone Deep, right side forehead, 4cm above right eyebrow.

(ii) Incised would 2cm x 0.5 cm x Scalp Deep right side forehead, 3 cm. above left eyebrow.

(iii) I.W. size 2cm x 0.5 cm x Muscle Deep outer end of right eyebrow.

(iv) L.W. size 3cm x 0.5 cm into Scalp Deep, left side of head, 13 cm. above left ear.

(v)L.W. sized 4.5cm x 0.5 cm x Bone Deep, right side of head, 4 cm. Away from injury no. 4.

(vi) L.W. size 2.5 cm x 0.5 cm x Bone Deep, right side of head, 8 cm. above right ear.

(vii) L.W. size 3.5 cm x 0.5 cm into Bone Deep, right side head, 6 cm. above right ear.

(viii) L.W. size 2cm x 0.5 cm x Bone Deep, T.S. 15 cm x 8 cm of right elbow forearm.

(ix) Multiple contusion in front part of chest and abdomen, bigger is 22cm x 2cm. and smaller is 3cm x 1cm.

(x) Contusion size 24cm x 2cm left side back and abdomen.

(xi) Multiple contusion in front of right side in an area 24cm x 15cm, larger is 12cm x 5cm and smaller is 5cm. x 4cm.

(xii) Contusion 5cm. X 4cm. middle part of left thigh.

11. Injuries no. 1, 2 and 8 were kept under observation and X-ray was advised.

12. After X-ray, supplementary report of medico legal examination of injured Pradeep was submitted which is also by the doctor PW-3 as Ex. KA-4. According to this report no bony injury was seen in injure no. 1 and fracture of ulna bone was found in X-ray. All the injuries of Pradeep were found simple except injury no. 8 which was found grievous in nature.

13. Medical examination of injuries sustained by informant Prakashwati was also conducted by Dr. Azadveer Singh. He has proved this report as Ex. KA-3 according to which following injuries were sustained by injured Prakashwati :-

(i) Abraded contusion size 3cm. x 2cm. Dorsiflexion of left hand.

(ii) Contusion 2.5cm. x 2cm. Dorsiflexion of right hand.

(iii) Abraded contusion 7cm. x 4cm. Back of left arm 5cm. above left elbow.

(iv) Contusion size 4cm. x 2cm. back of left forearm 9cm. above wrist joint.

(v) C/O pain in chest.

14. All the above injuries of injured Prakashwati were simple in nature.

15. Hence as per injury reports of both the injured persons, there was no injury of firearm. Hence from the evidence of PW-1, PW-2 and also from the perusal of injury reports, it is crystal clear that no injured sustained any firearm injury and prosecution has failed to prove that any firearm was used in the occurrence. Informant/injured Prakashwati has tried to make exaggeration in her statement and use of firearm is brought into the picture just to exaggerate the case and for bringing it within the ambit of offence under Section 307 I.P.C. Dr. Azadveer Singh PW-3 has also given opinion that no injury was dangerous to life. Injured Pradeep sustained 12 injuries in all and out of these 12 injuries, 11 injuries were found simple in nature and only one injury i.e. injury no. 8 was found grievous in nature due to fracture in forearm of the injured. Injured Prakashwati sustained five injuries and all the five injuries were found simple in nature. Hence with this analysis and scrutiny of evidence of witnesses on record, this court is of the considered view that no offence under Section 307 I.P.C. is made out against any of the appellants and learned trial court did not appreciate the evidence in this regard in right perspective and finding of trial court for convicting the appellants under Section 307 I.P.C. is perverse and liable to be set aside.

16. Injured Pradeep sustained three injuries of incised wound which are injury no. 1, 2 and 3, all these injuries were simple in nature but it is clear that these injuries were inflicted with sharp edged weapon and prosecution has proved that *''Balkati'* was used in occurrence which is a sharp edged instrument and injury no. 1, 2, and 3 could be inflicted to him by *''Balkati*.' Prosecution has proved that all the appellants entered the house of informant with common intention to commit offence. They entered the informant's house together with *''Balkati'* and *''Lathi-danda'* in their hands. So it can be definitely opined that they were having common intention to commit the crime.

17. Injured Pradeep sustained three injuries of incised wound as aforesaid, hence appellants are held guilty for offence under Section 324 I.P.C.

18. Injury no. 8 sustained by injured Pradeep, which is fracture in ulna bone, was grievous injury. It can be safely held that this injury was caused by appellant Amit @ Guddu because as per statement of injured PW-2 Pradeep Kumar in examination-in-chief Amit @ Guddu was having *''Lathi'* in his hand. Further he has stated that Amit @ Guddu assaulted on his head by *''Lathi'* 4 to 5 times but he was saving himself by his hands. So it is proved that the injury no. 8 was inflicted to Pradeep by the appellant Amit @ Guddu. Hence appellant Amit @ Guddu is held guilty under Section 325 I.P.C. also.

19. With the discussion as above I am of the considered opinion that no case under Section 307 I.P.C. is made out against any of the appellants. Hence conviction and sentence awarded to appellants under Section 307 r.w.s. 34 I.P.C. is hereby set aside.

20. Sentence under Sections 452 and 504 I.P.C. is very harsh keeping in view of the fact that no offence under Section 307 I.P.C. is made out. Hence sentence under Section 452 I.P.C. is reduced for two years from seven years. Sentence under Section 506 I.P.C. is reduced to

two years from seven years. Imposition of fine and imprisonment in default of fine shall remain intact for the offences under Sections 452 and 506 I.P.C. Sentence under Section 323 r.w.s. 34 I.P.C. and under Section 504 I.P.C. shall remain intact.

21. Appellants Jasveer, Raju, Amit @ Guddu and Rajan are sentenced for three years rigorous imprisonment under Section 324 I.P.C.

22. Appellant Amit @ Guddu is sentenced for three years rigorous imprisonment and Rs.5,000/- fine. He shall undergo simple imprisonment for three months in case of default of fine.

23. All the sentences shall run concurrently.

24. In the result, appeal is **partly allowed** as modified aforesaid. Copy of this judgment and record be transmitted to concerned court below for ensuring compliance.

(2021)12ILR A83
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.12.2021

BEFORE

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

Jail Appeal No. 4556 of 2014

Gaurav Kumar Srivastava ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Amit Tripathi, Sri Santosh Kumar Yadav, Sri Mukesh Kumar

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 302-challenge to-conviction-prosecution has not disclosed any motive-PW-2 inimical witness, also stated that he never saw any altercation between son and mother-Danda was recovered on the pointing out the appellant from inside the Chappar of his house and blood was found on it-PW-1 and PW-2 are not eye-witnesses as they were not present on the spot-However, injuries were sufficient in the ordinary course of nature to cause death, therefore, the appellant held guilty under Section 304 (Part-I) instead of under section 302 IPC.(Para 1 to 24)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Tuka Ram & ors.. Vs St. of Mah. (2011) 4 SCC 250

2. BN Kavadakar & anr. Vs St. of Kar. (1994) Supp (1) 304

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred by the appellant- Gaurav Kumar Srivastava against the judgment and order dated 28.08.2014, passed by Additional Sessions Judge, Farrukhabad, in Session Trial No.117 of 2012 *(State vs. Gaurav Kumar Srivastava)* arising out of Case Crime No.137 of 2012 under Section 302 IPC, Police Station-Kamlaganj, District- Farrukhabad, whereby the appellant-accused was convicted and sentenced for life imprisonment and fine of Rs.5,000/- under Section 302 IPC. He was further directed to undergo six months of simple imprisonment, in case of default of fine.

2. The brief facts of this case are that on 31.03.2012, a written report was submitted by complainant Sitaram at Police Station-Kamalganj, District- Farrukhabad stating that besides his house in village Sindhirampur, there is house of his elder sister Smt. Phoolan Devi,

wife of late Rakesh Chandra. Today on 31.03.2012 at about 10:30 PM, Phoolan Devi's son Gaurav Kumar had murdered his mother Phoolan Devi by using *Danda*. On hearing the noise, he and Ram Saran of his village ran to the place of occurrence and saw the occurrence. They tried to catch Gaurav but he ran away. On the basis of this written report, a first information was registered at police station-Kamalganj on Case Crime No.137 of 2012 under Section 302 IPC.

3. S.I. Raj Kishore Awasthi took up the investigation. Inquest proceedings of deceased Phoolan Devi were conducted. Post mortem was conducted by Dr. Kamlesh Kumar Sharma and post mortem report was prepared. During the course of investigation, the I.O. recorded the statements of witnesses under Section 161 Cr.P.C., site-plan was prepared. Accused was arrested and the *Danda*, used in crime, was recovered on his pointing out from his house, which was sent for chemical examination, the report of which indicated that it was having blood stains. After completing the investigation, I.O. submitted charge sheet against the accused-appellant. The case being exclusively triable by court of sessions was committed to the sessions court by the competent Magistrate for trial.

4. Learned trial court framed charges against the accused-appellant under Section 302 IPC. The accused denied the charges and claimed to be tried.

5. To bring home the charges, the prosecution produced following witnesses, namely:

1.	Sitaram	PW1
2.	Ram Saran	PW2
3.	Constable Devendra Kumar Singh	PW3
4.	Dr. Kamlesh Kumar Sharma	PW4
5.	S.I. Raj Kishore Awasthi	PW5
6.	S.I. Sunil Kumar Tiwari	PW6

6. In support of the ocular version of the witnesses, following documents were produced by prosecution and contents were proved by leading the evidence:

1.	Written Report	Ex. Ka1
2.	FIR	Ex. Ka2
3.	Recovery-memo of blood-stained and plain-earth	Ex. Ka12
4.	Recovery-memo of Danda	Ex. Ka13
5.	P.M. Report	Ex. Ka4
6.	Panchayatnama	Ex. Ka6
7.	Charge-sheet	Ex. Ka15
8.	Report of FSL	Ex. Ka12

7. Statement of accused was recorded under Section 313 Cr.P.C., in which he said that false evidence is produced against him. The accused did not examine any witness in defence.

8. We have heard Shri Santosh Kumar Yadav, learned Amicus Curiae appearing for the appellant, Shri Vikash Goswami, learned AGA for the State and perused the record.

9. Learned counsel for the appellant first of all submitted that in this case, complainant has not disclosed any motive of the crime in FIR nor the witnesses of fact made any statement regarding motive before the learned trial court. There was no occasion and no reason for appellant to commit the murder of his own mother. Therefore, silence of motive creates a big doubt on prosecution case and it cannot be inferred that accused-appellant committed the crime. It is also submitted that PW1 Sitaram is complainant and in his statement, he has clearly stated that he wrote the report of this case on dictation of Sub-Inspector of police. It clearly indicates that appellant is falsely implicated by

the complainant with the consultation of the police.

10. Learned counsel for the appellant vehemently submitted that there is no eye-witness of the occurrence. Prosecution has produced two witnesses of fact, namely, PW1- Sitaram and PW2- Ram Saran. PW1- Sitaram has deposed that when he reached to the scene of crime, accused Gaurav was not there. Lastly in his statement, he has specifically said that he could not tell who had murdered Phoolan Devi. He was not on the spot, so he could not tell that she was murdered by miscreants or some other persons. It shows that PW1 has not seen any occurrence, therefore, his testimony cannot be relied on. It is further submitted that PW2- Ram Saran is also not the eye-witness. He has said in his cross-examination that he was the first person to reach at the place of occurrence and saw the incident with his own eyes but complainant PW1 has stated that when he reached to the place of occurrence, Gaurav was not there and the people, who reached to the spot after him, also did not see Gaurav at the place of occurrence. Hence, on the basis of aforesaid statement, made by the PW1, the statement of PW2- Ram Saran becomes falsified that he saw the occurrence.

11. Learned counsel for the appellant next submitted that as per statement of PW1, Virendra and Munnilal reached to the spot prior to him but these Virendra and Munnilal were not produced by the prosecution in evidence. Regarding the recovery of *Danda*, the learned counsel submitted that false recovery of *Danda* is made by the police and *Danda* is planted. Moreover, it is recovered from inside the *Chhappar* of the house of the appellant, where it is not natural that a person after committing the crime like murder will hide the *Danda* in his own house. So the recovery of *Danda* is made by the police is falsified to give the colour to the case and learned trial court has not rightly appreciated the evidence and convicted the appellant without any direct or circumstantial evidence on record.

12. Learned AGA for the State rebutted the arguments advanced on behalf of the appellant and submitted that PW1 and PW2 supported the prosecution version and if there are any minor contradiction, it does weaken the prosecution case. It is also submitted that the report of FSL shows that blood was found on the *Danda*, recovered on the pointing out of the appellant. It further strengthens the prosecution case. Learned AGA attracted our attention towards post mortem report of deceased Ex.Ka4 and submitted that there were six ante mortem injuries found on the body of the deceased and such type of injuries could be inflicted by *Danda*. In this way, statement of PW1 and PW2 are corroborated by medical evidence.

13. We sift the evidence on record, keeping in view the rules of appreciation of evidence. Prosecution has produced two witnesses of fact, namely, PW1- Sitaram, who is the complainant and PW2- Ram Saran, who is said to be the eye-witness as per first information report. Complainant also claims himself to be eye-witness in FIR but perusal of statement of PW1 clearly shows that he is not eye-witness at all because in FIR and examination-in-chief, he has stated that he reached on the spot and tried to catch the appellant-Gaurav but could not do so. While in examination-in-chief, he has specifically stated that he reached to the spot after 10 minutes of hearing the noise and did not find Gaurav there. At the end of his cross-examination, he has very clearly stated that he could not tell as to who murdered the Phoolan Devi because he was not on the spot and he could not even tell whether some miscreants murdered her or any other person. So, PW1 is not at all eye-witness of this case. PW2- Ram Saran has said that he reached on the spot and tried to catch Gaurav but he succeeded to run

away due to dark night but it is pertinent to mention that PW2- Ram Saran and appellant were having enmity as stated by complainant PW1 on account of purchase of some land by PW2 Ram Saran from father of the appellant.

14. It is relevant that *Danda* was recovered by the investigating officer on the pointing out of appellant from inside the *Chhappar* of his house and in FSL, blood was found on it.

15. We have perused the post mortem report and considered the ante mortem injuries.

16. Considering the evidence of these witnesses and also considering the medical evidence including postmortem report, there is no doubt left in our mind about the guilt of the present appellant. However, the question which falls for our consideration is whether on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 IPC should be upheld or the conviction deserves to be converted under Section 304 (Part-I) or (Part-II) of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which reads as under:

"299.Culpable Homicide-*Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

17. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300 IPC. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done.	A person commits culpable homicide if the act by which the death is caused is done.
	INTENTION
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

18. In the case in hand, PW4- Kamlesh Kumar Sharma found following ante mortem injuries on the body of the deceased:-

(i) Lacerated wound 5x2cm bone deep over nose and middle part of forehead underline bone fracture.

(ii) Lacerated wound 3.5x1.5cm bone deep over right cheek underline bone fracture.

(iii) Lacerated wound 3x1 cm bone deep just below injury No.2.

(iv) Lacerated wound 1.5x1 cm right angle of mouth and rounded by abraded contusion measuring marks 4x2 cm and 2x1.5 cm and neck bone was fractured.

(v) Multiple abraded contusion on abdomen measuring 4x1.5 cm.

(vi) Contusion 3.5x2 cm on right shoulder.

19. In his opinion Dr. Kamlesh Kumar Sharma PW4 has stated that cause of death could be by strangulation and injuries sustained in neck and on head. But in his cross-examination doctor has specifically stated that there were no signs/marks of strangulation. Therefore, keeping in view the entire evidence, oral as well as documentary, it comes in our mind that injury No.1, which was on the forehead, was responsible for the death of the deceased because injury No.4 in which part of hyoid bone was found fractured could be due to strangulation but as per medical evidence there were no signs of strangulation. In this way, injury No.4 does not match with the committing the crime as stated by the complainant in his FIR and statements of PW1 and PW2.

20. On overall scrutiny of the facts and circumstances of the case coupled with the opinion of the medical officer and considering the principle laid down by the Hon'ble Apex Court in the case of ***Tuka Ram and others vs. State of Maharashtra*** [(2011) 4 SCC 250] and in the case of ***BN Kavadakar and another vs. State of Karnataka*** [1994 Supp (1) 304], we are of the considered opinion that the offence would be punishable under Section 304 (Part-I) IPC.

21. From the upshot of the aforesaid discussion, it appears that the death of deceased, caused by the appellant, was not intended because prosecution has not disclosed any motive. In this case, motive has great relevance because the relation between the appellant and deceased was of son and mother. There could be some motive for the son to kill his mother. PW2-Ram Saran, inimical witness, also said in his statement that he never saw any altercation between appellant and his mother prior to this occurrence. Hence, it can be safely assumed that killing of his mother was never intended by the accused-appellant though the injuries were sufficient in the ordinary course of nature to cause death, therefore, the instant case false under the Exceptions 1 and 4 to Section 300 IPC.

22. In the light of the foregoing discussions, the appeal is liable to be allowed in part. Appellant is held guilty for commission of the offence under Section 304 (Part-I) IPC instead of offence under Section 302 IPC.

23. Hence, the conviction and sentence awarded to the appellant for the offence under Section 302 IPC is converted into the offence under Section 304 (Part-I) IPC and appellant is sentenced under Section 304 (Part-I) IPC for 10 years rigorous imprisonment and fine of Rs.5,000/-. The appellant shall undergo further simple imprisonment for one year in case of default of fine.

24. Accordingly, the appeal is **partly allowed**, as modified above.

(2021)12ILR A87
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2021

BEFORE

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

Jail Appeal No. 5083 of 2015

Munna Singh ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Anurag Shukla, Sri Indra Kumar Chaturvedi, Sri Jagram Singh, Sri Sunil Kumar

Counsel for the Opposite Party:
A.G.A., Sri Brijesh Singh, Sri Prem Shankar

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,

1860-Section 302-challenge to-conviction-as per post-mortem report wound on the body of the deceased does not have any blackening which belies the theory put forward by PW-1 & PW-2 rather the medical evidence is in favour of the accused that firearm injury is not from very close range but at least from 8-10 ft-evidence of PW-3, doctor shows that the version of PW-1& PW-2 is absolutely concocted-infact, PW-1 & PW-2 are not eye-witnesses-recovery of Tamancha was from open place and cartridges was not found on the place of occurrence, therefore, provision of section 27 of the Evidence Act could not have applied-Moreso, factum of animosity for the accused being sole person in the locality professing another religion as per version u/s 313 Cr.P.C. cannot be ruled out-Thus, benefit of doubt is given to the accused.(Para 1 to 22)

The appeal is allowed. (E-6)

List of Cases cited:

1. Mahavir Singh Vs St. of M.P. (2016) 10 SCC 220

2. Brijpal Singh Vs St. of M.P. (2004) SCC (Cri) 90

3. Shanker Vs St. of M.P. (2018) 15 SCC 725

4. Rajesh @ Sarkari & anr. Vs St. of Har. (2021) 1 SCC 118 Alim Ullah Vs St. (2003) 46 ACC 1151

5. Guru Dutt Pathak Vs St. of U.P. LAWS SC 2021 55

6. St. of Guj. Vs Bhalchandra Laxmishankar Dave (2021) 2 SCC 736

7. Gurcharan Singh Vs St. of Punj. (1963) AIR SC 340

8. Ashoksinh Jayendrasinh Vs St. of Guj. (2019) 6 SCC 535

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

1. Heard Sri Sunil Kumar, learned counsel for the appellant and Sri N.K. Srivastava, learned A.G.A. for the State.

2. This appeal challenges the judgment and order dated 18.9.2015 passed by the Additional Sessions Judge, Banda in Sessions Trial Nos. 36 of 2011 & 37 of 2011 convicting & sentencing Munna Singh, appellant, for commission of offence under Sections 302 of Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.') to undergo rigorous imprisonment for life with fine of Rs.20,000/-, in case of default of payment of fine, further to under go four month imprisonment.

3. Facts as culled out from the First Information Report, are that on 24.11.2010 at about 12.30 p.m., accused-respondent, Munna Singh came near the deceased, son of the complainant, who was sitting at *(chabutra)* and started quarreling with deceased and after some time, the accused took out his country made pistol *(tamancha)* and fired. Saida Parveen, daughter-in-law of complainant who was drawing water by hand pump had seen the incident. Md. Nafees Khan and his mother-in-law had also come at the spot on hearing the voice of gun shot and on hearing shouting of Saida Parveen that deceased-Momin was shot by Munna Singh. Munna Singh took out second country made pistol, threatened them and ran away from the place of incident. The son of complainant ran after the accused but due to fear returned back to the scene of incident. It was stated that he called for help but because of fear of Munna Singh, nobody came for rescue.

4. This F.I.R. culminated into recording of statements of the witnesses and charge-sheet was laid against the sole accused. The accused was alleged to have committed murder, hence, he was committed to the Court of Sessions. The accused being summoned, pleaded not guilty and wanted to be tried.

5. The prosecution examined 7 witnesses who are as follows:

1	Rashid Khan	PW1
2	Saida Parveen (Eye-witness)	PW2
3	Pranav Kumar Rai	PW3
4	Ramesh Kumar	PW4
5	Daya Shankar Singh	PW5
6	Sanjay Singh Yadav	PW6
7	D.P. Singh	PW7

6. In support of ocular version following documents were filed:

1	First Information Report	Ex.Ka.3 & Ex. Ka.11
2	Written Report	Ex.Ka.1
3	Recovery Memo of blood-stained & plain soil	Ex. Ka. 18
4	Recovery Memo of Tamancha	Ex. Ka. 7
5	Postmortem Report	Ex.Ka.2
6	Panchayatnama	Ex.Ka.12
7	Charge-sheet	Ex. Ka.8 & Ex. Ka. 10

7. On the witnesses being examined and the prosecution having concluded its evidence, the accused was put to questions under Section 313 Cr.P.C. The accused-respondent also examined Chandra Prakash alias Changu as D.W.1. He has taken defence that as he is the only person belonging and professing the different religion, all the witnesses and complainant have colluded with each other to see that he is convicted so that he may vacate the said area.

8. Submission of Sri Sunil Kumar, learned counsel for the appellant, hinges on the following decisions and learned counsel for the appellant has placed reliance on **Mahavir Singh Vs. State of Madhya Pradesh, (2016) 10 SCC 220, Brijpal Singh Vs. State of M.P., 2004 SCC (Cri) 90, Shanker Vs. State of Madhya Pradesh, (2018) 15 SCC 725, Rajesh Alias Sarkari and Another Vs. State of Haryana, (2021) 1 SCC 118, Alim Ullah Vs. State, 2003 (46) ACC 1151** and submitted that this is a case of total improbability as medical evidence is contrary to the deposition of P.W.2, the so called eye-witness, who was not an eye-witness but posed as such and even if she was eye-witness, the genesis of offence as narrated by P.W.1 are contradictory to that narrated by P.W.2.

9. It is submitted by learned counsel for the appellant that the accused who is in jail since 2011 requires to be granted benefit of doubt on the basis of aforesaid judgments and on the basis of gun shot injury which was mentioned to be fired from a very close range but evidence discloses something else. It is submitted that no empty cartridge was found from the place of occurrence. Learned counsel for the appellant has submitted that there was no blackening or charring and has raised the issue of F.I.R. being ante timed. He has tried to demonstrate that the postmortem and time of F.I.R. do not match with each other.

10. The submission of learned A.G.A. is that absence of blackening is not a ground to grant the accused benefit of doubt. Learned A.G.A. has further submitted that blackening would be only if the shot was made at from very very close range and with full of vigour. It is further submitted by learned A.G.A. that there is no reason to disbelieve the prosecution witness nos. 1 & 2 who are though related to accused but are not interested witnesses. In support of his arguments, learned A.G.A. has relied on the decision in **Guru Dutt Pathak Vs. State of Uttar Pradesh, LAWS (SC) 2021 5 5** to contend that this is not a case where conviction requires to be upturned.

11. Learned A.G.A. has relied on the finding of facts which are elaborately discussed by learned Sessions Judge which according to him cannot be easily interfered with.

12. Before we threadbare discuss the evidence and decide the case, two facts required to be undertaken. One, the decision of the Apex Court in **Guru Dutt Pathak Vs. State of Uttar Pradesh, LAWS (SC) 2021 5 5**., pressed into service by the learned A.G.A. and the judgment of the Apex Court in **State of Gujarat Vs. Bhalchandra Laxmishankar Dave, (2021) 2 SCC 736** wherein the Apex Court has held that if the first Trial Court is reversing the judgment of conviction, each and every evidence and the finding of the Sessions Judge should be met with.

13. Depositions of P.W.1, P.W.2 & P.W.3 go to show that pistol *(tamancha)* which was said to have been fired has not been recovered from the accused but was found from open place, and no empty cartridges were found at place of occurrence. Deposition of P.W.2 also goes to show that her presence is doubtful. The decision of the Court below also goes on this premise and has placed heavy reliance on ocular version of P.W.1, though he is not an eye-witness but he was conveyed by his son's wife that Munna Singh had fired at Momin. There are certain facts which have come on record which have not been considered by the learned Trial Court which goes to show that statement of accused under Section 313 Cr.P.C. is a plausible statement that he is only person professing other religion and, therefore, he has been time and again tried to be made accused. There are lot of contradictions in the testimony of P.W.1. At one stage, he has stated that Nafees has shouted and, in his chief, he has stated that Nafees, Momin and other persons were crying. In the cross examination he has accepted that Nafees was driver of Ambulance and Momin was staying with him. There is question put that Momin had illicit relation with Saida Parveen.

14. Even if we believe the statements put forward by P.W.1 in his cross examination that Munna Singh had asked the deceased not to hear music on the mobile but Momin used to abuse him, the evidence of P.W.2 is also full of contradictions. The evidence of doctor who had been examined as P.W.3 goes to show that the version of P.W.1 & P.W.2 is absolutely concocted, the manner in which he has depicted the firing. In his testimony, the doctor has stated as under :

"यदि मृतक बैठी हालत में हो और फायर करने वाला खड़ी हालत में हो तो मृतक को ऐसी चोट आना संभव नहीं है I किस प्रकार के आग्नेयस्त्रो का प्रयोग किया गया व कैसे मारा गया यह शस्त्र विशेषज्ञ ही बता सकता हैI"

15. The findings of facts are also not consistent with medical evidence and the Postmortem report. In fact learned counsel for the appellant had even made alternative prayer that if this Court believes version of P.W.1 and P.W.2, then also there are altercation only and there are several discrepancies in the statement of P.W.1 and P.W.2 and the judgment of convicting the accused under Section 302 of I.P.C. is bad in eye of law. At the most if this Court does not deem it fit granting benefit/Acquittal, it is a case of Section 304 part II of I.P.C.

16. While going through the record it is clear that learned judge has committed grave error in not examining the evidence from the angle that all the witnesses of fact opined that accused had fired from one ft. whereas as per the Medical evidence it was made from more than 8 to 10 ft. This fact goes in favour of the accused as it looks there was no eye-witness. Thus, it transpires that P.W.1 & P.W.2 were not eye-witnesses. The accused has already pleaded in his statement under Section 313 Cr.P.C. which was also not considered by the Court below. The recovery of the Tamancha was from an open place and, therefore, provision of Section 27 of the Evidence Act could not have been applied by the Trial Court against the accused which was

found from an open place near Ken River. The factum of this recovery was not proved by the witnesses of fact. The police official accepted fact that in the cross examination that time of recovery is not mentioned.

17. Witnesses who have been examined are interested and partisan witnesses. If the incident had occurred at the place which is narrated which is an open place, there would have been other witnesses of fact. The medical evidence vis-a-vis ocular version of witnesses, there are lot of contradictions and omissions. The judgments in Guru Dutt Pathak & Bhalchandra Laxmishankar Dave (Supra) have been properly scrutinized by us. The Rules for appreciating evidence go to show that there is discrepancy which is writ large on the record that gun shot could not have been in the manner in which P.W.1 and P.W.2 have narrated which is a major contradictions rather which goes to the root of the matter. Factum of animosity for the accused being sole person in that locality professing another religion therefore is sought to be roped in as per his version under Section 313 Cr.P.C. cannot be ruled out.

18. The decision in case of **Rajesh (Supra)** will apply in full force to the facts of this case, the reason being, the witnesses who were deposed are not only related witnesses but are interested witnesses. The removal of the deceased to the Hospital by them has also been in doubtful circumstances. The incident of firing and there is variation about the incident. The ballistic expert should have been examined in such matter. The recovery in the context of investigation was not found. When there is discrepancy in the reports which would result into fatality for the prosecution and the benefit of doubt should be given to the accused. The decision in **Gurucharan Singh v. State of Punjab, AIR 1963 SC 340** has been reiterated in **Rajesh (Supra)**. The medical evidence and the controversy would permit us to take a different view then that taken by the Court below as the Court below has overlooked this aspect.

19. Decision in **Shanker (Supra)** would go to show that before a conviction is awarded no room for suspect evidence of key prosecution witnesses should be there. In our case, the trial court has not sifted the evidence by quality of evidence. The appreciation of evidence, in the case in hand, also proves that there is material non corroboration. Genesis and genuineness of the F.I.R. is also absent. In our view, learned Sessions Judge did not deal with the case of the accused in gross with settled principle of law namely author of fatal firearm wound was not proved. The judgment in **Ashoksinh Jayendrasinh v. State of Gujarat, (2019) 6 SCC 535** will also enure for the benefit of the accused. There are serious contradictions and these are reconciled by the reports. The law laid down in **Brijpal Singh (Supra)** will come to the aid of the accused as it would not have safe to convict the accused on the basis of the oral testimony which is highly doubtful.

20. The appreciation of evidence as done by the High Court in the case of **Bhalchandra Laxmishankar Dave (Supra)** shall apply. The tests are applied and we have threadbare decided the matter and come to a definite conclusion that accused could not have been convicted on the basis of scanty evidence. Ground of the prosecution is that the witnesses did not come forward as they were scared of the accused, this would prove fatal to the prosecution as the entire area was of a particular community even though no independent witness was examined though the incident occurred in broad day light and in a open space.

21. Going from the postmortem report, we find that the wound on the body of the deceased does not have any blackening which would belies the theory put forward by P.W.1 & P.W.2.

Rather the medical evidence is in favour of the accused that firearm injury is not from very close range but at least from 8-10 ft. The tenor of injury in the postmortem report will also go to the aid of the accused.

22. In view of the above, benefit of doubt is given to the accused. Judgment and order passed by the learned Sessions Judge is set aside. This appeal is allowed. Let the accused be released from jail forthwith, if not warranted in any other offence.

23. Record and proceedings be sent back to the Court below forthwith.

(2021)12ILR A92
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.11.2021

BEFORE

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

Jail Appeal No. 5532 of 2009

Aftab ...Appellant

Versus

State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Pawan Singh Pundir A.C.

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 302-challenge to-as per statement of PW-2 & PW-3 accused having altercation with his grandfather, cut the neck with knife in his hand and ran away-on the instance of accused knife was recovered beneath the peepal tree-injury caused to the deceased was sufficient to cause death-accused had no intention of doing away with his own grand father but in heat of the moment the incident occurred- therefore, the appellant held guilty under Section 304 (Part-I) instead of under section 302 IPC.(Para 1 to 28)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. St. of Guj. Vs Bhalchandra Laxmishankar Dave (2021) (0) AIJEL-SC 66983

2. Guru Dutt Pathak Vs St. of U.P. (2021) LAWS SC 55

3. St. of Punj. Vs Jagir Singh (1973) AIR SC 2407

4. Lahna Vs St. of Har. (2002) 3 SCC 76

5. S. Sudershan Reddy Vs St. of A.P. (2006) AIR SC 2716

6. Pulukuri Kotayya Vs Emperor (1947) AIR PC 67,

7. Sharafat & anr. Vs St. of U.P. CRLA NO. 1237 of 2013

8. Pardeshiram Vs St. of M.P.(2021) 3 SCC 825

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

1. Heard learned Amicus Curiae Mr. Pawan Singh Pundir for the appellant, learned AGA for the State and also perused the record.

2. This appeal has arisen from the judgement and order dated 28.4.2009 passed by learned Sessions Judge, Meerut in S.T. No.307 of 2009, State of U.P. v. Aftab, (Case Crime No.378 of 2008) under Section 302 I.P.C., Police Station Delhi Gate, District Meerut. The learned Sessions Judge convicted the accused for life imprisonment for commission of offence under Section 302 Indian Penal Code (IPC) and with fine of Rs.10,000/-. In default of payment of fine, the accused shall undergo rigorous imprisonment for 6 months.

3. The brief facts as per prosecution case are that the complaint/FIR was lodged by Aas Mohammad (PW-2), brother of the accused and grand-son of the deceased declares that on 8.1.2008 at about 10.15 p.m. Aftab and his grand father were having altercatiion and then the accused cut the neck of Ramjan by Knife (Chhuri). He witnessed the occurrence. His brother Chand, his children and tenants were also present there. He and Chand tried to chase Aftab but he ran away from the spot. He took his grand-father in an injured condition to the District Hospital where his grand-father Ramjan was declared dead.

4. Learned counsel for appellant contended the so called dispute arose out of asking money by the accused from the deceased who was his grand-father. The learned counsel has submittted that the offence would not fall within Section 302 of Indian Penal Code (IPC) but would be at the most punishable under Section 304 part I or part II of the IPC.

5. It is an admitted position of fact as mentioned by PW-2 and PW-3 that there was an altercation which took place between accused and deceased and thereafter appellant-Aftab was chased but he ran away.

6. The submission of learned counsel was for a clean acquittal but later on he has pressed for alternative sentence contending that there was no intention to do away with own grand-father and, therefore, he has requested that the offence be considered under Section 304 part-II.

7. The prosecution examined four witnesses so as to bring home the charge framed against the accused as enumerated:

1.	Deposition of Dr. N.K. Gupta	PW1 PW1
2.	Deposition of Ash Mohammad (brother of accused)	PW2
3.	Deposition of Chand (brother of accused)	PW3
4.	Deposition of Naresh Chandra Verma	PW4

8. In support of ocular version following documents were produced to bring home the charge:-

1	First Information Report	Ex.Ka.1
2	Written Report	Ex.Ka.2
3	Recovery Memo of blood stained piece of "Dari' and Blanket	Ex.Ka.4
4	Recovery memo & Supurdginama of Bulb	Ex.Ka.5
5	Recovery memo of blood stained and Plan Cemented Floor	Ex.Ka.6
6	Recovery memo of Knife	Ex.Ka.7
7	Post mortem Report	Ex.Ka.11
8	Report of Vidhi Vigyan Prayogshala	Ex.Ka.23
9	Panchayatnama	Ex.Ka.15
10	Charge Sheet Mool	Ex.Ka.9
11	Site Plan with Index drawn on 9.11.2008	Ex.Ka.3
12	Site Plan with Index drawn on 18.11.2008	Ex.Ka.8

9. The recent decision of the Apex Court in the case of State of **Gujarat v. Bhalchandra Laxmishankar Dave, 2021 (0) AIJEL-SC 66983,** decided on 2nd February, 2021 wherein the Apex Court has held that while dealing with the matter relating to conviction, the Court should discuss the decision of the trial court and also the judgment in **Guru Dutt Pathak v. State of Uttar Pradesh, LAW(SC) 2021 5 5,** decided on 5th May, 2021. All the principles laid down in these latest decisions, obliged us to consider the evidence afresh.

10. Dr. N.K. Gupta (PW-1) has stated on oath that he had examined the body of Ramjan alias Mohammad prepared the autopsy (Ext. Ka-

1) and found the following ante mortem injuries on his body- (i) incised wound 22 cm. x 6 cm. x bone cut (c-4) on the right side of the neck; (ii) incised wound 6 cm x 0.5 cm muscle deep over the outer aspect of right arm. Rigorous mortis was present in extremity-passed in the neck. No decomposition was there. On internal examination c-4 vertebra was cut, neck artery and vessel on right side were cut. All the organs like spleen, kidneys, liver were pale. He further stated on oath that the death of the deceased could be caused on 8.11.2008 at about 10.15 p.m. and these injuries could be caused by Knife (Chhuri)

11. Aas Mohammad (PW-2) is the witness of fact. He has stated on oath that Aftab and his grand father were having altercation when the accused caused injury in the neck of Ramjan by Knife (Chhuri). He took the injured Ramjan to the District Hospital where he was declared dead. He proved the written report (Ext. Ka-2) given by him he has with stood the cross examination.

12. Chand (PW-3) is also a witness of fact. He has stated on oath that on 8.11.2008 at about 10.00 p.m. accused Aftab and Ramjan were having altercation and when he reached the spot, he saw cut neck of Ramjan and accused Aftab was running. He chased Aftab having Chhuri in his hand but accused ran away.

13. Naresh Chand Verma, Inspector, P.S. Delhi Gate (PW-4) is the investigating officer of the case. He inspected the spot and prepared the site plan (Ext. Ka-3). He had taken the blood stained pieces of Dari, blanket, rope of cot and sealed the same. He prepared the memo (Ext. Ka-4). He had also taken bulb from the place of occurrence. The occurrence was seen by Aas Mohammad and Chand (Pws-2 and 3) respectively in light of the bulb as it was right time. The same was handed in the Supardagi of Aas Mohammad and prepared the memo (Ext. Ka-5). The witness (IO) also also took the blood stained earth and simple earth and sealed the same in two different containers, and prepared the memo (Ext. Ka.-6). On 13.11.2008 he recovered Kinfe (Chhuri) used in this murder at the instance of accused Aftab from beneath of Peepal tree. He prepared the recovery memo (Ext. Ka-7). He proved the site plan of the place of recovery of Knife (Chhuri) as the Ext. Ka-8). He sent the knife (Chhuri), blood stained Dari, blanket and rope of cot for the Chemical Examination, Agra. He proved the filing of charge sheet (Ext. Ka-9) by him.

14. The learned trial court has convicted the accused on the basis of recovery and also on the fact that the prosecution witnesses over, his brothers had deposed against the accused, we concur with the same and held the accused guilty. The learned Judge has relied on the judgments of the Apex Court titled ***State of Punjab v. Jagir Singh, AIR 1973 SC 2407; Lahna v. State of Haryana, 2002 (3) SCC 76; and S. Sudershan Reddy v. State of Andhra Pradesh, AIR 2006 SC 2716.***

15. The learned Judge relied on the provisions of Section 27 of the Evidence Act and has relied on the Decision in ***Pulukuri Kotayya v. Emperor, AIR 1947 PC 67***, the finding of fact as far as the will of the accused is concerned cannot be interfered as well as that of the recovery of the knife which was from a place of occurrence.

16. The statements of the eye witnesses were recorded and as per information of FIR, the medical report is also consistent with version that the deceased was attacked by knife by his grand-son, the involvement of accused is proved beyond any doubt.

17. It would now necessary for discussing the role of the accused and the manner in which, the incident occurred the injuries are found on

the right side of the neck. The accused is in jail since 14 years. The incident appears to have occurred on spur of the moment, offence of that it is very clear that the death occurred by the hands of the accused.

18. While considering the deposition of eye witnesses, entire evidence considered the injuries are not superficial, but as such which shows that the intention of the accused as culled out from the record does not shows that bad intention with his grand-father, therefore, altercation between the same.

19. The accused was 28 years of age at the time of commission of offence, he is the grand-son of the deceased and real brother of PW-2 and PW-3. There was altercation and, the occurrence of incident had taken place at about 10.15 at night in house.

20. In that view of the matter, we concur with the learned sessions Judge held that the accused was author of the crime. We further concur with the learned Jude on the finding of fact that deceased who was aged about 75 years and the injury caused was sufficient to cause the death.

21. We are unable to accept the submission of learned counsel for appellant that Section 304 Part-II IPC would be attracted in this case the reason for not accepting this concertion is that the place of occurrence on the body part the deceased was injured on the vital part further the accused cannot be said to not have knowledge about the fact that his inflicting the injuries would cause such injuries which can prove fatal.

22. The learned counsel for appellant has relied on recent decision in **Criminal Appeal No.1237 of 2013, (Sharafat and another v. State of U.P),** decided on 21.1.2021 where the facts were similar and has contended that that offence would not be under Section 302 of the Indian Penal Code, but would under Section 304 Part I or Part II of the Indian Penal Code. The learned counsel has placed reliance on the said decision wherein finding in paragraphs 17 to 20, the court has held:

"17. This takes us to the issue of whether the offence would be punishable under Section 299 or Section 304 I.P.C.

18. Considering the evidence of these witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants and admission on part of accused. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

19. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299 ***Section 300***

A person commits culpable homicide if the act by which the death is caused is done-	*Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.*
INTENTION	
(a) with the intention of causing death; or	*(1) with the intention of causing death; or*
(b) with the intention of causing such bodily injury as is likely to cause death; or	*(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;*
KNOWLEDGE	***KNOWLEDGE***
(c) with the knowledge that the act is Playlikely to cause death.	*(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.*

20. It is very clear from the F.I.R. though unsupported by the prosecution and other witnesses of facts that there was a heated discussion and during the quarrel one of the accused had tried to see that the deceased remaining in the four corners of the home or go back to her matrimonial home as she wanted to elope with a person though she was a married lady having four children."

23. We are even supported in our decision by the judgment of the Apex Court reported in *Pardeshiram v. State of M.P., (2021) 3 SCC 825*, where in considering the period of custody undergone, relationship between the appellant and the deceased and the background in which the injuries were caused, sentence directed to be reduced to period already undergone.

24. While going through the record, we are convinced that the accused had no intention of doing away with his own grand father but in hit of the moment the incident has occurred. Learned Judge heavily relied on recovery. The grand-son is not attributed to have any intention to do away with the deceased, there was a quarrel which were going on he wanted he share all money but the grand-father wanted to him to shift to Jaipur. This was the main bone of contention for the incident having taken place.

25. From the above discussion, it is evident that the incised wound on deceased were sufficient in the ordinary course of nature to prove fatal on the deceased, an old man, and he actually died due to the injuries which were the result of injuries due to use of sharp weapon. There was no enmity between the accused and deceased as deposed by Aas Mohd. (PW-2) and Chand (PW-3). There was light at the place of occurrence. There is no delay in lodging the FIR. The recovery of knife at the instance of the accused also lends support to the case of the prosecution. The evidence of the prosecution is solid and free from any weakness or lacunae. Hence under Section 304 part-I of I.P.C. is made out and not under Section 302 of I.P.C.

26. Having held that the offence is punishable under Section 304 part I punishment of period undergone and the fine of Rs.10,000/- is reduced to Rs.5000/-, incarceration in default of payment of fine would be for six months.

27. The accused appellant, if not wanted in any other offence, be set free forthwith.

28. Appeal is **partly allowed** accordingly.

29. Record and proceedings be sent back to the trial court.

30. Shri Pawan Singh Pundir, learned Amicus Curiae appointed by Legal Services Committee, who shall be paid all his dues as are admissible.

31. This court is thankful to learned counsel for the parties for ably assisting this Court in getting this matter disposed off.

(2021)12ILR A97
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.11.2021

BEFORE

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

Criminal Appeal No. 6032 of 2018

Anil Kumar Bind ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri M.A. Siddiqui, Sri Kalamuddin

Counsel for the Respondents:
A.G.A.

Criminal Law - Indian Penal Code, 1860- Section 376- Evidence of prosecutrix produced before learned trial court as PW3 - This evidence seems to be exaggerated - The testimony of prosecutrix does not inspire confidence. Moreover, her testimony is not corroborated by medical evidence- There were no injuries. Doctor has clearly opined that at the time of her internal medical examination, she did not find that intercourse was committed with her- Statement of Doctor falsifies the factum of rape. Enmity of prosecutrix's father with the appellant is itself stated by the prosecutrix in her examination-in-chief- From beginning it was projected that the girl was minor but the learned trial judge came to the finding that provision of POCSO Act will not be applicable in this case because she was not minor.

Where the testimony of the prosecutrix is exaggerated, uncorroborated with the medical evidence, prior enmity is admitted and the claim of her being minor is found false, then it would not be safe to rely upon such testimony.

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3(2)(v)- Just because the accused was knowing the prosecutrix belonging to the vulnerable caste cannot itself take the matter in that ambit and it is relevant to mention that when offence of rape is not proved then there is no question of punishment under Section 3(2)(V) of SC/ST Act.

When the offence of rape is itself not proved then the accused cannot be convicted only on the basis of Section 3(2)(v0 of the Sc/St Act.(Para 16,17)

Criminal Appeal allowed.(E-3)

Judgements/ Case relied upon:-

1. Jafar & anr. Vs St. of U.P. 2009 0 Supreme (All) 3417

2. Bibhishan Vs St. of Maha. 2007 0 Supreme (SC) 1219

3. St. of Guj. Vs B. L. Dave ,Criminal appeal No.99 of 2019 (SC)

4. Guru Dutt Pathak Vs St. of U.P ,Criminal Appeal No.502 of 2015 (SC)

(Delivered by Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the appellant-Anil Kumar Bind has challenged the Judgment and order 30.08.2018 passed by Additional Sessions Judge (Court No.12), Allahabad, in Special Session Trial No.56 of 2016 (State Vs. Anil Kumar Bind) arising out of Case Crime No.119 of 2016 under Section 376 Indian Penal Code and Section 3(2)(V) SC/ST Act and Section 3/4 POCSO Act, Police Station-Handia, District-Allahabad whereby the accused-appellant was convicted under Section 376 IPC and sentenced to imprisonment for 10 years with fine of Rs.10,000/- and in case of default of payment of fine, to undergo further imprisonment for one year and for life imprisonment and fine of Rs.10,000/- under Section 3(2)(V) SC/ST Act and in case of default of payment of fine, to undergo further

imprisonment for one year. Appellant was acquitted under Section 3/4 POCSO Act.

2. The brief facts of the case are that complainant Chote Lal Pasi submitted written report Ex.Ka-1 to the Police Station- Handia, District- Allahabad on 24.03.2016 stating that his daughter prosecutrix, age 15 years, went to ease herself at about 10:00 pm in the night near the pond. From there Anil of his village took her daughter forcible by sequeezing her mouth to nearby hut and committed rape with her. On hearing the noise of crying, his son Hausila Prasad and other people ran towards the place of occurrence and his son caught Anil Bind red handed but he fled away from the spot. On the basis of this report an FIR was registered on Case Crime No.119 of 2016.

3. Ravi Shankar Prasad C.O. took up the investigation, I.O. visited the spot and prepared site-plan, recorded the statements of witnesses under Section 161 Cr.P.C. Prosecutrix was medically examined. Her statement under Section 164 Cr.P.C. was recorded by competent authority. After completing the evidence I.O. submitted charge sheet against the appellant. The case being exclusively triable by court of sessions was committed to the sessions court by competent magistrate for trial.

4. So as to bring home the charge, prosecution produced following witnesses, namely :-

1	Chote Lal Pasi	P.W.1
2.	Nanki Devi	P.W.2
3.	Prosecutrix	P.W.3
4.	Hausila Prasad	P.W.4
5.	Jai Hind Yadav	P.W.5
6.	Dr. Neelu Mishra	P.W.6
7.	Ravi Shankar Prasad	P.W.7

5. After completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C. The accused did not examine any witness in defence.

6. Apart from oral evidence, following documentary evidence was produced by the prosecution and proved by leading evidence:

1.	Written Report	Ex.ka1
2.	FIR	Ex.ka4
3.	Statement u/s 164 Cr.P.C.	Ex.ka2
4.	Medico Legal Examination Report	Ex.ka5
5.	Supplementary Report	Ex.ka6
6.	Charge-Sheet	Ex.ka9
7.	Pathology Report	Ex.ka-
8.	Report of Radiologist	Ex.ka-

7. Heard Shri M. A. Siddiqui, learned counsel for the appellant, learned AGA for the State and also perused the record.

8. Learned counsel for the appellant submitted that appellant has been fasely implicated in this case. There is no evidence of rape. It is further submitted that as per prosecution case, prosecutrix was of age of 15 years at the time of occurrence, but when she was medically examined by radiologist, her age was found between 18 and 22 years. It clearly shows that at the time of alleged incident prosecutrix was major.

9. It is next submitted by the learned counsel for the appellant that as per medical examination report of prosecutrix, no evidence of rape was found. Doctor, who medically examined the prosecutrix, has opined that at the time of examination it was not found that any intercourse has been committed with the prosecutrix. In chemical examination report no

spermatozoa was found. There were no injury marks on her private part.

10. Learned counsel for the appellant also submitted that prosecutrix is examined as PW3. She has stated in her statement that her father was having enmity with the appellant. Moreover, she has not supported the prosecution version in her cross-examination. Her statement is having so much contradictions that it cannot be relied on. Her statement is exaggerated.

11. Learned AGA submitted that prosecutrix has supported the prosecution version in her statement under Section 164 Cr.P.C. as well as deposition made before learned trial court. It is also submitted that in medical examination Hymen was found torn. Learned trial court has rightly convicted and sentenced the appellant and it was also submitted by learned AGA that prosecutrix belongs to Scheduled Caste. Hence, he was rightly convicted under Section 3(2)(V) SC/ST Act also.

12. At the very outset, it is pertinent in this case, to consider the age of prosecutrix at the time of alleged occurrence. In first information report, the father of the prosecutrix has mentioned her age 15 years but to determine the real age, ossification test was conducted by the radiologist and as per supplementary report prepared by him, her age was found above 18 years and below 22 years. As per supplementary report Ex.Ka6, this fact is established that at the time of alleged incident, prosecutrix was not minor but she was major.

13. We have examined the evidence of prosecutrix produced before learned trial court as PW3. This evidence seems to be exaggerated. In her examination-in-chief she has included two more persons with appellant which were not in the picture before her statement. It is also stated in her cross-examination that she went to ease herself with her mother. But mother was left behind and she reached to the pond by running and when she did not return to the house then her mother raised the alarm. It is further submitted by the prosecutrix that she was forcibly taken away from the pond to the hut by three persons out of which two were hiding their face by cloth. She has also stated that when she was being taken away, she did not raise alarm because she fainted. After that she became conscious and when rape was committed she again fainted. The testimony of prosecutrix does not inspire confidence. Moreover, her testimony is not corroborated by medical evidence. Dr. Neelu Mishra conducted her medical examination and she was produced as PW6. Doctor has stated in her report that no spermatozoa was found. There were no injuries. Doctor has clearly opined that at the time of her internal medical examination, she did not find that intercourse was committed with her. Hence, this statement of Doctor falsifies the factum of rape. Enmity of prosecutrix's father with the appellant is itself stated by the prosecutrix in her examination-in-chief. Learned counsel for the appellant has relied on ***Jafar and another Vs. State of U.P. 2009 0 Supreme (All) 3417*** and ***Bibhishan Vs. State of Maharashtra 2007 0 Supreme (SC) 1219.***

14. We have gone through the above case laws, which are fully applicable on the facts of this case.

15. We have also considered the judgements of Apex Court in **State of Gujarat Vs. B. L. Dave** passed in criminal appeal No.99 of 2019 and **Guru Dutt Pathak Vs. State of Uttar Pradesh** passed in Criminal Appeal No.502 of 2015, in which parameters of reversing the judgments of court below are guided.

16. We have convinced that the doctor has positively opined that she could not find any

trace of spermatozoa and, therefore, no injury marks. She further testified that the prosecutrix had not been subjected to any forcible sexual harassment or intercourse. From beginning it was projected that the girl was minor but the learned trial judge came to the finding that provision of POCSO Act will not be applicable in this case because she was not minor.

17. Offence of rape is not proved, hence, the accused could not have been punished under Section 3(2)(V) of SC/ST Act. We are unable to accept the submission of learned counsel for the State that just because the accused was knowing the prosecutrix belonging to the vulnerable caste cannot itself take the matter in that ambit and it is relevant to mention that when offence of rape is not proved then there is no question of punishment under Section 3(2)(V) of SC/ST Act.

18. Hence, after meticulous appreciation of evidence on record and in the facts and circumstances of this case, we are of the considered view that prosecution has failed to prove the charges against the appellant. Learned trial court did not appreciate the evidence in right perspective as far as the rape is concerned and the accused-appellant was wrongly convicted on the basis of perverse finding.

19. Accordingly, the appeal is likely to be allowed.

20. The appeal is allowed. Conviction and sentence of appellant awarded in this case is hereby set aside. Appellant be set free forthwith if he is not wanted in any case. Fine, if deposited, be refunded to the appellant. Bail bond is cancelled and sureties are discharged, if any. Record of court below be sent back forthwith.

(2021)12ILR A100
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 10.11.2021

BEFORE

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

Criminal Appeal No. 6194 of 2008

Braj Kishore ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri D.S. Singh, Sri Anand Saurabh, Sri Kashif Zaidi, Sri Noor Mohd. Sri Raghuvansh Misra, Sri Rahul Misra, Sri Shiv Kumar Singh, Sri Sudama Ji Shandlya

Counsel for the Respondent:
A.G.A.

Criminal Law - Indian Penal Code, 1860 - Section 376- Rape of minor- Imprisonment for life- Quantum of Punishment- Reformative Theory and Doctrine of Proportionality- No accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream- 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. Keeping in view of theory of 'doctrine of proportionality',the sentence awarded to the appellant seems harsh. Since, the appellant has already served 14 years of sentence and ends of justice would be met if sentence is reduced from life imprisonment to the period of ten years. There were no external injury or there were no external injury were found. The accused-appellant was a young man at the time when he committed the offence. Hence, the sentence awarded to the appellant by the learned trial-court is modified and is reduced to fourteen years rigorous imprisonment with all remissions and fine default sentence mentioned.

Where the offence was committed by the accused at a young age, there were no external or internal injuries on the person of the victim and the accused has served 14 years of the sentence, hence by way of providing the accused the opportunity of reforming himself and in view of the harshness of the punishment of life sentence awarded to him, the sentence modified to the period undergone by the appellant.(Para 22, 23, 24, 25)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case law relied upon:-

1. Manoj Mishra @ Chhotkau Vs The St. of U.P (Crl. Appeal No.1167 of 2021) dec. on 8th Oct.r, 2021

2. Mohd. Giasuddin Vs St. of AP, [AIR 1977 SC 1926]

3. Deo Narain Mandal Vs St. of UP [(2004) 7 SCC 257]

4. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

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

1. By way of this appeal, the appellant-Braj Kishore has challenged the Judgment and order dated 25.08.2008 passed by court of Additional Sessions Judge, Court No.3, Jhansi in Session Trial No.87 of 2007 arising out of Case Crime No.131 of 2006, under Section 376 Indian Penal Code (hereinafter referred to as 'IPC'), Police Station- Mauranipur, District Jhansi whereby the accused-appellant was convicted under Section 376 IPC and sentenced to imprisonment for life.

2. The brief facts as per prosecution case are that on 17.12.2006, a written report was submitted by Raj Kumar stating therein that on 16.12.2006 at about 4:30 p.m. the prosecutrix, a girl of 10 years of age, was returning to her House. On the way the accused-appellant met her. He took her in his house, committed rape with the prosecutrix and when she raised hue and cry, the accused- appellant ran away. The report of the incident was lodged on the next day at 1:20 a.m. i.e. in the night between 16/17.12.2006. A case crime No.131 of 2006 was registered at Police Station Mauranipur, District Jhansi under Section 376 IPC.

3. S.I.-Ram Naresh Singh took the investigation, visited the spot, prepared site plan, recorded statements of the prosecutrix and witnesses. Medical examination of prosecutrix was conducted by the doctor.

4. After completion of investigation, charge sheet was submitted against appellant - Braj Kishore under Section 376 IPC to the Magistraterial Court. The case being triable by Court of Sessions, was comitted by concerned Magistrate to the Court of Sessions for trial.

5. Trial Court framed charges against the appellant under Section 376 IPC. The accused denied the charge and claimed to be tried. The prosecution so as to bring home the charge, examined seven witnesses, who are as under:-

1	Kasturi Devi	P.W.1
2.	Prosecutrix	P.W.2
3.	Raj Kumar	P.W.3
4.	Ram Prakash	P.W.4
5.	Dr. Alpana Bratariya	P.W.5
6.	Ram Naresh Singh	P.W.6
7.	R.L. Kureshi	P.W.7

6. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka-3
2.	Written report	Ext. Ka.2A
3.	Staement of prosecutrix	Ext. Ka-2
4.	Recovery memo	Ext. Ka-9
5.	Recovery memo	Ext. Ka-1
6.	Injury report	Ext. Ka-6

7.	Injurty report of prosecutrix	Ext. Ka-5
8.	X-Ray Report	Ext. Ka-10
9.	Site plan	Ext. Ka-7A

7. Heard Shri Rahul Misra assisted by Sri Raghuvansh Misra, learned counsels for the appellant, learned AGA for the State and also perused the record.

8. Perusal of record shows that occurrence of this case took place on 16.12.2006. The prosecution has alleged that the accused committed rape on ten year old daughter of complainant-Raj Kumar. The victim's statement under Section 164 Cr.P.C. was recorded by the concerned Magistrate. During the course of investigation, medical examination of victim was conducted and the medical report was prepared. Dr. Alpana Brtariya, conducted the medical examination. She in her evidence as PW-5 has stated that no spermatozoa was seen in the set smears. In her opinion, no definite opinion regarding rape could be given. Considering the x-ray report, the age of prosecutrix is 9-12 years.

9. The victim was examined as prosecution as PW-2. She reiterated what she had stated in her statement recorded under Section 164 Cr.P.C., the victim supported the prosecution version. In her statement before the Trial Court, she supported the prosecution version. Her mother- Kasturi Devi -PW-1 also supported the case against accused.

10. Complainant- father of the victim, Raj Kumar was examined as PW-3. He has proved the written report as Ex. Ka-2A which was submitted by him at police station for registration of the case against accused.

11. Learned counsel for the appellant would contend that on perusing the FIR, it was only a case of attempt to commit murder. However, on further statement of witness the police had filed charge sheet against the accused under Section 376 IPC also.

12. Learned AGA submitted that the age of victim at the time of commission of offence was just twelve years and as per the medical examination, she was found aged between 9-12 years. She has supported prosecution version in her statement and her testimony is supported with medical evidence. . It is submitted that prosecution case is proved beyond doubt and accused is rightly convicted by the trial Court.

13. Learned Trial Court relied on the testimony of witnesses, mainly the testimony of victim coupled with medical evidence, convicted and sentenced the accused appellant for life imprisonment and fine under section 376 IPC.

14. After some arguments, learned counsel for the appellant submitted that he is not pressing this appeal on merits but prays for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel for the appellant further contended that the medical evidence categorically showed that alleged incident took place on 16.12.2006 at 4:30 p.m.. There is a belated FIR. Seven witness who have been examined go to show that the FIR was ante timed and hence the sanity of FIR is also doubtful. The presence of PW1 and PW-3 are doubtful at the scene of occurrence. There is offence of opinion of rape that there were not external or internal injuries are found. The recovery of undergarment of accused and the victim is also very doubtful. The statement of victim was recorded under Section 164 Cr.P.C. The presence of PW-1 and PW-3 at the time of occurrence is not proved.

15. Learned counsel for the appellant has relied on the decision of Supreme Court in **Rahim BEG & Another Vs. State of U.P. (1972) 3 Supreme Court Cases 759 and Bavo Alias Manubhai Ambalal Thakore Vs. State of Gujarat, (2012) 2 Supreme Court Cases 684** and contended that the case does not fall within the parameters for commission of rape and punishment for the said offence.

16. This case pertains to the offence of *'rape'*, defined under Section 375 IPC, which is quoted as under:

[375. Rape.- *A man is said to commit "rape" if he-*

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions :-

First.- *Against her will.*

Secondly.- *Without her consent.*

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

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

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

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

Seventhly.- *When she is unable to communicate consent.*

Explanation 1.- *For the purposes of this section, "vagina" shall also include labia majora.*

Explnation 2.- *Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.*

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- *A medical procedure or intervention shall not constitute rape.*

Excpetion 2.- *Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]*

17. Factual scenario goes to show that the accused has been named in the FIR. It is not proved that there was any enmity between the parties, though there is some doubt. Learned counsel for the appellant contended that he would press for commutation of sentence from life to a lesser sentence.

18. A very recent judgment of Hon'ble Supreme Court titled as Manoj Mishra @ Chhotkau Vs. The State of Uttar Pradesh (

Criminal Appeal No.1167 of 2021) decided on 8th October, 2021 is also considered by us. The facts were similar and, therefore, we cannot disagree with the finding of facts of the Court below but at the same time considering the factual scenario and sentencing the policy will permit us to reduce the life imprisonment to lesser punishment of incarceration as far as Section 376 IPC is concerned.

19. In ***Mohd. Giasuddin Vs. State of AP,*** [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

20. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

21. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak***, [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh,*** [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh,*** [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana***, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of

crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

22. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

23. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

24. Learned AGA also admitted the fact that appellant is languishing in jail for the last more than 14 years. Keeping in view of theory of 'doctrine of proportionality' as discussed above, the sentence awarded to the appellant seems harsh. Since, the appellant has already served 14 years of sentence and ends of justice would be met if sentence is reduced from life imprisonment to the period of ten years.

25. We find that there were no external injury or there were no external injury were found. The accused-appellant was a young man at the time when he committed the offence. Hence, the sentence awarded to the appellant by the learned trial-court is modified and is reduced to fourteen years rigorous imprisonment with all remissions and fine default sentence mentioned.

26. Accordingly, the appeal is **partly allowed** with the modification of the sentence, as above. Record be sent back to the Court below forthwith.

27. Release order be sent to the Jail Authority without waiting for detailed judgment.

(2021)12ILR A105
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.12.2021

BEFORE

THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Criminal Appeal No. 6822 of 2019

Ram Sharan Jatav ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Aay Sengar

Counsel for the Respondents:
A.G.A., Sri Rajiv Kumar Tripathi

Criminal Law - Code of Criminal Procedure, 1973- Sections 154, 156(3) & 190- Rejection of Application Under Section 156(3)- The registration of first information report is mandatory under Section 154 Cr.P.C. if the information discloses the commission of cognizable offence and no preliminary inquiry is permissible in such a situation. However, if the information received does not disclose the commission of cognizable offence but indicates necessity for inquiry the preliminary inquiry may be conducted in order to ascertain whether cognizable offence is disclosed or not.

The preliminary inquiry is needed only when the information does not disclose the cognizable offence - The only need was to summon the report whether the case had been registered or not in the police station concerned regarding the complaint. It was incumbent upon the Magistrate concerned to order the registration of first information report as the application itself disclosed the commission of cognizable offence and in that situation no preliminary inquiry was permissible.

Where the application u/s 156(3) Cr.P.c discloses the commission of a cognizable offence, then it is incumbent upon the Magistrate to direct the police to register an F.I.R and conduct investigation whereas a preliminary inquiry is required only when the information does not disclose the commission of a cognizable offence. The purpose of calling for a police report is only to ascertain whether any case has been registered at the police station and for no other purpose. (Para 21, 22, 24).

Criminal Appeal allowed. (E-3)

Judgements/Case law relied upon:-

1. Har Prasad Vs. St. of U.P., 2006 (10) ADJ 412

2. Seema Devi Vs. St. of U.P. & 3 ors, 2018 (3) All. Crl. Rulings 3294

3. Lalita Kumari Vs. Govt. of U.P & anr., 2014 (2) SCC 1

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard Sri Ajay Sengar, learned counsel for the appellant, learned A.G.A. and perused the record.

2. The challenge in this appeal is to the order dated 14.10.2019 of the Special Judge (SC & ST Act), Jalaun at Orai in Criminal Misc. Case No. 72 of 2019 Ram Sharan Jatav Vs. Sandeep Dixit and others Police Station Madhogarh, District Jalaun. By the impugned order the lower court rejected the application of the appellant under Section 156 (3) Cr.P.C. of the appellant.

3. Brief facts of the case are that the appellant Ram Sharan Jatav moved an application under Section 156 (3) Cr.P.C. before the Special Judge (SC & ST Act) Jalaun on 18.09.2019 along with affidavit that he is a resident of Village Bangara, P.S. Madhogarh, District Jalaun and is by caste 'Chamar' (scheduled caste). Sandeep Dixit the son of Gram Pradhan Brahmin by caste is a person of criminal nature. He exploits the weaker section persons and on protest abuses them and gives them threat of life. Because of his terror no one comes forward to file a suit or depose against him. On 07.09.2019 at 9.00 p.m. he was coming back from the market to his home along with Uday Singh, as soon as he reached in front of the house of the Village Pradhan and was purchasing something from the shop existing in the house of Village Pradhan, Sandeep Dixit along with his companion Prem Babu Pachori came there. Sandeep Dixit kicked him from the back. When he resisted both of them in furtherance of their common intention hurled caste based abuses and asked him why did he refuse to come on their call to work for them. Both of them assaulted and beat him badly with fists, blows and kicks. Mohit s/o Ram Swaroop, Udai Singh s/o Veer Singh and other persons standing thereby saved him. He submitted his complaint in the police station Madhogarh on 08th September, 2019 his report was taken but the same was not registered. He got himself medically examined on 09.09.2019 by his own and gave his complaint to the Circle Officer Madhogarh on 10.09.2019 and Superintendent of Police, Jalaun on 12.09.2019 by registered post but his report has not been lodged till now. The accused persons who are influential persons are giving threat not to let him live in the village, hence the officer incharge of police station concerned be directed to lodge the first information report and investigate the matter.

4. After receiving this application, the court concerned summoned the report from the police station Madhogarh. The witness Mohit filed an affidavit denying to witness the incident.

5. After perusal of the report of police station concerned and affidavit of witness, the officer concerned passed the impugned order and rejected the application of the appellant under Section 156 (3) Cr.P.C. on 14.10.2019.

6. The present appeal has been preferred against this rejection order dated 14.10.2019 passed on Misc. Application No. 72 of 2019 (Ram Sharan Jatav Vs. Sandip Dixit), P.S. Madhogarh, District Jalaun on the premise that the lower court has committed manifest error of law by not considering the case of the appellant. He being the member of scheduled caste community is exploited at the hands of opposite party nos. 2 and 3 and is compelled to do the forced labour. On 07.09.2019 at 9.00 p.m. he was assaulted with kicks and fists and abused by hurling caste base words by both the opposite party nos. 2 and 3. The cognizable offence has been committed but his report was not lodged in the police station concerned. The Circle Officer concerned and the Superintendent of Police also did not pay any heed so he was compelled to file the application under Section 156 (3) Cr.P.C. and that too has been rejected by the Court concerned after summoning a report from the police station concerned. The witness Mohit was compelled by the opposite party nos. 2 and 3 to give affidavit to the effect that he did not witness the incident. The police has submitted false report. Prima facie a cognizable offence is proved to be committed by the opposite party nos. 2 and 3. The Special Judge, SC/ST Act, Jalaun has reached at the wrong conclusion that there is party bandi in the village and the appellant is a member of party of Shivam Gurjar and upon instigation of Shivam Gurjar he is falsely implicating the opposite party nos. 2 and 3, who are witnesses of the crime committed by Shivam Gurjar. So the appeal be allowed, the impugned order be set aside and an F.I.R. be registered with regard to the cognizable offence committed against him.

7. On the date fixed, neither the opposite party nos. 2 and 3 or their counsel appeared nor any counter affidavit has been filed on their behalf.

8. Learned A.G.A. in his counter affidavit has stated that the eye witness in the application under Section 156 (3) Cr.P.C. has filed an application supported with an affidavit that he did not witness the incident as on the date of incident he was in Jaipur. After considering the said affidavit and each and every aspects of the mater, the lower court has rightly rejected the application moved by the appellant under Section 156 (3) Cr.P.C. The order impugned is perfect, just, legal and valid and does not suffer from any infirmity or illegality.

9. In support of his contentions the appellant has placed before this Court the copy of application under Section 156 (3) Cr.P.C., his injury report dated 09.09.2019, copy of complaint given to the Superintendent of Police, Jalaun, copy of complaint give to the Circle Officer, Madhogarh, enquiry report filed by the concerned police station, affidavit of witness Mohit along with his application and the impugned order dated 14.10.2019.

10. A perusal of the impugned order reveals the observation of the lower court that as one of the witnesses Mohit has refused to witness the occurrence by filing an affidavit and the report has been received from the concerned police station that in the village there are two parties one of Shivam Gurjar, who had murdered Hari Om Pachori on 13.06.2017 along with his companion and the case was registered in the matter. The present opposite party no. 2 Sandip Dixit and Prem Babu Pachori are the eye

witnesses of the incident and thus belong to the rival party and the present appellant belongs to the party of Shivam Gurjar, so on the basis of this party bandi on false allegation the application under Section 156 (3) Cr.P.C. has been moved by the appellant. The lower court opined that as per injury report the injuries sustained by the applicant-appellant are of simple in nature and could be self inflicted and so placing reliance on the judgement in the case of Sukhvasi Vs. State of U.P., 2007 (59) ACC 739 Allahabad, the lower court rejected the application of the appellant under Section 156 (3) Cr.P.C. vide impugned order dated 14.10.2019.

11. As the application of appellant under Section 156 (3) Cr.P.c. has been rejected so let us see what are the requirements to move an application under Section 156 (3) Cr.P.C. Section 156 Cr.P.C. can be reproduced as under:-

156. Police officer's power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

12. As per this Section 156 (3) Cr.P.C. as the Magistrate is empowered under Section 190 Cr.P.C. to order such investigation. So section 190 Cr.P.C. is also to be looked into, which runs as under:-

190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer,

or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try.

13. According to this section, the Magistrate is empowered to take cognizance of any offence upon receiving a complaint of facts which constitute such offence, upon a police report of such facts and upon information received from any person.

14. The complaint is defined under Section 2 (d) of Cr.P.C., which reads as under:-

Section 2(d) of The Code Of Criminal Procedure, 1973

(d) " complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;

15. Thus, the Magistrate is empowered to take cognizance when an application under Section 156 (3) Cr.P.C. is moved before him.

16. The lower court has placed reliance on the judgement of Sukhvasi (supra), wherein the Court has opined as under:-

"Applications under section 156 (3) Cr.P.C. are comig in torrents. Provisions under section 156 (3) Cr.P.C. should be used sparingly. They should not be used unless there is something unusual and extra ordinary like miscarriage of justice which warrants a direction to the Police to register a case. Such application should not be allowed because the law provides them with an alternative remedy of filing a complaint, therefore, recourse should not normally be permitted for availing the provisions of section 156 (3) Cr.P.C.

The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application section 156 (3) Cr.P.C. and there is no such legal mandate."

17. While in this regard the appellant has placed reliance on the judgement in ***Har Prasad Vs. State of U.P., 2006 (10) ADJ 412,*** wherein the coordinate Bench of this Court allowed the revision of the revisionist and hold that if the application under Section 156 (3) Cr.P.C. discloses the commission of cognizable offence and at the stage of Section 156 (3) Cr.P.C., which is a pre-cognizance stage, once cognizable offence is disclosed through an application it was the duty of the concerned court to order for registration and investigation of the offence as crime detection and crime prevention are the foremost duty of the police and not of the court.

18. The reliance has also been placed on the judgement in ***Seema Devi Vs. State of U.P. & 3 others, 2018 (3) All. Crl. Rulings 3294*** (Criminal Appeal No. 1647 of 2018 decided on 24.09.2018) wherein the coordinate Bench of this Court held that if the averments of the complaint are trustworthy or these are found so after preliminary inquiry, then the Magistrate under Section 156 (3) Cr.P.C., 1973 may direct the S.H.O. to register F.I.R. and conduct investigation on the basis of averments of the complaint.

19. However, the findings of the Constitution Bench of the Apex Court in the case of ***Lalita Kumari Vs. Government of Uttar Pradesh and another,*** reported in ***2014 (2) SCC 1,*** can be looked into. Paragraph-111 of the aforesaid judgement, is reproduced herein:-

"111) In view of the aforesaid discussion, we hold:

i)Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation."

20. Section 154 Cr.P.C. runs as under:-

154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

[Provided that if the information is given by the woman against whom an offence under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, [section 376A, section 376AB, section 375B, section 376C, section 376D, section 376DA, section 376DB,]

section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:

Provided further that-

(a) in the event that the person against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, [section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB] section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of aninterpreter or a special educator, as the case may be;

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of such-section (5A) of section 164 as soon as possible.]

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

21. Thus, from the findings of the Apex Court and the provisions mentioned above, it is clear that the registration of first information report is mandatory under Section 154 Cr.P.C. if the information discloses the commission of cognizable offence and no preliminary inquiry is permissible in such a situation. However, if the information received does not disclose the commission of cognizable offence but indicates necessity for inquiry the preliminary inquiry may be conducted in order to ascertain whether cognizable offence is disclosed or not. Though in sub-para 5 of para-111 of the judgement Lalita Kumar (supra) it is mentioned that the scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence, though, in which case preliminary inquiry may be made, has also been mentioned in sub-para 6 of para-111 of the judgement. It is clear from the above findings that the preliminary inquiry is needed only when the information does not disclose the cognizable offence.

22. In the application under Section 156 (3) Cr.P.C. moved by the appellant, he has mentioned that the "opposite party nos. 2 and 3 hurled caste based abuses and beaten him with kicks and fists." It makes clear that in the application itself commission of cognizable offence has been mentioned so as per judgment of the Apex Court in Lalita Kumari (supra) no preliminary inquiry was needed by the Magistrate. The only need was to summon the report whether the case had been registered or not in the police station concerned regarding the complaint. The fact is admitted by the concerned court in the impugned order that the purpose of summoning the police report was only to ascertain the fact as to whether an F.I.R. in the matter had been registered in the police station or not and in the report of police station it is clearly mentioned that no first information report has been registered in the police station concerned regarding allegation made in the application under Section 156 (3) Cr.P.C.

23. The lower court after perusing the application under Section 156 (3) Cr.P.C. was aware of the fact that commission of cognizable offence is reported in the application under Section 156 (3) Cr.P.C. and in the report of police station also it was mentioned that some incident took place on the date and time mentioned in the application under Section 156 (3) Cr.P.C. Though, in the report it is mentioned that the applicant-appellant was hurling abuses and after hearing the noise the opposite party nos. 2 and 3 came out of their houses pursuaded the applicant and sent him to his home but after some time the applicant-appellant again came to the shop and again started hurling abuses. Both the opposite party nos. 2 and 3 holding his hands then brought the applicant-appellant to his home. The report also discloses that to pressurize Sandip Dixit and Prem Babu Pachori this false application has been given.

24. Thus, from the report itself it is clear that on 07.09.2019 at 9.00 p.m. some incident took place and what was that incident it was not to be inquired by the police at the stage of pre-cognizance as the application under Section 156 (3) Cr.P.C itself discloses the commission of cognizable offence. Thus, on the basis of judgement in Lalita Kumari (supra) it was incumbent upon the Magistrate concerned to order the registration of first information report as the application itself disclosed the commission of cognizable offence and in that situation no preliminary inquiry was permissible.

25. In view of above, I am of the view that the lower court has misinterpreted the provisions and has wrongly relied upon the report of police station concerned, hence the appeal is **allowed.** The impugned order dated 14.10.2019 is hereby **set aside**.

26. The file be sent to lower court where the parties shall appear on 04th January, 2022.

(2021)12ILR A111
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.11.2021

BEFORE

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

Jail Appeal No. 7744 of 2009

Kunwar Pal **...Appellant**

Versus

State **...Opposite Party**

Counsel for the Appellant:
From Jail, Ms. Kanchan Chaudhary

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

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 302, 376/511-challenge to-conviction-accused took the deceased six year old girl from her house and she was found dead in the room of accused house-at that time there was no one in the house of accused-Hence, burden lies on the shoulder of accused to prove as to how the death of deceased took place because this fact was within the special knowledge of the accused but accused failed to do so-minor contradictions about the timing when he had come and dead body was found will not dislodge the prosecution case-Moreso, young girl died due to asphyxia as per post-mortem report, the appellant cannot be given any benefit of doubt.(Para 1 to 17)

The appeal is dismissed. (E-6)

List of Cases cited:

1. U.O.I. Vs Dharam Pal (2019) 0 AIJEL SC 64322

2. Vikas Yadav Vs St. of U.P. (2016) 9 541

3. Maru Ram Vs U.O.I. (1980) AIR SC 2147

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

1. This appeal has been preferred by the appellant-Kunwar Pal against the judgment and order dated 04.11.2009, passed by Additional Sessions Judge, Court No. 13 Bareilly, in Session Trial No. 946 of 2007 *(State vs. Kunwar Pal)* arising out of Case Crime No. 26 of 2007, under Sections 302, 376, read with section 511 Indian Penal Code (I.P.C.), Police Station Awala, District Bareilly, whereby the accused was convicted and awarded sentence under Section 302 IPC for life imprisonment and fine of Rs.15,000/- in default accused was directed to undergo further imprisonment for one year. Accused was acquitted of charges under sections 376 read with section 511 of IPC.

2. The facts giving rise to this appeal are that complainant Omkar Jatav submitted written-report at Police Station Awala, District Bareilly, stating therein that on 18.01.2008 at 11:30 in the morning when six years old child-girl who had accompanied with appellant was found dead in his house. The prosecution was moved into motion by father of the deceased alleging that she had been raped and then murdered. The Investigating Officer conducted the investigation and being satisfied that case was made out, submitted charge-sheet against the accused-appellant, under Sections 302, 376, read with section 511 IPC.

3. As accused was facing charges under Sections 302, 376, read with section 511 IPC, the case was committed to the court of Sessions. Learned trial court has framed charges on 29.03.2008 against appellant under Sections 302, 376, read with section 511 IPC. Charges were read over to the accused, who denied the charges and claimed to be tried.

4. To bring home the charges, following witnesses were examined by the prosecution:

1.	Omkar	PW1
2.	Lilawati	PW2
3.	Babu Singh	PW3
4.	Badami	PW4
5.	Dr. A. K. Gautam	PW5
6.	V.K. Kasana	PW6
7.	Gajendra Pal Singh	PW7
8.	Ram Sharan Verma	PW8

All of them have given statements under section 161 Cr.P.C. and have opined against the accused.

5. The ocular version was sought to be corroborated by production of documentary evidences:

1.	F.I.R.	Ex. Ka2
2.	Written Report	Ex. Ka1
3.	P.M. Report	Ex. Ka4
4.	Panchayatnama	Ex. Ka7
5.	Charge Sheet Mool	Ex. Ka6
6.	Site Plan with Index	Ex. Ka5

6. Accused-appellant was examined under Section 313 Cr.P.C. and evidence against him led by prosecution against him were put to him. Accused stated that false evidence has been led against him. Accused did not examine any witness in his defence.

7. We have heard Ms. Kanchan Chaudhary, who has been appointed by High Court Legal Services Committee, as Amicus Curiae and learned AGA for the State and perused the record.

8. Learned counsel for the appellant has vehemently submitted that there is contradiction in the ocular version of Omkar and Lilawati i.e. father and mother of the deceased and also about the timing as mentioned in the postmortem

report as Ex. 4. She has further submitted that accused is totally innocent and could not have been convicted on fragile evidence of eye-witnesses which is full of contradiction. It has been further submitted that dead body might have been planted by somebody else and the accused is roped in.

9. *Per contra*, learned AGA has taken us through the evidence on record and has contended that this is not a case where the accused can be given any benefit of doubt as it was his own house where the dead body was found. The father of the victim categorically in ocular version supported the F.I.R. stating that his daughter had accompanied the accused and she did not return back at home, they went to the house of the accused who did not open the door and when the door was opened he ran away from the scene of offence.

10. At the outset only the offence for which the accused has been convicted under section 302 IPC we would now sift the evidence on record.

(a) The dead body was found in the house of accused, the testimony of father corroborates the F.I.R. that deceased had accompanied with accused, there is no rebuttal evidence produced and, therefore, we have to call section 106 of the Indian Evidence Act for which learned trial Judge has given cogent reasons that accused Kunwar Pal took the victim/deceased from her house and she was found dead in the room of accused's house. At that time there was no one in the house of accused. Hence, burden lies on the shoulder of accused to prove as to how the death of deceased took place because this fact was within the special knowledge of the accused but accused had not discharged this burden.

11. The fact that the dead body was found at the residence/place of accused at 1:00 p.m. and just because there is some minor contradictions about the timing when he had come at 11:30 and dead body 10/11:00 and will not dislodge the prosecution case. Estimated time is given by the doctor and it is not the exact time. The ligature mark in postmortem report categorically goes to show that young girl died on account of asphexia caused due to strangulation. We have convinced that this is not a case where accused can be given any benefit of doubt.

12. The recent judgment of Apex Court has held in the case of ***Union of India Vs. Dharam Pal, AIJEL 2019 (0) SC 64322*** where the accused was charged in murder of five persons there was imposition of death sentence mercy petition was filed and there was incarceration for a total period of over 25 years, out of which 18 years were in solitary confinement, the Apex Court commuted his death sentence into life imprisonment. We are supported in arguing by the decision of ***Vikas Yadav Vs. State of U.P. 2016 (9) 541*** will also for benefit of accused. It is not a heinous crime and however when he has committed the offence he was a young person.

13. Looking to the over all fact and circumstances, we also rely the judgment of ***Maru Ram Vs. Union of India, AIR 1980 SC 2147.*** This case has not yet been considered, though it is not a right of the accused but it is obligation on the State to consider the case for commutation. The recent judgment in Criminal Appeal No. 345 of 1983 decided on 29.08.2017 paragraph 33 of this Court has held as fallows:

"33. Going through the testimony and the record, it cannot be said that the commission of offence was so gruesome and life sentence would mean till the last blood. Accused shall be entitled to all the remissions. This direction is given in view of principles enunciated in Maru Ram Vs. Union of India, AIR 1980 SC 2147, considered again in ***Vikas Yadav Vs. State of***

U.P. 2016 (9) 541 *and the constitutional power vested in Article 72 and Article 161 of the Constitution of India read with Section 432 and 433-A of Cr.P.C. will also permit this Court to hold that it will be available to the State to exercise its jurisdiction vested under Section 432 Cr.P.C. and we do not, for a moment, hold that this is a case where life would mean till his last breath and, therefore, also the case of both the accused be considered for remission as expeditiously as possible not later than six months from today. It goes without saying that the State shall exercise the powers after 14 years incarceration is over."*

14. Thus in the light of these facts, the High Court as per reformative theory will permit us to grant fix term jail sentence to the accused.

15. At the end, we agree with the submission of learned counsel for the appellant that at end of 14 years the State may consider his case for remission under section 433 and 434 and this is not a heinous crime and he is in jail since 2007 and more than 14 years are already completed.

45. We find that in the State of U.P. even after 14 years of incarceration does not even send the matter to the Magistrate for reevaluation the cases for remission as per mandate of Sections 432 and 433 of Cr.P.C. and as held by Apex Court in catena of decisions even if appeals are pending in the High Court. The accused in present case is in jail since 2000.

46. Sections 433 and 434 of the Cr.P.C. read as follows:-

"Section 433. Power to commute sentence. The appropriate Government may, without the consent of the person sentenced, commute-

(a) a sentence of death, for any other punishment provided by the Indian Penal Code;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine."

*"**Section** 434. Concurrent power of Central Government in case of death sentences. The powers conferred by sections 432 and 433 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government."*

47. Section 433 and 434 of the Cr.P.C. enjoins a duty upon the State Government as well as Central Government to commute the sentences as mentioned in the said section. We are pained to mention that even after 14 years of incarceration, the State did not think of exercising its power for commutation of sentence of life imprisonment of the present accused and it appears that power of Governor provided under Article 161 of the Constitution of India are also not exercised though there are restriction to such power to commute sentence. The object of Sections 432 read with Section 433 of the Cr.P.C. is to remit the sentence awarded to the accused if it appears that the offence committed by him is not so grave. In our case, we do not see that why the accused is not entitled to remission. His case should have been considered but has not been considered. Remission/ commutation of sentence under Sections 433 and 434 of the Cr.P.C. is in the realm of power vested in the Government. The factual scenario in the present case would show that had the Government thought of taking up the case of the accused as per jail manual, it would have been found that the case of the appellant was not so grave that it could not have been considered for remission / commutation.

16. The State may consider for his remission, hence as a theory of reformation would apply to this case as it may be that he was young boy and due to bad luck and fear he may have committed this offence. He has no criminal antecedents attributed to him.

17. The appeal sans merit and is dismissed. However, with the aforesaid observations to the State.

18. Record for proceedings be consigned to the trial court.

19. The High Court Legal Services Committee will pay the requisite fees to the learned counsel who is amenably assisted this Court.

(2021)12ILR A115
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.12.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Criminal Revision No. 31 of 2021

Vishal Kannaujiya(Juvenile) ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Rajnish Shukla

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

(A) Criminal Law - The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 102 - Revision - Section 12 - bail to a person who is apparently a child alleged to be in conflict with law - reasons - circumstances - Indian Penal Code, 1860 - Sections 82,83,84 & 376 , The Code of criminal procedure, 1973 - Sections 29(B),161,399 & 562 - The Prevention of Child from Sexual Offence Act, 2012 - Section 5/6 .

(B) Criminal Law - The Juvenile Justice (Care and Protection of Children) Act, 2015 - proviso to Section 12(1) - a juvenile shall not be released, if there appears to be reasonable ground for believing that the release is likely to bring that child in association with any known criminal or expose the said person to mental, physical or psychological danger or the release would defeat the ends of justice, and thus, the Board shall record (reasons) "for denying the bail", and "circumstances that led to such a decision. (Para -35)

Juvenile along with minor - wandering in suspicious condition - intercepted - victim as well as juvenile apprised the police personnel - not willing to go to their respective houses - wanted to live together - FIR lodged by complainant - allegation - UPT report of victim found positive - pregnant - Statement under Section 161 & 164 CrPC - love with revisionist for past three months - willing to marry revisionist - orders passed by both courts below - without application of mind - orders rejecting the bail / release application of revisionist - hence revision . (Para - 40)

HELD:-Observation made by District Probation Officer is too far to be a ground to reject the bail/ release application. Report submitted by the District Probation Officer is to be considered in the light of the Statutory Provision under Section 12 of the Juvenile justice Act, 2015 . Nothing on record to show that there is any criminal antecedents either of the juvenile or his family . There is nothing adverse, but presumptions have been drawn that in case, he is released, then the same would defeat the ends of justice. Impugned judgment and order passed by the courts below refusing the bail to the revisionist are hereby set aside and reversed.(Para - 60,63)

Criminal Revision allowed. (E-7)

List of Cases cited:-

1. Om Prakash Vs St. of Raj. , 2012(5) SCC201

2. Sanjay Chaurasiya Vs St. of U.P, 2006 CrLJ 2957

3. Prakash Vs St. of Raj., 2006 CrLJ 1373

4. Shiv Kumar @ Sadhu Vs St. of U.P, 2010 (1) ACC 616

5. Rahul Patel Vs St. of U.P. , 2018 (1)JIC357

6. Mangesh Rajbhar Vs St. of U.P., 2018(6) ADJ

7. Sumit Kumar Vs St. of U.P. , Criminal Revision No. 915 of 2017

8. Deepesh Bhati Vs St. of U.P. , Criminal Revision no. 177 of 2018

9. Sahil Vs St. of U.P. , Criminal Revision No. 1328 of 2020

10. Data Ram Singh Vs St. of U.P. & anr., 2018(3) SCC 22

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This is a revision under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short the J.J. Act, 2015), instituted against the order dated 26.8.2020 passed by the Principal Magistrate, Juvenile Justice Board, Gorakhpur in Case Crime no. 09 of 2020 (State Vs. Vishal Kannaujiya), under Section 376 IPC read with Section 5/6 of the Prevention of Child from Sexual Offence Act, 2012, hereinafter referred to as the "POCSO Act', P.S. Khajani, District Gorakhpur as well as the order dated 27.11.2020 passed by learned Addl. Sessions Judge/ Special Judge (POCSO Act), Court No.1, Gorakhpur, in Criminal Appeal No. 62 of 2020, Vishal Kannaujiya Vs. State of U.P. and others refusing the bail to the revisionist.

2. Brief facts of the case setforth by the revisionist are that the prosecution has alleged that the victim Miss Neeraj Kannaujiya, daughter of Ram Laut Kannaujiya is 17 years old, as whereas revisionist-juvenile being Master Vishal Kannaujiya son of Rajesh Kannaujiya was aged about 16 years, they were found wandering in a suspicious condition in Kasba Khajani on the unlucky day, i.e, 28.12.2019. On interception, the juvenile as well as the victim Neeraj Kannaujiya apprised the police personnel that they were not willing to go to their respective houses as they wanted to live together. Faced with these circumstances, one Sri Rudra Pratap Singh, Sub-Inspector, P.S. Khajani, District Gorakhpur made a communication to the designated official of Child Welfare Committee, District Gorakhpur clearly narrating the fact that the juvenile and the victim both of them were not agreeable to go to their respective houses and further despite the fact that information was provided to the parents of the juvenile and the victim, none of them approached them to take custody of the juvenile or the victim and thus request was being sought to be made to them that the victim as well as the revisionist be taken into the custody of the Child Welfare Committee, District Gorakhpur for their upkeep, care and betterment.

3. It appears that on the same day, i.e, on 28.12.2019, G.D. entry was also made narrating the facts, which had been communicated on 28.12.2019 by the Sub-Inspector, P.S. Khajani, Gorakhpur to the Child Welfare Committee, Gorakhpur. Thereafter, FIR was lodged by one Sri Krishna Sinha being the member of the Child Welfare Committee, Gorakhpur before the police station Khajani, Gorakhpur dated 16.1.2020 registered as Case Crime no. 0009 of 2020 with an allegation that on 28.12.2019 itself the police officials found the revisionist and the victim together in suspicious condition and further on medical examination, it revealed that UPT was positive depicting that she was pregnant. It was also alleged that the father of the victim had not lodged the FIR because the victim was a minor and that will create negative impact upon the character of the victim. Statement of the complainant being Sri Krishna Sinha, Chairman / Member, Child Welfare Committee, District Gorakhpur was recorded on 17.1.2020 under Section 161 CrPC, wherein the same facts were reiterated, which already found place in the FIR. It has also come on record that despite being request administered to the parents of the victim, as well as the victim for getting her medically examined, she refused for the same. The statement of the victim was also recorded under Section 164 CrPC, a certified copy of the same is at page 70 of the paper book, wherein the victim has deposed that she is of 17

years of age and she is in love with the revisionist for the past three months and she according to her sweet will has married with the revisionist. Consequent to the initiation of the proceedings emanating from the FIR, the revisionist is in observation home since 22.7.2020, and the proceeding has been registered as Case Crime no. 9 of 2020, under Section 376 IPC read with Section 5/6 of POCSO Act.

4. The Court of Addl. Sessions Judge/ Special Judge (POCSO Act), Court No.1, Gorakhpur in the proceedings in Misc. Case No. 260 of 2020, CNR No. UPGK01-003610-2020 (State of U.P. Vs. Vishal Kannaujiya) by virtue of the order dated 21.7.2020 declared the revisionist to be juvenile, while determining his date of birth to be 1.4.2003 holding that he was 16 years 9 months and 15 days of age, i.e. below the age of 18 on the date of occurrence of incident. It has also come on record that District Probation Officer submitted report to the Board on 6.8.2020, according to which there was no good ground entitling the revisionist to be bailed out in terms of the provisions contained under Section 12 of the J.J. Act, 2015. A police report dated 25.8.2020 was also submitted, which also does not find favour with the revisionist.

5. The bail/ release application so preferred for releasing the revisionist on bail was at the first instance rejected by the Court of Principal Magistrate, Juvenile Justice Board, Gorakhpur in Case Crime no.9 of 2020, State vs. Vishal Kannaujiya, which was carried before learned Addl. Sessions Judge/ Special Judge (POCSO Act), Court No.1, Gorakhpur, being Criminal Appeal No. 62 of 2020, Vishal Kannaujiya vs. State of U.P. and others, which also met the same fate and the same was laid to rest by virtue of order dated 27.11.2020.

6. Challenging both the orders, the revisionist is before this Court in the present revision, which purports to be under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

7. Before proceeding further, while deciding the controversy in question it would be profitable to give a brief outline of the philosophy behind the introduction of Juvenile Justice system since inception.

8. The basic idea behind the formulation of the juvenile justice system is to reform, rehabilitate and re-integrate a child in conflict with law and the child in need of care and protection. Obviously, the philosophy in dealing with children committing offence is remarkably different from an adult committing an offence as in that case, different criteria and yardsticks have to be adopted. The first doctrine dealing with children of both the categories is the doctrine *parens patriae* in a juvenile justice legal system *parens patriae*, the doctrine that allows the State to step in and serve as a guardian for children, the mentally ill, the incompetent, the illiterate or disable persons, who are unable to take care of themselves.

9. Needless to point out that it refers to public policy power of State to intervene against absurd and inequitable parents, legal guardians or informal care taker and to act as a parent of any child or individual, who is in the need of protection. Normally, the natural parents and family are expected to take care of their child, but when they fail, then the State has to take steps and it has to step into the shoes of the parents and family to provide the same care and protection, as their own parents and family should have been provided for them.

10. With passage of time, the principle of *parens patriae* shifted to the right approach, which respects the constitutional and procedural rights of a juvenile. A child in conflict with law should be treated in a manner consistent with the

promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and, which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in the society.

11. In the Pre-Independence era, first legislation enacted for the children in distress is the Apprentice Act, 1850. It applies to children above the age of 10 and under the age of 18 found to have committed petty offence and vagabonds. Under the Act, the children in distress were to be trained for trade and commerce. "The Preamble of the Apprentice Act, 1850", which explains the idea behind the enactment is quoted hereinunder:

"For better enabling children, and especially orphans and poor children brought up in public charity, to learn trades, crafts and employments, by which, when they came to full age, may gain a livelihood."

12. Thereafter, came into existence the widely known code by the name and nomenclature Indian Penal Code, 1860 enacting various provisions relating to child, which are as under:-

"82. Act of a child under seven years of age.--*Nothing is an offence which is done by a child under seven years of age.*

83. ***Act of a child above seven and under twelve of immature understanding.--****Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.*

84. Act of a person of unsound mind.--*Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."*

13. Section 82 of the Indian Penal Code itself provides that nothing is an offence, which is done by a child under 7 years of age. Further classification has been made, while differentiating from a child, who is below the age of 7, while incorporating Section 83 in the Indian Penal Code, 1860 providing that nothing is an offence, which is done by a child above 7 years of age and under 12, who has not attained sufficient maturity of understanding to judge nature and consequences of his conduct on that occasion. Similarly, Section 84 has also been inserted, which itself provides that nothing is an offence, which is done by a person, who at the time of committing it by the reason of unsoundness of mind, is incapable of knowing the nature of the act or what he is doing is either wrong or contrary to law.

14. Then comes the stage wherein whereat a new legislation by the name and nomenclature of **"Reformatory Schools Act, 1876"** and its amendments made in 1897 was brought into existence according to which the Government was enjoined to establish reformatory schools for juvenile delinquents. Under the said Act, provision was made to keep juveniles in custody in reformatory school for a time period of 2 to 7 years, but after the attainment of 18 years, they were not to be kept in the Reformatory Schools. In the year 1898, another important legislation for children was brought into existence being Code of Criminal Procedure, 1898, wherein Section 29(B) was inserted, which reads as

"29B. Jurisdiction in the case of juveniles. - *Any offence, other than one punishable with death or [imprisonment] for life, committed, by any person who at the date when he appears or is brought before the Court is under the age of fifteen years, may be tried by a District Magistrate or a Chief Presidency*

Magistrate, or by any Magistrate specially empowered by the [State Government] to exercise the powers conferred by Section 8, sub-section (1), of the Reformatory Schools Act, 1897, or in any area, in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby.

State Amendments

Uttar Pradesh

In its application to the State of Uttar Pradesh, Section 29B of the Code of Criminal Procedure, 1898, ceases to apply to any area in which Chapters I and III to Act I of 1952, S. 76(1)."

15. Further Section 399 of the **"Code of Criminal Procedure, 1898"** reads as under:

"399.(1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the Government prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3). This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force."

State Amendments

Uttar Pradesh

- U.P. Act I of 1952, S. 76.

(2)(a) The Reformatory Schools Act, 1897 (VIII of 1897), which extends to whole of India except State of Jammu and Kashmir, has been extended to States merged in the State of (I) Bombay - See Bom. Act V of 1950, S.S; (2) Madhya Pradesh - See M.P. Act XII of 1950, S.S; (3) Punjab - See Punj. Acts V of 1950, S. 3 and XVIII of 1958, S.4; and (4) Orissa - See Ori. Act, IV of 1950, S. 4. The Act has been extended to the Union Territory of Goa, Daman and Diu - See Reg. XI of 1963."

16. Section 562 of the said Code conferred power upon the Court to release on probation of good conduct youthful offenders under 21 years of age under certain conditions instead of sentencing them to prison. Section 562 of CrPC, 1898 reads as under: -

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

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the [State Government] in this

behalf, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Sub-divisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380.

[(1.A) Conviction and release with admonition.-- In any case, in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code punishable with not more than two before whom he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.]

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

(3) When an order has been made under this section in respect of any offender, the High Court may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law:

Provided that the High Court shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(4) The provisions of sections 122, 126A and 406A shall, so far as ay be, apply in the case of sureties offered in pursuance of the provisions of this section.]

STATE AMENDMENT

Uttar Pradesh

(1) In its application to the State of Uttar Pradesh, S. 562 shall stand repealed - See U.P. Act VI of 1938, S.15 (1-2-1939.]

Note. - Section 15 of U.P. First Offenders' Probation Act, 1938 (U.P. Act VI of 1938), has been brought in fore in the whole of Uttar Pradesh on and from 1-2-1939-- See U.P. Gaz., 1939, Pt. I, p.99."

17. These provisions along with **"Reformatory Schools Act, 1897"** made a significant change in the juvenile justice system from punishment to reform and rehabilitation.

18. Thereafter, the recommendations made by the Indian Jail Committee (1919-1920) suggested that juvenile prisoners are amenable to reformation and their detention in prisons is undesirable, for, their simple mind may be polluted permanently by the atmosphere of Jail life. A child offender was mainly a product of unfavourable environment. He was entitled to new opportunities to grow and live in more congenial conditions. The Committee opined that juveniles could be reformed by re-education and proper treatment. It recommended that Borstal institutions should be established for reformation of juveniles. It also recommended for constitution of juvenile courts.

19. Thereafter, under the Juvenile Justice System in India, firstly the Juvenile Court was established under Madras Children Act, 1920.

20. After independence of India in 1947, the Parliament passed the first legislation on children, namely, **The Children's Act, 1960.** This was made applicable in centrally administered union territories and the States having no juvenile legislation were made free to adopt it. It was passed to function as model legislation and for implementation in union territories. This Act established separate child welfare courts to handle cases relating to neglected children. It also created the position of a Probation Officer to advise and assist the neglected or delinquent children. In addition, it established separate Children's Court for cases

related to delinquent juveniles, thereby supporting the judicial process for delinquent and neglected children.

21. It would be relevant to note here that prior to the passing of The Children's Act, 1960, there existed different Children's Act in different States. The most important aspect of the Children's Act, 1960 was complete prohibition of use of police station or jail under any circumstances for children covered within its purview. However, at this stage, Juvenile Justice System in India was not uniform because each State had its own standards, norms and practices.

22. The necessity of a uniform Children Act across the Country gave rise to enactment of **Juvenile Justice Act, 1986** (for short 'the Act of 1986').

23. The Act of 1986 promoted the best interest of the juveniles by incorporating the important provisions of Indian Constitution. The Act of 1986 was influenced by 'United Nations Declaration of the Rights of the Child, 1959' and 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice (''The Beijing Rules''), 1985'. The detention of juveniles in police lock-up or jail was abolished by the Act of 1986. It also recommended to establish Juvenile Homes for the reception of neglected juveniles, Special Homes for reception of delinquent juveniles and Observation Homes for the temporary reception of juveniles during pendency of the inquiry and trial and Aftercare Homes for the purpose of taking care of juveniles after discharge from Observation Homes or Special Homes. The object of the Act of 1986 was to protect juvenile from criminalization, penalization and stigmatization. The Act of 1986 repealed various Children's Acts enacted in different States and provided a uniform Juvenile Justice System in India. Boys under the age of 16 and girls under the age of 18 were defined as Juveniles.

24. Noticing various shortcoming in the Act of 1986 when India signed and ratified the 'United Nations Convention of Rights of Children' in December, 1992, the Act of 1986 was repealed and replaced by The Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'the Act of 2000'), which came into force from 1st April 2001. The Act of 2000 defined the term 'juvenile' as a person who having not completed the age of 18 years. The statement of objects and reasons for the Act of 2000 specified that it was enacted to bring the operation of Juvenile Justice System in conformity with Convention of Rights of Children and other United Nations Instruments signed by India. It incorporated the justice as well as the right approach towards children. It dealt with juveniles in conflict with law and children in need of care and protection.

25. The Act of 2000 was amended in 2006. The Amendment Act, 2006 brought several amendments in the Principal Act. By the amendment, it was made clear that crucial date for determination of age of a juvenile in conflict with law would be the date of commission of offence. Another important change was insertion of Section 7A, which provided that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case. The amended Act further clarified that under any condition, a juvenile in conflict with law should not be kept in a police lock-up or jail.

26. The Act of 2000 was again amended in 2011 to address gaps in its implementation and make the law more child friendly.

27. As the ill-luck it may be, this country came across two important events, firstly being the brutal gang-rape and secondly the death of a girl (Nirbhaya) in Delhi on 16th December, 2012, which enacted the legislature in a forceful debate, warranting that the legislations, which

were in the statute book are ill-equipped and ends over all modifications to tackle the children, who are in the age-group of 16-18.

28. After a long debate, the Juvenile Justice Will was introduced in Lok Sabha on 8.8.2014 and it was passed by the Lok Sabha on 7.5.2015 and Rajya Sabha on 22nd December, 2015 and then the **Juvenile Justice (Care and Protection) Act, 2015 (2 of 2016)** (hereinafter referred to as the JJ Act, 2015) was given a decent birth and the same came into force with effect from 15.1.2016, after being published in Gazette of India.

29. In order to appreciate the controversy in the best possible manner in the backdrop of the aims and the objects governing the enactment of the said piece of legislation, the Statements of the objects and reasons behind the enactment are to be given a closure look:

*"**Statement of Objects and Reasons.**- Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Articles 39(e) and (f), 45 and 47 further makes the State responsible for ensuring that all needs of children are met and their basic human rights are protected.*

2. The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all appropriate measures in case of a child alleged as, or accused of, violating any penal law, including (a) treatment of the child in a manner consistent with the promotion of the child's sense of dignity and worth (b) reinforcing the child's respect for the human rights and fundamental freedoms of others (c) taking into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

3. The Juvenile Justice (Care and Protection of Children) Act was enacted in 2000 to provide for the protection of children. The Act was amended twice in 2006 and 2011 to address gaps in its implementation and make the law more child-friendly. During the course of the implementation of the Act, several issues arose such as increasing incidents of abuse of children in institutions, inadequate facilities, quality of care and rehabilitation measures in Homes, high pendency of cases, delays in adoption due to faulty and incomplete processing, lack of clarity regarding roles, responsibilities and accountability of institutions and, inadequate provisions to counter offences against children such as corporal punishment, sale of children for adoption purposes, etc. have highlighted the need to review the existing law.

4. Further, increasing cases of crimes committed by children in the age group of 16-18 years in recent years makes it evident that the current provisions and system under the Juvenile Justice (Care and Protection of Children) Act, 2000, are ill equipped to tackle child offenders in this age group. The data collected by the National Crime Records Bureau establishes that crimes by children in the age group of 16-18 years have increased especially in certain categories of heinous offences.

5. Numerous changes are required in the existing Juvenile Justice (Care and Protection of Children) Act, 2000 to address the above mentioned issues and therefore, it is proposed to repeal existing Juvenile Justice (Care and Protection of Children) Act, 2000 and re- enact a comprehensive legislation inter alia to provide for general principles of care and protection of children, procedures in case of children in need of care and protection and children in conflict with law, rehabilitation and social re-integration measures for such children, adoption of orphan, abandoned and surrendered children, and offences committed against children. This legislation would thus ensure proper care, protection, development, treatment and social re-integration of children in difficult circumstance by adopting a child-friendly approach keeping in view the best interest of the child in mind.

6. The notes on clauses explain in detail the various provisions contained in the Bill.

7. This Bill seeks to achieve the above objectives."

30. It would be further useful to also quote the Preamble, which for the ready reference is quoted hereinunder:-

"An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, hereinunder and for matters connected therewith or incidental thereto.

WHEREAS, the provisions of the Constitution confer powers and impose duties, under clause (3) of article 15, clauses (e) and (f) of article 39, article 45 and article 47, on the State to ensure that all the needs of children are met and that their basic human rights are fully protected;

AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of United Nations, which has prescribed a set of standards to be adhered to by all State parties in securing the best interest of the child;

AND WHEREAS, it is expedient to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 to make comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993), and other related international instruments."

31. A plain reading of the Preamble as well as the main object behind the enactment of Juvenile Justice Act, 2015 also gets its identity from the Articles of the Constitution of India 1950, the same are as under: -

*"**Article 15(3):** Nothing in this article shall prevent the State from making any special provision for women and children"*

*"**Article 39 (e)** that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;*

***(f)** that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment"*

*"**Article 45**. Provision for free and compulsory education for children The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."*

*"**Article 47.** Duty of the State to raise the level of nutrition and the standard of living and to improve public health The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of*

intoxicating drinks and of drugs which are injurious to health."

32. Thus it can be safely said that the Juvenile Justice Act, 2015 has been enacted to fulfil the objects of the Constitution in Clause (3) of the Article 15, Clauses (e) and (f) of Article 39, Articles 45 and 47, which confers powers and imposes duty upon the State to ensure that all needs of the children are met and their human rights are protected. The relevant provisions of Juvenile Justice Act, 2015, which are germane to the controversy in question needs to be extracted hereinbelow:

*"**Section 2 (12):** "child" means a person who has not completed eighteen years of age;*

***2(13):** "child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence;*

***2 (14)(a)** has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or*

***2(14)(ix)** who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or*

***2(14) (x)** who is being or is likely to be abused for unconscionable gains; or*

***33** "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more;*

***45** "petty offences" includes the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years;*

***54** "serious offences" includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is imprisonment between three to seven years;"*

*"**Section 3. General principles to be followed in administration of Act.--** The Central Government, the State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely:--*

(i) Principle of presumption of innocence: Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.

(ii) Principle of dignity and worth: All human beings shall be treated with equal dignity and rights.

(iii) Principle of participation: Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child's views shall be taken into consideration with due regard to the age and maturity of the child;

(iv) Principle of best interest: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.

(v) Principle of family responsibility: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.

(vi) Principle of safety: All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.

(vii) Positive measures: All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

(viii) Principle of non-stigmatising semantics: Adversarial or accusatory words are not to be used in the processes pertaining to a child.

(ix) Principle of non-waiver of rights: No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver.

(x) Principle of equality and non-discrimination: There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child.

(xi) Principle of right to privacy and confidentiality: Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process.

(xii) Principle of institutionalisation as a measure of last resort: A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.

(xiii) Principle of repatriation and restoration: Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.

(xiv) Principle of fresh start: All past records of any child under the Juvenile Justice system should be erased except in special circumstances.

(xv) Principle of diversion: Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole.

(xvi) Principles of natural justice: Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act.

Section 4. Juvenile Justice Board. - *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the State Government shall, constitute for every district, one or more Juvenile Justice Boards for exercising the powers and discharging its functions relating to children in conflict with law under this Act.*

(2) A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.

(3) No social worker shall be appointed as a member of the Board unless such person has been actively involved in health, education, or welfare activities pertaining to children for at least seven years or a practicing professional with a degree in child psychology, psychiatry, sociology or law.

(4) No person shall be eligible for selection as a member of the Board, if he --

(i) has any past record of violation of human rights or child rights;

(ii) has been convicted of an offence involving moral turpitude, and such conviction has not been reversed or has not been granted full pardon in respect of such offence;

(iii) has been removed or dismissed from service of the Central Government or a State Government or an undertaking or corporation owned or controlled by the Central Government or a State Government;

(iv) has ever indulged in child abuse or employment of child labour or any other violation of human rights or immoral act.

(5) The State Government shall ensure that induction training and sensitisation of all members including Principal Magistrate of the Board on care, protection, rehabilitation, legal provisions and justice for children, as may be prescribed, is provided within a period of sixty days from the date of appointment.

(6) The term of office of the members of the Board and the manner in which such member may resign shall be such, as may be prescribed.

(7) The appointment of any member of the Board, except the Principal Magistrate, may be terminated after holding an inquiry by the State Government, if he --

(i) has been found guilty of misuse of power vested under this Act; or

(ii) fails to attend the proceedings of the Board consecutively for three months without any valid reason; or

(iii) fails to attend less than three-fourths of the sittings in a year; or

(iv) becomes ineligible under sub-section (4) during his term as a member.

5. ....

6. Placement of persons, who committed an offence, when person was below the age of eighteen years. *-(1) Any person, who has completed eighteen years of age, and is apprehended for committing an offence when he was below the age of eighteen years, then, such person shall, subject to the provisions of this section, be treated as a child during the process of inquiry.*

(2) The person referred to in sub-section (1), if not released on bail by the Board shall be placed in a place of safety during the process of inquiry.

(3) The person referred to in sub-section (1) shall be treated as per the procedure specified under the provisions of this Act.

7. ...

8. Powers, functions and responsibilities of the Board. -(1) *Notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, the Board constituted for any district shall have the power to deal exclusively with all the proceedings under this Act, relating to children in conflict with law, in the area of jurisdiction of such Board.*

(2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Children's Court, when the proceedings come before them under section 19 or in appeal, revision or otherwise.

(3) The functions and responsibilities of the Board shall include'--

(a) ensuring the informed participation of the child and the parent or guardian, in every step of the process;

(b) ensuring that the child's rights are protected throughout the process of apprehending the child, inquiry, aftercare and rehabilitation;

(c) ensuring availability of legal aid for the child through the legal services institutions;

(d) wherever necessary the Board shall provide an interpreter or translator, having such qualifications, experience, and on payment of such fees as may be prescribed, to the child if he fails to understand the language used in the proceedings;

(e) directing the Probation Officer, or in case a Probation Officer is not available to the Child Welfare Officer or a social worker, to undertake a social investigation into the case and submit a social investigation report within a period of fifteen days from the date of first production before the Board to ascertain the circumstances in which the alleged offence was committed;

(f) adjudicate and dispose of cases of children in conflict with law in accordance with the process of inquiry specified in section 14;

(g) transferring to the Committee, matters concerning the child alleged to be in conflict with law, stated to be in need of care

and protection at any stage, thereby recognising that a child in conflict with law can also be a child in need of care simultaneously and there is a need for the Committee and the Board to be both involved;

(h) disposing of the matter and passing a final order that includes an individualcare plan for the child's rehabilitation, including follow up by the Probation Officer or the District Child Protection Unit or a member of a non-governmental organisation, as may be required;

(i) conducting inquiry for declaring fit persons regarding care of children in conflict with law;

(j) conducting at least one inspection visit every month of residential facilities for children in conflict with law and recommend action for improvement in quality of services to the District Child Protection Unit and the State Government;

(k) order the police for registration of first information report for offences committed against any child in conflict with law, under this Act or any other law for the time being in force, on a complaint made in this regard;

(l) order the police for registration of first information report for offences committed against any child in need of care and protection, under this Act or any other law for the time being in force, on a written complaint by a Committee in this regard;

(m) conducting regular inspection of jails meant for adults to check if any child is lodged in such jails and take immediate measures for transfer of such a child to the observation home; and

(n) any other function as may be prescribed.

10. Apprehension of child alleged to be in conflict with law. -*(1) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:*

Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lockup or lodged in a jail.

(2) The State Government shall make rules consistent with this Act,--

(i) to provide for persons through whom (including registered voluntary or non-governmental organisations) any child alleged to be in conflict with law may be produced before the Board;

(ii) to provide for the manner in which the child alleged to be in conflict with law may be sent to an observation home or place of safety, as the case may be.

11. ...

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 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.

13. Information to parents, guardian or probation officer. - *(1) Where a child alleged to be in conflict with law is apprehended, the officer designated as Child Welfare Police Officer of the police station, or the special juvenile police unit to which such child is brought, shall, as soon as possible after apprehending the child, inform --*

(i) the parent or guardian of such child, if they can be found, and direct them to be present at the Board before which the child is produced; and

(ii) the probation officer, or if no probation officer is available, a Child Welfare Officer, for preparation and submission within two weeks to the Board, a social investigation report containing information regarding the antecedents and family background of the child and other material circumstances likely to be of assistance to the Board for making the inquiry.

(2) Where a child is released on bail, the probation officer or the Child Welfare Officer shall be informed by the Board.

14. Inquiry by Board regarding child in conflict with law.-- *(1) Where a child alleged to be in conflict with law is produced before Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under sections 17 and 18 of this Act.*

(2) The inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension.

(3) A preliminary assessment in case of heinous offences under section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board.

(4) If inquiry by the Board under sub-section (2) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated:

Provided that for serious or heinous offences, in case the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate, for reasons to be recorded in writing.

(5) The Board shall take the following steps to ensure fair and speedy inquiry, namely:--

(a) at the time of initiating the inquiry, the Board shall satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment;

(b) in all cases under the Act, the proceedings shall be conducted in simple manner as possible and care shall be taken to ensure that the child, against whom the proceedings have been instituted, is given child-friendly atmosphere during the proceedings;

(c) every child brought before the Board shall be given the opportunity of being heard and participate in the inquiry;

(d) cases of petty offences, shall be disposed of by the Board through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973;

(e) inquiry of serious offences shall be disposed of by the Board, by following the procedure, for trial in summons cases under the Code of Criminal Procedure, 1973;

(f) inquiry of heinous offences,--

(i) for child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Board under clause (e);

(ii) for child above the age of sixteen years as on the date of commission of an offence shall be dealt with in the manner prescribed under section 15.

15. Preliminary assessment into heinous offences by Board. - *(1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18:*

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation.--For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973:Provided that the order of the Board to dispose of the matter shall be applealable under sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14.

16. Review of pendency of inquiry. - *(1) The Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall review the pendency of cases of the Board once in every three months, and shall direct the Board to increase the frequency of its sittings or may recommend the constitution of additional Boards.*

(2) The number of cases pending before the Board, duration of such pendency, nature of pendency and reasons thereof shall be reviewed in every six months by a high level committee consisting of the Executive Chairperson of the State Legal Services Authority, who shall be the Chairperson, the Home Secretary, the Secretary responsible for the implementation of this Act in the State and a representative from a voluntary or non-governmental organisation to be nominated by the Chairperson.

(3) The information of such pendency shall also be furnished by the Board to the Chief Judicial Magistrate or the Chief Metropolitan Magistrate and the District Magistrate on quarterly basis in such form as may be prescribed by the State Government.

17. Orders regarding a child not found to be in conflict with law.-- *(1) Where a Board is satisfied on inquiry that the child brought before it has not committed any offence, then notwithstanding anything contrary contained in any other law for the time being in force, the Board shall pass order to that effect.*

(2) In case it appears to the Board that the child referred to in sub-section (1) is in need of care and protection, it may refer the child to the Committee with appropriate directions.

18. Orders regarding child found to be in conflict with law. - *(1) Where a Board is satisfied on inquiry that a child irrespective of*

age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,--

(a) allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;

(b) direct the child to participate in group counselling and similar activities;

(c) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;

(d) order the child or parents or the guardian of the child to pay fine:

Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;

(e) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;

(f) direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years;

(g) direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformative services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home:

Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety.

(2) If an order is passed under clauses (a) to (g) of sub-section (1), the Board may, in addition pass orders to--

(i) attend school; or

(ii) attend a vocational training centre; or

(iii) attend a therapeutic centre; or

(iv) prohibit the child from visiting, frequenting or appearing at a specified place; or

(v) undergo a de-addiction programme.

(3) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences.

19. Powers of Children's Court. *- (1) After the receipt of preliminary assessment from the Board under section 15, the Children's Court may decide that--*

(i) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 and pass appropriate orders after trial subject to the provisions of this section and section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere;

(ii) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of section 18.

(2) The Children's Court shall ensure that the final order, with regard to a child in conflict with law, shall include an individual care plan for the rehabilitation of child,

including follow up by the probation officer or the District Child Protection Unit or a social worker.

(3) The Children's Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail:

Provided that the reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support shall be provided to the child during the period of his stay in the place of safety.

(4) The Children's Court shall ensure that there is a periodic follow up report every year by the probation officer or the District Child Protection Unit or a social worker, as required, to evaluate the progress of the child in the place of safety and to ensure that there is no ill-treatment to the child in any form.

(5) The reports under sub-section (4) shall be forwarded to the Children's Court for record and follow up, as may be required.

*"**Section-27. Child Welfare Committee.**-- (1) The State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification.*

(2) The Committee shall consist of a Chairperson, and four other members as the State Government may think fit to appoint, of whom atleast one shall be a woman and another, an expert on the matters concerning children.

(3) The District Child Protection Unit shall provide a Secretary and other staff that may be required for secretarial support to the Committee for its effective functioning.

(4) No person shall be appointed as a member of the Committee unless such person has been actively involved in health, education or welfare activities pertaining to children for atleast seven years or is a practicing professional with a degree in child psychology or psychiatry or law or social work or sociology or human development.

(5) No person shall be appointed as a member unless he possesses such other qualifications as may be prescribed.

(6) No person shall be appointed for a period of more than three years as a member of the Committee.

(7) The appointment of any member of the Committee shall be terminated by the State Government after making an inquiry, if--

(i) he has been found guilty of misuse of power vested on him under this Act;

(ii) he has been convicted of an offence involving moral turpitude and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;

(iii) he fails to attend the proceedings of the Committee consecutively for three months without any valid reason or he fails to attend less than three-fourths of the sittings in a year.

(8) The District Magistrate shall conduct a quarterly review of the functioning of the Committee.

(9) The Committee shall function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class

(10) The District Magistrate shall be the grievances redressal authority for the Child Welfare Committee and anyone connected with the child, may file a petition before the District Magistrate, who shall consider and pass appropriate orders.

***28. Procedure in relation to Committee. -** (1) The Committee shall meet at*

least twenty days in a month and shall observe such rules and procedures with regard to the transaction of business at its meetings, as may be prescribed.

(2) A visit to an existing child care institution by the Committee, to check its functioning and well being of children shall be considered as a sitting of the Committee.

(3) A child in need of care and protection may be produced before an individual member of the Committee for being placed in a Children's Home or fit person when the Committee is not in session.

(4) In the event of any difference of opinion among the members of the Committee at the time of taking any decision, the opinion of the majority shall prevail but where there is no such majority, the opinion of the Chairperson shall prevail.

(5) Subject to the provisions of sub-section (1), the Committee may act,

notwithstanding the absence of any member of the Committee, and no order made by the Committee shall be invalid by reason only of the absence of any member during any stage of the proceeding:

Provided that there shall be at least three members present at the time of final disposal of the case.

29. Powers of Committee. - *(1) The Committee shall have the authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection.*

(2) Where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection.

30. Functions and responsibilities of Committee. - *The functions and responsibilities of the Committee shall include--*

(i) taking cognizance of and receiving the children produced before it;

(ii) conducting inquiry on all issues relating to and affecting the safety and well-being of the children under this Act;

(iii) directing the Child Welfare Officers or probation officers or District Child Protection Unit or non-governmental organisations to conduct social investigation and submit a report before the Committee;

(iv) conducting inquiry for declaring fit persons for care of children in need of care and protection;

(v) directing placement of a child in foster care;

(vi) ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child's individual care plan and passing necessary directions to parents or guardians or fit persons or children's homes or fit facility in this regard;

(vii) selecting registered institution for placement of each child requiring institutional support, based on the child's age, gender, disability and needs and keeping in mind the available capacity of the institution;

(viii) conducting at least two inspection visits per month of residential facilities for children in need of care and protection and recommending action for improvement in quality of services to the District Child Protection Unit and the State Government;

(ix) certifying the execution of the surrender deed by the parents and ensuring that they are given time to reconsider their decision as well as making all efforts to keep the family together;

(x) ensuring that all efforts are made for restoration of abandoned or lost children to

their families following due process, as may be prescribed;

(xi) declaration of orphan, abandoned and surrendered child as legally free for adoption after due inquiry;

(xii) taking suo motu cognizance of cases and reaching out to children in need of care and protection, who are not produced before the Committee, provided that such decision is taken by at least three members;

(xiii) taking action for rehabilitation of sexually abused children who are reported as children in need of care and protection to the Committee by Special Juvenile Police Unit or local police, as the case may be, under the Protection of Children from Sexual Offences Act, 2012;

(xiv) dealing with cases referred by the Board under sub-section (2) of

section 17;

(xv) co-ordinate with the police, labour department and other agencies involved in the care and protection of children with support of the District Child Protection Unit or the State Government;

(xvi) in case of a complaint of abuse of a child in any child care institution, the Committee shall conduct an inquiry and give directions to the police or the District Child Protection Unit or labour departmentv or childline services, as the case may be;

(xvii) accessing appropriate legal services for children;

(xviii) such other functions and responsibilities, as may be prescribed."

33. In exercise of the powers conferred by the provision to Sub-section (1) of Section 110 of the Juvenile Justice Act, 2015, the Central Government also framed Rules by the name and the nomenclature of the Juvenile Justice (Care and Protection of Children) Models Rules 2016, which were gazzetted on 21.9.2016 in order to achieve the objects as enshrined in the Juvenile Justice Act, 2015.

34. The moot question, which falls for consideration before this Court in the present revision purported to be under Section 102 of the JJ Act, 2015 is with regard to the fact as to whether the orders passed by both the courts below are within the four-corners of Section 12 of the JJ Act, 2015, while rejecting the bail/ release application of the revisionist.

35. A proviso has also appended to the sub-section (1) of Section 12 of the Juvenile Justice Act, 2015 that a juvenile shall not be released, if there appears to be reasonable ground for believing that the release is likely to bring that child in association with any known criminal or expose the said person to mental, physical or psychological danger or the release would defeat the ends of justice, and thus, the Board shall record (reasons) "for denying the bail", and "circumstances that led to such a decision".

36. A perusal of Section 12(1) of the Juvenile Justice Act, 2015 postulates rule of bail for every child in conflict with law, whether the offence is to be bailable or non-bailable, notwithstanding anything contained in the Code of Criminal Procedure and carves out three distinct exceptions, under which the bail is to be refused to the juvenile, i.e, (a) where there are reasonable grounds for believing that the release is likely to bring the child into association with any known criminal; (b) the release is likely to expose the child to mental, physical or psychological danger; and (c) the release of child would defeat the ends of justice.

37. The words "reasons' and "circumstances' have been deliberately employed in the proviso to Section 12 of the JJ Act, 2015, so as to eliminate the chances of passing of any order in routine manner without application of mind.

38. The Hon'ble Apex Court in the case of **Om Prakash vs. State of Rajasthan** reported in

2012(5) SCC201 in paragraph-3 has held as under:-

"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?"

39. However, the Hon'ble Apex Court in the case of Om Prakash (supra) has further gone to the extent that the courts must be cautious while passing orders with relation to a juvenile and also takes into account of the factors and the circumstances so prevalent therein.

40. Coming to the facts of the present case, it has come to the record that on the unlucky day, i.e, 28.12.2019, the juvenile along with the minor Neeraj Kannaujiya being the daughter of Ram Laut Kannaujiya was found wandering in the suspicious condition and when they were intercepted, then the victim Neeraj Kannaujiya as well as juvenile apprised the police personnel that they were not willing to go to their respective houses, as they wanted to live together. An FIR was also lodged by the complainant on 16.1.2020, which culminated into registration of a Case Crime no.0009 of 2020, wherein it was alleged that UPT report of victim was found to be positive, meaning thereby that she was pregnant and when the Statement was recorded under Section 161 CrPC on 17.1.2020, then it revealed that she is in love with revisionist for past three months and she according to her sweet will is willing to marry the revisionist.

41. Learned counsel for the revisionist has sought to argue that the orders passed by both the courts below are without any application of mind, as the orders rejecting the bail / release application of the revisionist has been passed without any basis or material available on record.

42. In order to buttress the said submission, learned counsel for the revisionist has drawn the attention of this Court towards the report of District Probation Officer dated 6.8.2020, so as to contend that the said report itself is contradictory and further there is nothing adverse found against the juvenile revisionist, particularly in view of the fact that the observations so given in the report are too general in nature and not being specific and further contradictory also.

43. Countering the said submission, learned A.G.A, who appears for the State has argued that the orders under challenge do not suffer from any illegality, as they have been passed within the four-corners of Section 12 of the J.J. Act, 2015.

44. The relevant observations made in report dated 6.8.2020 of the District Probation Officer is as under: -

"सामाजिक जांच रिपोर्ट
कानून का उल्लंघन करने वाले बच्चों के लिए
क्रम संख्या.....
किशोर न्याय बोर्ड, गोरखपुर
(पता) को प्रस्तुत।
परिवीक्षा अधिकारी/ स्वैच्छिक / गैर-सरकारी संगठन शशीकान्त
चौहान (व्यक्ति का नाम)
प्राथमिकी संख्या 09/20

धारा के अंतर्गत 376 IPC व 5/6 पाक्सो एक्ट

पुलिस स्टेशन खजनी

तथाकथित अपराध की प्रकृतिः लघु गंभीर जघन्य

1. नाम **विशाल कन्नौजिया**

2. आयु/ तारीख/ जन्म का वर्ष **01.04.2003**

3. लिंग **पुरूष**

4. जाति **धोबी (कन्नौजिया)**

5. धर्म **हिन्दू**

6. पिता का नाम **राजेश**

7. माता का नाम **प्रियंका**

8. संरक्षक का नाम **राजेश (पिता)**

9. स्थायी पता **ग्रा० व पो० बसिया खोर, था०-खजनी, गोरखपुर**

10. पते का लैंडमार्क **दुर्गा माता मन्दिर से पश्चिम ओर खंडजा मार्ग के अंत में मकान।**

11. पिछले आवास का पता **उपरोक्त**

12. पिता/ माता/ पारिवारिक सदस्य की सम्पर्क सूत्र

9935823290

13. क्या बाल विकलांग है : **नहीं**

14. .....

15. .....

16.....

17.....

18. बालक तथा परिवार की धर्म के प्रति अभिवृत्ति **सामान्य**

19. वर्तमान जीवन- निर्वहन की परिस्थितियां **आर्थिक स्थिति कमजोर है।**

20. महत्व के अन्य कारण यदि कोई हो **कोई नहीं**

21. (1) बालक की आदतें (जैसा भी लागू हो करें)

(क) (ख)

(क) धूमपान (छ) टी०वी०/ फिल्में देखना

(ख) शराब का सेवन (ज) अंतरंग / बहिरंग खेल खेलना

(ग) स्वापक का प्रयोग (निर्दिष्ट करें) (झ) पुस्तकें पढ़ना

22. घर में अनुशासन के प्रति बालक की राय तथा प्रतिक्रिया

सकारात्मक

23.....

24.....

25.....

26.....

27. बालक के प्रति कक्षा के साथियों की अभिवृत्ति (रवैया) **मित्रवत**

28. बालक के प्रति शिक्षकों तथा साथियों की अभिवृत्ति (रवैया) **मित्रवत**

29. स्कूल छोड़ने के कारण (हां/ नहीं करें जैसा भी लागू हो)

30.....

31. व्यासायिक प्रशिक्षण, यदि कोई हो **कोई नहीं।**

32. अधिकांश मित्र

(I) **शिक्षित**

(II).....

(III) **उसी आयु वर्ग के**

33. बालक मित्रों के प्रति अभिवृत्ति **मित्रवत**

34.....

35. बालक के प्रति पड़ोसियों का प्रेक्षण किशोर सीधा साधा

36. पड़ोस के बारे में प्रेक्षण (बालक पर पड़ोस के प्रभाव का आंकलन करने के लिए) किशोर का पास पड़ोस का परिवेश **सामान्य व अनुकूल है।**

37.....

38. क्या बालक किसी अपराध पीड़ित है। **नहीं**

39. क्या बालक का इस्तेमाल किसी गैंग द्वारा अथवा वयस्कों द्वारा अथवा वयस्कों के समूह द्वारा किया जा रहा है अथवा बालक को स्वापक के वितरण के लिए इस्तेमाल किया जा रहा है। **नहीं**

40. क्या बालक की प्रवत्ति घर से भागने की है यदि कोई हो **नहीं**

41. वे परिस्थितियां जिनमें बालक को गिरफ्तार किया गया था **सामान्य**

42.....

43. तथाकथित अपराध का कारण :

(v) हम उम्र समूह का प्रभाव

44. क्या बालक को पहले भी किसी अपराध के लिए गिरफ्तार किया गया है, यदि

हां तो बाल देखरेख संस्था में आवास सहित ब्यौरा दें। **नहीं**

45.....

46.....

46.....

47.....

48. बालक की मानसिक स्थिति : **सामान्य**

49. अन्य कोई टिप्पणी कोई **नहीं।**

<u>जांच का परिणाम</u>

1. भावनात्मक कारण कोई विशेष भावनात्मक कारण नहीं

2. शारीरिक स्थिति सामान्य

3. बुद्धिमता सामान्य

4. सामाजिक तथा आर्थिक कारक किशोर की आर्थिक स्थिति कमजोर है।

5. समस्याओं के सुझाए गए कारण किशोर के अल्पवयस्क होने के कारण जल्दी भावनाओं में वह जाना।

6. अपराध के कारणों/ कारणों में अंशदायी कारकों का विश्लेषण किशोर पर हम

उम्र समूह का अधिक प्रभाव है तथा माता पिता का नियंत्रण कम प्रभावी है।

7.....

8. परिवीक्षा अधिकारी/ बाल-कल्याण अधिकारी/ सामाजिक कार्यकर्ता द्वारा

पुनर्वास के सबंध में सिफारिश -

इस प्रकार जाँच से यह स्पष्ट होता है कि किशोर पर माता पिता का नियन्त्रण प्रभावी नहीं है तथा किशोर पर हम उम्र समूह का प्रभाव अधिक है। पाँच के दौरान किशोर के परिजनों की कोई आपराधिक पृष्ठभूमि प्रकाश में नहीं आयी। पड़ोसियों के अनुसार किशोर का स्वभाव सीधा सादा है वह बहकाने में आकर व भावनाओं में बहकर उक्त अपराध में शामिल हुआ है, चूंकि तथाकथित पीड़िता के बारे में पहले भई उल्टी सीधी बातें सुनने में आयी है। यह प्रकरण F I R किये जाने के पूर्व बाल कल्याण समिति गोरखपुर के समक्ष लाया जा चुका है जिसकी वाद संख्या - 891/12/2019 है महोदय संज्ञान में लेना चाहें। किशोर को जमानत पर मुक्त किये जाने की दशा में उसके किसी आपराधिक संगठन में शामिल होने की संभावना से इंकार नहीं किया जा सकता। जमानत पर मुक्त होने की स्थिति में किशोर की नैतिक, भौतिक व मनोवैज्ञानिक हानि से भी इंकार नही किया जा सकता। माता-पिता के प्रभावी नियन्त्रण के अभाव मे न्याय के उद्देश्यों के विफल होने की संभावना है।

अतः जाँच आख्या महोदय की सेवा में सादर प्रेषित है।"

45. Thus the District Probation Officer has given a negative report against the juvenile, which became a ground for non-release of juvenile, while observing that there is no control of the parents over the juvenile and he is in the influence of the persons, who belong to same age though there is no criminal antecedents and according to the neighbours, the juvenile is plain and simple. However, juvenile committed the said crime on account of the lack of control of his emotions and hence there is a likelihood that the juvenile may after release come in association with any known criminal and further in case, he is released, he is likely to be exposed to moral, physical or psychological danger and thus in the absence of any control of the parents over the juvenile, there are chances that the very object of releasing the juvenile on bail would be defeated.

46. This Hon'ble Court in the case of ***Sanjay Chaurasiya vs. State of U.P,*** **2006 CrLJ 2957** had the occasion to consider the general observations so sought to be made by the

District Probation Officer, which became a ground for rejection of bail / release application. In paragraph-10, this Court has observed as under: -

"In case of the refusal of the bail, some reasonable grounds for believing abovementioned exceptions must be brought before the court concerned by the prosecution but in the present case, no such ground for believing any of the abovementioned exceptions has been brought by the prosecution before the Juvenile Justice Board and appellate court. ***The appellate court dismissed the appeal only on the presumption that due to commission of this offence, the father and other relatives of other kidnapped boy had developed enmity with the revisionist, that is why in case of his release, the physical and mental life of*** *the revisionist will be in danger and* ***his release will defeat the ends of justice*** *but substantial to this presumption no material has been brought before the* ***appellate court and the same*** *has not been discussed and only on the basis of the presumption, Juvenile Justice Board has refused the bail of the revisionist which is in the present case is unjustified and against the spirit of the Act. It appears that the impugned order dated 27-6-2005 passed by the learned Sessions Judge, Meerut and order dated 28-5-2005 passed by the Juvenile Justice Board are illegal and are hereby set aside."*

47. As already noticed earlier, deliberately the word "reasonable ground" "record the reasons" and "circumstances" has been employed in the proviso appended to sub-section (1) of Section 12 of the Juvenile Justice Act, 2015, in order to eliminate the chances that without assigning any appropriate reasons, the bail/ release application should not be rejected. Nonetheless, the report so submitted by the District Probation Officer cannot be accepted in routine manner on the ground that it has merely been filed, however, independent application of mind has to be made so as to find out that is there was any valid reason for rejecting the bail/ the release application, particularly in view of the fact that once the report of the District Probation Officer itself is general in nature. In nutshell, once jurisdiction is conferred upon the courts of law to pass an order either rejecting or allowing the bail/ release application, then it envisages a pre-condition that before passing any orders on the bail / release application, there has to be an independent application of mind that should be reduced in writing by way of an order.

48. The report of the District Probation Officer cannot be read in isolation rather to the contrary, the same is to be read in totality. The final conclusion so drawn by the District Probation Officer in its report dated 6.8.2010 cannot be held to be a gospel truth, as the reasons in coming to the conclusion have to be seen as it is not a case, wherein a criminal trial is being sought to be proceeded with, as the same is only for a limited purpose in order to see the over all conduct and the future of the delinquent, if in case, he is allowed to go set free on the strength of bail/ release.

49. I find that the report of the District Probation Officer is a general report being filed as an empty formality just in order to submit a report for the sake that it has to be submitted. The observations as well as the inputs, which became the basis for not recommending for grant of release/ bail, which too general and it cannot be a ground to negate the claim of the juvenile.

50. There is another aspect of the matter, which is to be dealt with with regard to the fact that under Section 12 of the Juvenile Justice Act, 2015, the gravity of offences are not to be seen, as in the matter of normal bails, either being anticipatory or regular bails, which are to be granted under the provisions of Criminal

Procedure Code, the gravity of offences and charges have to be seen.

51. However, in the bail / discharge application under Juvenile Justice Act, 2015, there is complete departure of the same as the ingredients as mentioned under Section 12 of the Juvenile Justice Act, 2015 are to be adhered to in this regard.

52. The Hon'ble Rajesthan High Court in the case of ***Prakash vs. State of Rajesthan*** **2006 CrLJ 1373** in paragraphs-9 and 10 has observed as under: -

"9. At the time of consideration of bail under Section 12 of the Act, the merit or nature of offence has no relevancy. The language of Section 12 of the Act, using the word "shall" is mandatory in nature and providing non-obstante clause by using the expression "notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time-being in force be released on bail" shows the intention of the Legislature to grant bail to the delinquent juvenile offender by releasing him on bail who is arrested or produced before a Court, however, with exception to release him on bail if there are reasonable grounds for believing that his release him on bail if there are reasonable grounds for believing that his 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. It is for the prosecution to bring on record such material while opposing the bail and to make out any of the grounds provided in this section which may persuade the Court not to-release the juvenile on bail.

10. The Act is beneficial and social-oriented legislation which needs to be given full effect by all concerned whenever the case of juvenile comes before them. In absence of any material or evidence of reasonable grounds to believe that the delinquent juvenile, if release on bail, is likely to come into association with any known criminal or expose him to moral, physical or psychological danger, it cannot be said that his release would defeat the ends of justice. On the contrary, keeping in view the legislative intent in enacting the Act, the juvenile offender deserves to be released on bail."

53 . In the case of ***Shiv Kumar @ Sadhu Vs. State of U.P,*** **2010 (1) ACC 616**, this Court in paragraphs-6 and 7 has observed as under: -

"6. Gravity of the offence has not been mentioned as a ground for rejection of bail in Section 12 of the Act.

The learned Appellate Court dismissed the appeal on the ground that the nature of offences are grave and if the revisionist Shiv Kumar is released on bail, he may tamper with the prosecution evidence by intimidating or terrorizing the witnesses.

7. From perusal of the lower court record, it transpires that there was nothing to show any material or any substance for believing that the release of the revisionist is likely to bring him into association with any known criminal or expose him to moral, physical or psychological change or that his release would defeat the ends of justice as provided by Section 12 of the Act. The learned courts below passed the impugned orders are not in consonance with the provision of Section 12 of the Act.

Considering the peculiar facts and circumstances of the case and in view of the above discussions, the revision is allowed and the impugned order dated 24.7.2009 passed by the Special Judge, SC/ST Act, Faizabad as well as impugned order dated 25.6.2009 passed by Juvenile Justice Board, Faizabad are set aside."

54. Further in the case of ***Rahul Patel Vs. State of U.P. reported in 2018 (1)JIC357,*** this

Hon'ble Court in paragraph-8 has observed as under: -

"The Apex Court in a catena of judgements has constantly held that gravity of the offence is not a ground to deny bail to a juvenile accused. Unless the conduct of the accused is such to indicate that in all likelihood, after being released on bail, the juvenile-accused will indulge into more crimes. If there are no imminent chances of his repeating the crime, bail to a juvenile should not be ordinarily refused. "

55. This Court in the case of ***Mangesh Rajbhar Vs. State of U.P., 2018(6) ADJ*** in paragraphs- 23, 27, 28, 29, 30 and 31 has held as under: -

"23. No doubt, generally speaking bail is the rule in the case of a juvenile, even after the enforcement of the present Act, in cases of juveniles below the age of 16 years, and, burden is on the prosecution to show that on the parameters specified in the proviso to Section 12 (1) of the Act bail should be denied to a juvenile. In this connection reference be made to an order passed by this Court in the case of Raja (minor) v. State of U.P. in Criminal Appeal No. 1113 of 2017 decided on 4.5.2017. In this case, the Court has endorsed the view that burden is on the prosecution to bring the case within one of the exceptions under the proviso to Section 12(1) relying on an authority of the Hon'ble Supreme Court in Jitendra Singh vs. State of U.P.3 which makes a clear statement of the law on a reading of paragraph 5 of the judgment in Raja (minor) (supra).

"39. The provision dealing with bail (Section 12 of the Act) places the burden for denying bail on the prosecution. Ordinarily, a juvenile in conflict with law shall be released on bail, but he may not be so released if the reappear 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."

24. ...

25. ...

26. ...

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."

56. Further in the case of **Sumit Kumar vs. State of U.P. in Criminal Revision No. 915 of 2017** decided on **13.4.2018,** this Court after following the judgment of Mangesh Rajbhar in paragraph-16 has held as under: -

"16. Seen in the context of the above legal position, the case of the revisionist though falls in the category of a heinous offence and is certainly one which endangers the safety and security of children in society, but at the same time it is a case where the child in conflict with law stands charged with an offence where nothing has been proved so far. The prima facie complicity of the revisionist in the crime has not at all been looked into as a factor to assess whether releasing him on bail would defeat the ends of justice. From what appears on record it is a case of circumstantial evidence, where the only evidence is that of last seen. Before the courts below or before this Court no further circumstance to connect the revisionist to the crime has been brought on record, like recovery of anything related to the victim. The social investigation report on the other hand does not show that the past conduct of the child is in any manner such where he has been involved in any crime or that he requires supervision in a Child Protection Home away from his family. It is further to be considered that the child has already suffered incarceration of about one and

a half years in whatever kind of custody, and, the maximum period for which he could be confined is three years. He has done half of the said period that he would have undergone even if found guilty."

57. In the case of ***Deepesh Bhati Vs. State of U.P.*** **in Criminal Revision no. 177 of 2018,** decided on **16.8.2018** in paragraphs-14, 15 and 16, this Court observed as under: -

"14. A reading of the Social Investigation Report, which is the most wholesome input, apart from the evidence relating to the crime of which the revisionist stands charged, does not at all suggest that there is any kind of likelihood of exposure of the child to any moral, physical or psychological danger, in the event of release. It also does not suggest that in the event of release there is likelihood of the revisionist coming into contact with any known criminal. There is no input from the police also to that effect. Now, so far as the last and the most important premise of the disentitling grounds on which bail may be refused to a juvenile is concerned, that is to say, the contingency that release of the juvenile would lead to "ends of justice being defeated", this Court finds that so far as the offence is concerned no doubt it is heinous. It involves rape of a 10 years old girl who is a neighbour. Not much can be said about the veracity of the allegation at this stage that still awaits a test at the trial before the Juvenile Justice Board. But not much has been said either about a reason for a false implication, at least in these proceedings.

15. This disentitling ground is to be assessed, not just by the heinous nature of the offence charged but also taking into account other factors, that include the specific need for supervision or intervention, circumstances as brought out in the Social Investigation Report and the past conduct of the child, all of which are relevant under Section 18 of the Act, as held in Mangesh Rajbhar (supra). In the present case, this Court finds that prima facie, and, not by way of a finding as already said, the charge is heinous, the manner in which it has been committed also shows maturity of mind and an understanding of the consequences of the action. At the same time there is absolutely nothing in the Social Investigation Report which may suggest that there is specific need for supervision and intervention, or anything in the circumstances, so to speak, that may necessitate institutional incarceration.

16. It is also of relevance that the child does not have anything in his past conduct to show that granting freedom to him would be a bad decision for the society. Rather, the circumstances of the revisionist's family show that for him restoration of his liberty and the company of his family might remove those early aberrations in his psyche which in institutional incarceration, in the solitude of an atmosphere where he finds himself a stranger, might become magnified. Then there is also this fact, so far as the decision to release the revisionist on bail is concerned, that the maximum period of detention authorized by law, even if the revisionist were held guilty, is three years of institutional incarceration, of which he has done 16 months, that is to say, a little less than half of the said period. Thus, considering the overall facts and circumstances, this Court finds that in the entirety of the circumstances of the case, which includes the offence charged and various other factors relevant under the law, the orders impugned denying bail to the revisionist deserve to be set aside and reversed."

58. Recently, this Court reiterated the law as laid down in the aforesaid decisions and has delivered the judgment dated 22.10.2020 in **Criminal Revision No. 1328 of 2020,** ***Sahil Vs. State of U.P.,*** wherein this Court observed as under: -

"A perusal of the said provision show that bail for a juvenile, particularly, one who is

under the age of 18 years, is a matter of course and it is only in the event that his case falls under one or the other disentitling categories mentioned in the proviso to sub-Section (1) of Section 12 of the Act that bail may be refused. The merits of the case against a juvenile acquire some relevance under the last clause of the proviso to sub-section (1) of Section 12 that speaks about the ends of justice being defeated. The other two disentitling categories are quite independent and have to be evaluated with reference to the circumstances of the juvenile. Those circumstances are to be gathered from the Social Investigation Report, the police report and in whatever other manner relevant facts enter the record.

What is of prime importance in this case is that the juvenile, who is a young boy, has no criminal history. There is nothing said against the juvenile, appearing from the Social Investigation Report that may show him to be a desperado or misfit in the society. The two courts below have held the juvenile disentitled to bail on account of his case falling under each of the three exceptions enumerated in the proviso to sub section (1) of Section 12, for which no reason has been indicated. That finding, in both the orders impugned, is based on an ipse dixit, in one case of the judge and in the other of the Board. Even if it be assumed that the offence was committed in the manner alleged, it would be rather strained logic to hold that release of the juvenile on bail would lead to the ends of justice being defeated. Both the courts below have also overlooked the statement of the victim recorded under Section 161 and 164 CrPC and further the courts below have also not considered the radiological age of the victim as per the medical report.

This Court in the case of Shiv Kumar alias Sadhu Vs. State of U.P. 2010 (68) ACC 616(LB) was pleased to observe that the gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile.

After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also in the absence of any convincing material to indicate the possibility of tampering with the evidence and in view of the 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 UP and another, (2018) 3 SCC 22 and the view taken by the Apex Court in the cases of Kamal Vs. State of Haryana (supra), Takht Singh Vs. State of Madhya Pradesh (supra) and Shiv Kumar alias Sadhu Vs. State of U.P. (supra)., this Court is of the view that the present criminal revision may be allowed and the revisionist may be released on bail.

In the result, this revision succeeds and is allowed. The impugned judgment and order dated 09.06.2020 passed by Additional Session Judge/ Special Judge, POCSO Act, Azamgarh dismissing the Criminal Appeal No.14 of 2020, filed under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "the Act') and affirming an order of Juvenile Justice Board, Azamgarh dated 18.12.2019 refusing the bail plea to the revisionist in Case Crime No. 43 of 2019, under Sections 376-D, 504, 506, 120-B I.P.C. and Section 3/4 of P.O.C.S.O. Act and Section 3(2)(5) of SC/ST Act, Police Station Bilariyaganj, District Azamgarh, are hereby set aside and reversed.The bail application of the revisionist stands allowed."

59. In view of the proposition of law laid down consistently by the Hon'ble Apex Court, this Court as well as other Courts an inescapable conclusion is drawn that while deciding a bail or release application of a juvenile, the gravity of offence/ charge are not to be seen, however what is to be noticed is that in case the juvenile is released, then he may not get associated with the hardened criminal or the juvenile is likely to be

exposed to moral, physical or psychological danger or the very purpose of releasing him gets defeated.

60. This Court while exercising the powers under Section 102 of Juvenile Justice Act, 2015 cannot embark any inquiry upon the gravity of the allegations or the charges/ offences and even cannot not make any comment with regard to what transpired on 28.12.2019. Court is only concerned with the fact that whether both the courts below while passing the order under challenge have taken into account, the ingredients for grant of bail or rejecting the bail/ release as envisaged under Section 12 of the Juvenile Justice Act, 2015. This Court finds that the observation so made by the District Probation Officer is too far to be a ground to reject the bail/ release application. The report submitted by the District Probation Officer is to be considered in the light of the Statutory Provision under Section 12 of the Juvenile justice Act, 2015, so as to block the chances of the revisionist juvenile to be released on bail on the ground that there are sufficient material available on record to show that the release is likely to bring the juvenile in association with any known criminal or expose the said person to moral, physical or psychological danger and release would defeat the ends of justice.

61. Even otherwise, the basic object of engrafting of the provisions under Juvenile Justice Act, 2015 are reformative and in case, a punitive theory is sought to be adopted, that too in absence of any negative material available on record, then the very object of Section 12 of J.J. Act, 2015 would become redundant.

62. Broadly speaking, the orders under challenge are the orders, which are totally silent with regard to the fact that as to how and under what circumstances, the release/ bail of the juvenile will defeat the purpose of Section 12 of the Juvenile Justice Act, 2015.

63. Needless to point out that the juvenile is in the observation home since 22.7.2020. Additionally, there is nothing on record to show that there is any criminal antecedents either of the juvenile or his family and rather admittedly, from the perusal of the report of the District Probation Officer itself shows that there is nothing adverse, but presumptions have been drawn that in case, he is released, then the same would defeat the ends of justice.

64. At this juncture, it would be appropriate to refer to the judgment of the Hon'ble Apex Court in the case of ***Data Ram Singh vs. State of U.P. and another***, **2018(3) SCC 22,** wherein the Hon'ble Apex Court in paragraph-1 has held as under: -

"A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society."

65. Resultantly, this revision succeeds and is **allowed**. The impugned judgment and order dated 26.8.2020 passed by the Principal Judge, Juvenile Justice Board, Gorakhpur in Case Crime no. 09 of 2020 (State Vs. Vishal Kannaujiya), under Section 376 IPC read with

Section 5/6 of the POCSO Act, as well as order dated 27.11.2020 passed by the Addl. Sessions Judge / Sepcial Judge (POCSO Act), Court No.1, Gorakhpur in Criminal Appeal No. 62 of 2020, Vishal Kannaujiya Vs. State of U.P. and others refusing the bail to the revisionist are hereby set aside and reversed. The bail application of the revisionist stands **allowed.**

66. Let the revisionist, Vishal Kannaujiya through his natural guardian/ father Rajesh Kannaujiya be released on bail in Case Crime No. 9 of 2020, under Sections 376 read with Section 5/6 of P.O.C.S.O. Act, Police Station Khajani, District Gorakhpur 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, Ballia subject to the following conditions:

(i) That the natural guardian/ father Rajesh Kannaujiya will furnish an undertaking that upon release on bail the juvenile will not be permitted to go 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) That the father will further furnish an undertaking to the effect that the juvenile will pursue his study at the appropriate level, which he would be encouraged to do besides other constructive activities and not allowed to waste his time in unproductive and excessive recreational pursuits.

(iii) The revisionist and his father Rajesh Kannaujiya will report to the District Probation Officer on the first Monday of every calendar month commencing with the first Monday of January, 2021 and if during any calendar month the first 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, Gorakhpur on such periodical basis as the Juvenile Justice Board may determine.

(2021)12ILR A144
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Criminal Revision Defective No. 393 of 2021

Buddhu ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sanjay Kumar

Counsel for the Opposite Parties:
G.A., Nand Lal Pandey, Rajneesh Singh, Ujjwal Pandey, Vivek Tiwari

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 161 , 164 & 401 - Indian Penal Code, 1860 - Sections 363 , 366 , 376 & 506 - The Juvenile Justice (Care and Protection of Children) Act 2000 - The Juvenile Justice (Care and Protection of Children) Act, 2015 - Sections 2(5) , 2(12) , 37, clauses (a) to (h) of Sub-Section (1) of Sections 37 ,94 (2) - claim of juvenility - first preference or the first determining factor that should be looked into is the educational certificate of the child - In section 94 (2)(i) of 2015 Act both the date of birth certificate from the school as well as the matriculation or equivalent certificate placed in the same category.(Para - 16,17)

Revisionist's daughter kidnapped by opposite party no.2 - lodged F.I.R. - Investigating Officer produced minor daughter of revisionist before Chief Judicial Magistrate - application for custody of daughter - lawful guardian of her daughter - summoned Head Master of Primary School - corroborated - as per school record date of birth of daughter/ victim was 08.03.2006 - order against correct position on law as

in the new Juvenile Justice Act, 2015 - revision filed by revisionist .

HELD:-Educational certificate showed date of birth of victim as 08.03.2006 and therefore at the time of filing of F.I.R. and at the time of moving of the application by the revisionist she was not 18 years of age, and not major. Chief Judicial Magistrate exceeded his jurisdiction and misapplied the law without correctly appreciating the new Act . Matter remanded back to pass a fresh order after due consideration of law and statutory provisions as notified by the Act of 2015. (Para - 18,19)

Revision disposed of.(E-7)

List of Cases cited:-

1. Vandana @ Bandana Saini & anr. Vs St. of U.P. & 5 ors. , Habeas Corpus Writ Petition No.390 of 2021

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

3. Mahadeo Vs St. of Mah., 2013 (14) SCC 637

4. St. of M.P. Vs Anoop Singh, 2015 (7) SCC 773

5. Independent Thought Vs U.O.I., 2017 (10) SCC 800

6. Subhani & ors. Vs St. of U.P. & ors., S.L. P. No.8881 of 2018, Civil Appeal no. 4532 of 2018

7. Jitendra Arora & ors. Vs Sukriti Arora & ors., 2 JIC 193 (SC)

8. Rajjak Ahmad Vs St. of H.P., Criminal Appeal No.1395 of 2005:

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

10. Mahadev Vs St. of Mah. & anr. ,2013(14) SCC 637

11. M.P. Vs Anoop Singh, 2015 (7) SCC 773

12. Suhani Vs St. of U.P., Civil Appeal No.4532 of 2018 , 2018 SCC Online (Supreme Court) 781

13. Jitendra Arora & ors. Vs Sukriti Arora & ors. , 2017 (3) SCC 726

14. Razak Mohd Vs St. of H.P., 2018 (9) SCC 248

15. Sanjeev Kumar Gupta Vs St. of U.P., 2019 (12) SCC 370

16. Parag Bhati Vs St. of U.P. ,2016 (12) SCC 744

17. Ramdev Chauhan Vs St. of Assam ,2001 (5) SCC 714

18. Ashwini Kumar Saxena Vs St. of M.P. ,2012 (9) SCC 750

19. Abu Zar Hossain Vs St. of Bengal ,2012 (10) SCC 489

20. Akbar Sheikh Vs St. of Bengal, 2009 (7) SCC 415

21. Pawan Vs St. of Uttaranchal ,2009(15) SCC 259

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard learned counsel for the revisionist and learned A.G.A. for the State.

2. This Revision has been filed by the revisionist under Section 401 Cr.P.C. against the order dated 05.12.2020 passed by the learned Chief Judicial Magistrate Bahraich in Case Crime no.715 of 2020 under Sections 363 and 366 I.P.C., Police Station Nanpara, District Bahraich.

3. It has been submitted by learned counsel for the revisionist that the revisionist's daughter was kidnapped by the opposite party no.2 on 16.11.2020 when she was aged about 14 years. The revisionist lodged an F.I.R. on 16.11.2020. During investigation, the Investigating Officer produced the minor daughter of the revisionist before the Chief Judicial Magistrate Bahraich. The Revisionist gave an application before the Chief Judicial Magistrate Bahraich for custody of daughter because he was the lawful guardian of her daughter. The date of birth of the daughter was 08.03.2006 as per record of the School. Learned Chief Judicial Magistrate in determining the age of the daughter of the revisionist summoned the Head Master of

Primary School who in his statement before the learned trial court corroborated that as per the school record, the date of birth of the daughter/ victim was 08.03.2006. Despite such statement made by the Head Master and availability of the certificate issued from the School, the Chief Judicial Magistrate Bahraich passed the order dated 05.12.2020. Such order is against the correct position on law as in the new Juvenile Justice Act, 2015, Section 94 clearly provides the parameters to determine the age of a child in need of care and protection.

4. It has been argued that learned trial court has cited judgements for coming to the conclusion that the daughter of the revisionist was major which are not applicable as such judgements were rendered before the Juvenile Justice Act, 2015. Under the new Act, the Date of Birth certificate from the School or the Matriculation or equivalent certificate from the concerned Examination Board and in absence thereof, the birth certificate issued by Municipal Authorities would be the determining factor and in absence of such certificate being available, the age has to be determined by ossification test or any other advanced medical test.

5. Learned counsel for the revisionist has also placed reliance upon a Division Bench judgement rendered by this Court in Habeas Corpus Writ Petition No.390 of 2021: *Vandana @ Bandana Saini and Another Vs. State of U.P. and five others*, decided on 30.06.2021, wherein the petitioner no.1 through her alleged husband petitioner no.2, had filed the Habeas Corpus petition saying that she had been wrongly sent to the custody of Superintendent of Government Women's Asylum Khuldabad, District Prayagraj by an order dated 25.12.2020 passed by the Judge, Child Welfare Committee, Fatehpur. The medical report had stated the age of the detenue to be as 19 years and thus it was claimed that she was major and that she had married the petitioner no.2 in a Temple in Gujarat and was living with him before she was sent to the Government Women's Asylum against her wishes. It was alleged that School Leaving Certificate had wrongly showed her Date of Birth as 02.04.2004. The court had come to the conclusion that the School Leaving Certificate of the detenue showed her Date of Birth as 02.04.2004 and under Section 94 (2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 as amended, the first preference has to be given to an educational certificate in such matters. Juvenile has been defined as Section 2(5) of the Act as meaning a child below 18 years. Under Section 37 of the Act, the Child Welfare Committee on being satisfied through enquiry that child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature, pass orders as provided in clauses (a) to (h) of Sub-Section (1) of Section 37 of the Juvenile Justice Act. The Court considered several judgements of the Supreme Court viz. *Jarnail Singh Vs. State of Haryana*; 2013 (7) SCC 263, *Mahadeo Vs. State of Maharashtra*; 2013 (14) SCC 637, and *State of Madhya Pradesh Vs. Anoop Singh*; 2015 (7) SCC 773, as also the judgment rendered by Hon'ble Supreme Court in the case of *Independent Thought Vs. Union of India*; 2017 (10) SCC 800, to observe that once the detenue has been found to be a child as definded under Section 2(12) of the Juvenile Justice Act, as per the Date of Birth in Educational Certificate which is 02.04.2004, she would fall in the category of child in need of care and protection, and hence the order passed by the Child Welfare Committee placing a minor child in the Government Women's Asylum, Khuldabad, Prayagraj, cannot said to be illegal. The prayer for issuance of Habeas Corpus was rejected.

6. This Court has considered the submissions made by learned counsel for the revisionist and gone through the order dated 03.12.2020 where learned Chief Judicial Magistrate after referring to the Educational

Certificate showing her date of birth as 08.03.2006, referring to the opinion of the Chief Medical Officer Bahraich that she was around 19 years of age and to the victim's statement herself saying that she was of 20 years of age; had directed the Principal of the Primary School in which the victim had studied to appear and give his evidence. After such evidence was given, the matter was placed before the learned C.J.M. again on 05.12.2020 where he referred to the application moved by the father i.e. the Revisionist herein praying for release of the girl child to him as she was a minor. Learned Additional Chief Judicial Magistrate referred to the statements having been taken of the victim under Section 161 and 164 Cr.P.C. as well as medical examination having been done on an application being made by one Kailash has said in the order impugned that on her own statement as well as on the medical certificate and on the basis of Adhar Card of the victim, she was major and she should be left on her own to decide for herself as to where she wanted to live. Learned Additional Chief Judicial Magistrate referred to the F.I.R. and also the statement made by the victim that she was living with the accused out of her own sweet will. Referring to the judgments rendered by Supreme Court in Civil Appeal no. 4532 of 2018: *Subhani and others Vs. State of U.P. and others*, S.L. P. No.8881 of 2018: *Jitendra Arora and others Vs. Sukriti Arora and others*, 2 JIC 193 (SC) and orders passed by Supreme Court again in Criminal Appeal No.1395 of 2005: *Rajjak Ahmad Vs. State of Himachal Pradesh;* decided on 23.08.2018, without mentioning the facts of such judgements and how they were applicable, the learned Additional Chief Judicial Magistrate observed that the victim was present in Court and looking to her physical and mental health she *prima facie* appearred to be major as also from her statement under Section 161 and 164 Cr.P.C. She had given very mature views regarding her liking for the accused and looking to her medico legal certificates and Aadhar card showing her Date of Birth, the court was of the opinion that on the date of passing of the order, the victim was *prima facie* major. As such she was entitled to live with whoever she wishes and should be left alone.

7. The application filed by the father for custody of the victim was rejected by the learned Chief Judicial Magistrate Bahraich in the order impugned.

8. In *Jarnail Singh versus State of Haryana* 2013 (7) SCC 263 Supreme Court was considering the argument of the accused appellant that the prosecutrix had eloped with one of the accused voluntarily and had sexual intercourse consensually. The learned trial court and the High Court had found the prosecutrix to be a minor and therefore held the consent of a minor as inconsequential. In paragraph 22 of the judgement the Supreme Court observed -

"on the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of children) Rules 2007, (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under section 68 (1) of the Juvenile Justice (Care and Protection of Children) Act 2000. Rule 12 referred to here in above provides-

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 maybe, 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 30 days from the date of making the application for that purpose.

(2) the Court or the Board or as the case maybe, the Committee, shall decide the juvenility or otherwise of the juvenile or the child or as the case maybe, 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 enquiry 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 certificate, if available, and ***in the absence thereof,***

(ii) the date of birth certificate from the School (other than a Playschool)first attended; ***and in the absence thereof ;***

(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 the child, in case exact assessment of which cannot be done. The court or the Board or as the case maybe 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 the lower side within the margin of one year;

And, while passing orders in such cases shall, after taking into consideration such evidence as may be available,or the medical opinion, as the case maybe, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i),(ii),or (iii) *or in the absence where of,* clause (b) shall be the conclusive proof of the age as regards the child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of the offence, on the basis of any of the conclusive proofs specified in sub- rule (3); the Court or the Board as the case maybe, 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 the Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5)save and except where, further enquiry or otherwise is required, inter-alia in terms of section 7 -A , section 64 of the Act and the Rules, no further enquiry 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) of the Act, requiring dispensation of the sentence under the Act for passing appropriate orders in the interest of juvenile in conflict with the law."

The Supreme Court further observed in paragraph 23- *"Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view there is hardly any difference in so far as issue of minority is concerned, between a child in conflict with law, and a child who is victim of crime. Therefore in our considered opinion it would be just and appropriate to apply rule 12 of the 2007 rRules, to determine the age of the prosecutrix - - -. The manner of determining age conclusively has been expressed Sub rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12 (3). If, in the scheme of options postulated in Rule 12 (3) and option is expressed in a preceeding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of this Section Rule 12 (3) matriculation or equivalent certificate of the child concerned is the highest rated option.* In

case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12 (3) can be referred to and we suggest consideration of the date of birth entered in the school first attended by the child, in case such an entry of date of birth is available, the date of birth depicted parent is liable to be treated as final and conclusive, and no other material is to be relied upon only in the absence of such entry, Rule 12 (3)postulates reliance on birth certificate issued by the Corporation or a Municipal authority or a Panchayat. Yet again, if such a certificate is available then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12 (3) postulates the determination of age of the child concerned, on the basis of medical opinion.

The Supreme Court thereafter referred to the fact that the prosecutrix Had studied only up to class 3 and thereafter had left school and had started to do household work. The prosecution in the facts and circumstances of the case had endeavoured to establish age of the prosecutrix on the next available basis in the sequence of options expressed in rule 12 (3) of the 2007 Rules. The prosecution produced headmaster of the Government High School where the prosecutrix had studied up to class III. The headmaster had proved the certificate as having been made on the basis of school records indicating that the prosecutrix was born on 15 May 1977.

The Supreme Court further observed in paragraph 24 thus:- *"in the scheme contemplated under rule 12 (3)of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause. We are therefore of the view that the High Court was fully justified in relying on the aforesaid basis for establishing the age of the prosecutrix - - -. It would also be relevant to mention that under the scheme of Rule 12 it would have been improper for the High Court to rely on any other material including the Ossification test, for determining the age of the prosecutrix - - - "*. The deposition of the headmaster had not been contested therefore the date of the birth of the prosecutrix as given in the certificate issued from the School assumes finality. Accordingly it was clear that the prosecutrix was less than 15 years of age on the date of the occurrence in March 1993. The prosecutrix being a minor on the date of the occurrence, the conclusion as recorded by the High Court and by the trial court was unexceptional. The contention raised by the appellant accused that she had accompanied him of her own sweet will and had consensual sex with him would be clearly inconsequential as she was a minor.

9. In *Mahadev versus State of Maharashtra and another* 2013(14) SCC 637, the Supreme Court was considering the case of the appellant who was accused of kidnapping and rape of a minor girl. The Supreme Court referred to Rule 12 (3) of the Juvenile Justice (Care and Protection of Children) Rules 2007, and held it to be applicable to determine the age of the young prosecutrix/victim. The Appellant had been proceeded against for offences punishable under Sections 363, 376 and 506 IPC, and was punished having been found guilty by the Trial Court. The High Court by its judgement though confirmed the conviction of sentence for the offences under section 363 and 376 IPC, set aside the sentence for offence under Section 506 IPC. The prosecutrix was aged about 15 years at the time the offence was committed, she was studying in ninth standard, her father was a police head constable. The prosecutrix had a flair for music and used to participate in singing bhajans. The appellant who was a musician and a singer developed acquaintance with the prosecutrix due to her participation in Bhajan programmes along with him and he allured her

by stating that if she goes along with him to Hyderabad to prepare audio cassettes of a bhajans and songs she can make a lot of money. On 18.09.2005 the prosecutrix eloped with the appellant and after going to Hyderabad and from there to a relative's house at Kurnool, the appellant is alleged to have committed forcible sexual intercourse by confining her in the said place for a month and twenty days. During the said period the appellant is stated to have committed it in the said offence repeatedly. In support of the case the prosecution produced the headmistress of the School where the prosecutrix was admitted in fifth standard to prove the School Leaving Certificate which disclosed her date of birth as 20.05.1990, the appellant attempted to find fault with the said conclusion by making reference to evidence of the doctor who had examined the prosecutrix and who in her evidence stated that on her examination she could state that the age of the prosecutrix could have been between 17 to 25 years. The Ossification test was not done, and the age was ascertained only on the basis of opinion of the doctor. The Supreme Court on hearing the appeal referred to the Juvenile Justice (Care and Protection of Children) Rules 2007, in paragraph 12 and subsection (3) thereof and it observed that under Rule 12 (3)b it is specifically provided that only in the absence of alternative methods described under Rules A (i)(ii)(iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of age of a juvenile, the same yardstick can be rightly followed by the Courts for the purpose of ascertaining the age of a victim as well. The Supreme Court observed that there were certificates issued by the school in which the prosecutrix studied upto fifth standard and in the School Leaving Certificate issued by such school the date of birth had been clearly mentioned as 20.05.1990, and this document was also approved by the headmistress. Apart from that, the Transfer Certificate and the admission form maintained by the Primary School Latur, where the prosecutrix had her initial education also confirmed the date of birth as 20.05.1990. The Supreme Court observed that the reliance placed upon the said evidence by the Courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of occurrence was perfectly justified and dismissed the Appeal.

10. In State of *Madhya Pradesh versus Anoop Singh* 2015 (7) SCC 773, the Supreme Court observed that ossification test is not the sole criteria for determining the date of birth, once birth certificate and middle school certificate are available. Difference of two days in the date of birth mentioned in both certificates was a minor discrepancy and was immaterial. Reliance placed by the High Court upon the ossification test, because of such difference, for presuming that the prosecutrix was more than 18 years of age at the time of the incident and was a consenting party and thus no offence against the accused is proved, was erroneous. The two certificates issued by the educational institutions proved the age of the prosecutrix to be below 16 years on the date of the incident, proving her to be underage for consent. The conviction of the accused by the trial court was restored. The Supreme Court observed in paragraph 12: *"the case involves only one issue for the court to consider which was regarding the determination of the age of the prosecutrix."* The court referred to Mahadev versus State of Maharashtra, and quoted several paragraphs there from. The Supreme Court observed that the High Court should have relied firstly on the documents as stipulated under Rule 12 (3)(b) and only in their absence, the medical opinion should have been sought. The trial court had also dealt with this aspect of the ossification test but had noted that the ossification test is not the sole criteria for determination of the date of birth of the prosecutrix as certificate of birth by municipal corporation had been enclosed which had not been disproved.

11. The learned trial court has placed reliance upon judgement rendered in *Suhani versus state of U.P.*, Civil Appeal No.4532 of 2018 reported in 2018 SCC Online (Supreme Court) 781. In the said case the Supreme Court was considering the question of age of the petitioner. The father of the petitioner had lodged an F.I.R. under section 363 and 366 of the Indian Penal Code. It was contended before the High Court that the petitioner was about 19 years of age and that her statement was recorded under section 164 Cr.P.C. where she had stated that she had entered into wedlock with the petitioner number two. On behalf of the contesting respondent number three, a certificate issued by the Secondary School Examination showed the date of the birth of the petitioner as 25.09.2003. The High Court came to the conclusion that she was thirteen years and eight months old and on that basis treated her as a minor. However, she expressed an unequivocal desire not to accompany her parents. The High Court therefore directed that she should be allowed to reside in Nari Niketan, Allahabad. The Supreme Court on hearing the matter had directed that the petitioner number one should be examined by the concerned department of All India Institute of Medical Sciences, New Delhi. The radiological examination and final report /opinion Submitted showed x-rays of clavicle, sternum, pelvis, spine, wrist and elbow, shoulder and it was observed that all epiphysis at elbow, shoulder and wrist joints were fused, suggesting age of 16.5 years fusion of iliac crest epiphysis suggested her age to be 19+ -1 years, the medial end of the clavicle was not fused suggestive of age of 22 to 27 years. S1 vertebrae of sacrum was not fused with S2, suggestive of the age of 17 to 24 years. The final opinion of All India Institute of Medical Sciences as quoted by the Supreme Court in its order stated that the findings of physical, dental and radiological examination found the bone age of the petitioner number 1 to be between 19 to 24 years. The Court thereafter observed that on the basis of radiological examination the petitioner number one was a major and therefore the High Court had erred in directing her to stay in Nari Niketan, Allahabad. The petitioner number one admitted the factum of marriage with the petitioner number two who was the husband and therefore she was allowed to accompany him. The Supreme Court observed that she was an adult and she had gone voluntarily with the petitioner number two and had entered into wedlock therefore the proceedings initiated under Sections 363 and 366 of the Indian Penal Code against the petitioner number two stood quashed. It however clarified that the order Quashing the proceedings was passed to do complete justice.

12. The learned Trial court has also relied upon Jitendra *Arora and others versus Sukriti Arora and others* 2017 (3) SCC 726, which was a case relating to custody of a child/minor, under the Guardians and Wards Act. In the said case marriage between the appellant and the respondent was solemnised in India in 1999. The parties shifted to U.K. and lived there for some time. Two daughters are born to them. Later on relationship between them soured and a divorce petition was filed by the respondent in the Court in U.K. where she was granted a divorce decree. Thereafter the appellant shifted to India along with The elder daughter. The respondent had in the meantime obtained a British citizenship for the elder daughter and came to India and filed a Habeas Corpus petition in Punjab and Haryana High Court against the appellant and others which was allowed by the High Court directing the appellant to hand over the minor daughter to the custody of the respondent. Against the said judgement of the High Court, the father had filed the appeal before the Supreme Court. During the hearing of the case the Supreme Court had asked the respondent as to whether she could shift to India even temporarily for a year or so, so that the court could consider giving custody of the daughter to her for that period. However she

expressed her inability to do so and had insisted that the daughter should come to U.K. and live with her. The Court had interacted with the daughter in the chambers earlier and on the date of hearing also she was present in Court and in front of parents had unequivocally expressed that she was happy with the father and wanted to continue in his company and did not want to go with her mother. The Supreme Court observed that the child was 15 years of age and quite mature and she could fully understand what was in her best interest and therefore competent to take a decision for herself. There had been interactions with her by different Benches of the Supreme Court from time to time from which it was clearly discernible that she was in a position to weigh the pros and cons of the two alternatives and to decide as to which course of action is most suited to her. She had a developed personality and formed her opinion after considering all the attendant circumstances. The Court observed that her intellectual capacities had been adequately developed and she was able to solve problems and think about her future and understand the long-term effects of the decision which she was taking. She had been brought up in a conducive atmosphere and had achieved sufficient level of maturity. Further, in spite of giving ample chances to the respondent by giving temporary custody of the girl child to her, the respondent had not been able to win over her confidence. She had wanted the girl child to live with her in U.K. whereas the daughter had very categorically stated that she did not want to go to U.K. and wanted to live with her father. The court therefore observed that it could not take the risk of sending the child to a foreign country against her wishes which may prove to be a turbulent and tormenting experience for her which would not be in her interest therefore it decided that her welfare lay in the continued company of her father.

It is clear from the facts of the case as narrated here in above that the learned trial court had misplaced reliance upon the judgement which had nothing at all to do with section 363 and 366IPC. Quoting a judgement out of context and placing reliance thereupon is a hazardous course of action which should be avoided by the learned Trial Court.

13. The learned Trial Court has placed reliance also upon *Razak Mohd versus State of Himachal Pradesh*, 2018 (9) SCC 248, the accused was convicted by the High Court under Sections 363, 366 and 376 of the I.P.C. He had been acquitted by the learned trial court. The High Court in appeal had reversed the order. The Supreme Court observed that the evidence of the prosecutrix with regard to the incident of abduction and commission of rape stood contradicted by her previous statement in writing recorded under Section 161 of the Code of Criminal Procedure with which she was confronted with during trial. Apart from the above, it was evident from the evidence of other prosecution witnesses that the prosecutrix had remained with the appellant accused in the village for about 12 days until she was recovered, and that she had freely moved around with the appellant accused in the course of which movement, she had come across many people at different points of time. Yet, she did not complain of any criminal act on the part of the appellant accused. The Supreme Court observed that the focal point for decision would be the age of the prosecutrix in order to determine as to whether she was a major so as to give her consent. The court thereafter considered the evidence and material on record. The age of the prosecutrix had been sought to be proved by the prosecution by bringing on record School Admission form, and certificate issued by one teacher of a Government School. The teacher P.W.5, in her deposition had stated that the details mentioned by her in the school admission form had been obtained from the School Leaving Certificate issued by the government primary school. The certificate issued by the

Government Primary School on the basis of which details in the admission form had been filled up by P.W.5 has not been exhibited by the prosecution. The court observed that such a document which is only a consequential certificate issued on the basis of entries mentioned on the basis of an exhibit which was not proved could not be relied upon. Moreover in the opinion of the radiologist the prosecutrix was between 17 to 18 years. The Supreme Court observed that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way had to be allowed, yet in the totality of facts stated by it, read with the report of the radiological examination of the prosecutrix left the Court in doubt. The benefit of the doubt would go naturally in favour of the accused. The possibility of the prosecutrix being a consenting party could not be altogether ruled out. Therefore the order of the High Court convicting the Appellant accused was set aside by the Supreme Court.

14. This Court has considered the new Act of 2015 passed by the Legislature to obviate the confusion that was prevailing in the Society at large with regard to the factors that needed to be looked into for determining the age of the child. The Act of 2000 did not have any Section to determine the age of a child in need of care and protection or a juvenile in conflict with law. The Rules of 2007 did have such a provision under Rule 12 but not in the parent act of 2000. Section 94 was added with a specific purpose to do away with such confusion and to clarify the statutory provisions. It has referred to factors that needed to be looked into in sub section (2) which is being quoted hereinbelow in its entirety:-

"94. 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 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"

15. There is only one judgement considering Section 94 of the 2015 Act reported till date. In the case of *Sanjeev Kumar Gupta Vs. State of U.P., 2019 (12) SCC 370*; a Division bench of the Supreme Court was considering an appeal by the complainant against the High court's order declaring the Second respondent as juvenile at the time of the incident.

16. The claim of juvenility of the accused on the basis of matriculation certificate was allowed. The complainant had approached the Supreme Court mentioning that in the first

school that was attended by the appellant his date of birth was mentioned as 17.12.1995. The second respondent had also filed an application for obtaining a Driving License and Aadhar Card in which he had declared his date of birth is 17.12.1995. However, in the Matriculation certificate issued by the CBSE his date of birth was mentioned as 17.12.1998. The Supreme court asked the CBSE to produce its records and to file an affidavit indicating the basis on which the date of birth was recorded in the Matriculation certificate. The affidavit filed by the CBSE indicated that the date of birth in the records maintained by the CBSE was recorded purely on the basis of the final list of students forwarded by the Senior Secondary School the Respondent had attended at Shikohabad. The headmistress of the school had admitted before the Juvenile Justice Board Firozabad that date of birth of the student at the time of admission is noted as per information given by the parents and at the same time an affidavit is obtained, but in the said case no affidavit was obtained from the father. The father of the second respondent did not produce any record at the time of admission in respect of date of birth of the student. The Second Respondent had attended Senior Secondary School from the fifth standard till Matriculation. He had earlier attended another school till fourth standard and the School Register and Transfer Certificate from that School specifically contained an entry in regard to the date of birth of the Second Respondent as 17.12.1995.

The Supreme Court observed that the High Court had clearly erred in setting aside the well considered order passed by the Juvenile Justice Board and that of the Sessions Judge in Appeal. The Sessions Judge had relied upon observations made by the Supreme Court in *Parag Bhati versus State of U.P.* 2016 (12) SCC 744 and *Ramdev Chauhan versus State of Assam* 2001 (5) SCC 714 where the Supreme Court had observed that where there are two conflicting school documents produced, the credibility and authenticity of such such documents depend upon the circumstances of the case and a further enquiry would be required. The court considered that Section 7 -A of the 2000 Act and Rule 12 of the rules of 2007 had been interpreted by the Supreme Court in *Ashwini Kumar Saxena versus State of M.P.* 2012 (9) SCC 750 and observed that Ashwini Kumar Saxena was decided by two judges bench whereas subsequently three judges bench of the Supreme Court had dealt with the matter in *Abu Zar Hossain versus State of Bengal* 2012 (10) SCC 489. Both the Judgements were considered by a subsequent bench in Parag Bhati (supra).

In *Ashwini Kumar Saxena* (supra), the Court held that where it was found on enquiry that educational certificates were fabricated or manipulated, the Court could discard the date of birth as reflected therein. It was observed in paragraph 34 thus :

"34 - - there may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a Panchayat may not be correct. But the Court, the juvenile Justice Board or Committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go beyond behind the certificates to examine the correctness of those documents maintained during normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the Juvenile Justice Board or the Committee need to go for medical report for age determination. - - "

Subsequently, a three-judge bench in *Abu Zar Hussain* (supra) observed that "the documents referred to in Rule 12(a) (i),(ii),(iii) of the 2007 Rules shall definitely be sufficient for the *prima facie* satisfaction of the Court about the age of the delinquent - - the statement recorded under section 313 of the Code is too

tentative and will 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 and they must be *prima facie* accept or reject. In Akbar Sheikh Versus State of Bengal 2009 (7) SCC 415; and Pawan Versus State of Uttaranchal 2009(15) SCC 259, these documents were not found *prima facie* credible while producing the documents viz , School Leaving Certificate, marksheet and the medical report were treated sufficient for directing an enquiry and verification of the appellants age. If such documents *prima facie* inspire confidence of the Court, the Court may act upon such documents for the purpose of Section 7-A and order an enquiry for determination of the age of the delinquent. *"Directing an enquiry is not the same thing as declaring the accused to be a juvenile. In the former the Court simply records the prima facie conclusion while in the latter a declaration is made on the basis of evidence."* Hence the approach at the stage of directing an inquiry has to be more liberal. The Supreme Court observed in Sanjiv Gupta's case that the 2015 Act came into force on 15 January 2016. Section 111 repealed the earlier 2000 Act but stipulated that despite the repeal, anything done or any action taken under the said act shall be deemed to have been done or taken under the corresponding provisions of the new legislation. In the new Act Section 94 contains provisions in regard to the determination of age. It was observed by the Court that section 94(2)1 indicates a significant change over the provisions which were contained in Rule 12 (3)a of the 2007 Rules made under the 2000 Act. Under Rule 12 (3) even though matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended could be obtained. In section 94 (2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate were placed in the same category. It is evident that the Supreme Court in the case of *Sanjeev Kumar Gupta* after referring to judgements rendered earlier by it under the 2000 Act, 2007 Rules referred to the 2015 Act and Section 94 thereof to observe that under Section 7A, if the accused claims juvenility, the court shall consider the documents like educational certificates and certificate issued by a municipal authorities as *prima facie* sufficient to order an inquiry. In ordering such enquiry the court should be liberal. However once evidence is to be considered in such enquiry, to give a declaration of juvenility, the Court should be careful and look into the attendant circumstances of the case, including the date of application for obtaining such education certificates, the age of the siblings, and other relevant considerations for giving a declaration Of juvenility.

17. The aforesaid provision in the Act of 2015 would show that first preference or the first determining factor that should be looked into is the educational certificate of the child.

18. In this case, the educational certificate showed the date of birth of the victim as 08.03.2006 and therefore at the time of filing of the F.I.R. and at the time of moving of the application by the revisionist she was not 18 years of age, and not major. The Chief Judicial Magistrate exceeded his jurisdiction and misapplied the law settled by Hon'ble Supreme Court without correctly appreciating the new Act, and has passed the order impugned.

19. The order dated 05.12.2020 passed by the Chief Judicial Magistrate is set aside. The matter is remanded to the Chief Judicial Magistrate to pass a fresh order after due consideration of the law settled by Hon'ble Supreme Court and the statutory provisions as

notified by the Act of 2015. Let a fresh order be passed on the application moved by the revisionist within four weeks from the date of production of certified copy of this order.

20. The Revision stands ***disposed of.***

(2021)12ILR A156
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Criminal Revision No. 477 of 2021

Gulafsa Begum ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Ashish Kumar Shukla, Deepanjali Singh

Counsel for the Opposite Party:
G.A., Umesh Singh

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397 - Revision - Indian Penal Code, 1860 - Sections 376, 504 & 506 - The Protection of Children From Sexual Offences Act, 2012 - Section 3/4 - No Court can bind the prosecutrix to get the DNA Test conducted - An adverse inference can be drawn against the prosecutrix - No DNA Test can be conducted of the prosecutrix without her consent . (Para - 6)

First Information Report lodged by revisionist against opposite party nos.2 and 3 and other co-accused - daughter of revisionist aged about 14 years was raped - pregnant - statement under Sections 161 and 164 Cr.P.C. - Charge-sheet - Application for conducting DNA Test of PW-2 - Objections filed by revisionist - Juvenile Justice Board rejected application - opposite party no.2 filed Criminal Appeal - opposite party no.2 filed an application for arrange/impleading revisionist as opposite party no.2 - Appellate Court without deciding application for impleadment of revisionist decided the Appeal finally and passed impugned order - observation of Appellate Court - DNA Test will determine paternity of child and would clarify the issue - hence revision.(Para - 3,4)

HELD:- No question for determining the paternity of the child, the question involved in the case was whether rape was committed on the prosecutrix by the opposite party no.2. No reason for the prosecutrix to let her child undergo DNA Test. Order dated 25.06.2021 set aside.Trial Court order dated 25.03.2021is affirmed subject to modificattion.(Para -14)

Criminal Revision allowed. (E-7)

List of Cases cited:-

1. Shameem @ Bugul Vs St. of U.P. , Criminal Appeal (Juvenile) No.19/2021

2. Goutam Kundu Vs St. of W.B. & anr. , (1993) 3 SCC 418

3. Ashok Kumar Vs Raj Gupta & ors., Civil Appeal No.6153 of 2021

4. Calcutta High Court Anandmay Bag Vs St. of W.B. & anr.

5. G. Vasanthi Vs M. Muneeshwaran

6. Muthukutti Vs The Deputy Director & ors.

7. Yedla Srinivasa Rao Vs St. of A.P. , (2006) 11 SCC 615

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

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

(2) This Criminal Revision has been filed challenging the judgment and order dated 25.06.2021 passed by the learned Additional Sessions Judge, (POCSO Act), No.12, Sultanpur, passed in Criminal Appeal (Juvenile) No.19 of 2021, relating to Case Crime No.360/2017, under Sections 376, 504, 506 IPC

and Section 3/4 POCSO Act, Police Station Kotwali Dehat, District Sultanpur.

(3) It has been submitted by the learned counsel for the revisionist that on 17.12.2017 the First Information Report of Case Crime No.360/2017, under Sections 376, 504, 506 IPC and Section 3/4 POCSO Act, Police Station Kotwali Dehat, District Sultanpur, was lodged by the revisionist against the opposite party nos.2 and 3 and other co-accused that the daughter of the revisionist aged about 14 years was raped seven months ago as a result whereof she became pregnant. When the revisionist got information of her daughter's pregnancy they tried to marry her with the opposite party no.2 but the father of the opposite party no.2 denied such proposal. The revisionist and her associates told the father of the opposite party no.2 that if the child is not aborted they would have to face dire consequences. The Investigating Officer after recording the statement under Sections 161 and 164 Cr.P.C. filed Charge-sheet on 13.06.2014 in the Court of Chief Judicial Magistrate, Court No.17, Sultanpur, against the opposite party no.2 and two persons. With regard to the other accused in the F.I.R. investigation is pending till date and they have not been arrested as yet. Later on, the opposite party no.2 was declared juvenile and the Trial was transferred to the Juvenile Justice Board, Sultanpur. After examination-in-chief and cross-examination of prosecution witness as PW-1 i.e. the revisionist and PW-2 i.e. the victim her daughter, a date was fixed for examination of other prosecution witnesses.

(4) The opposite party no.2 filed an application for conducting DNA Test of the PW-2. Objections were filed by the counsel for the revisionist. On 25.03.2021 learned Juvenile Justice Board after considering the entire facts and circumstances and evidence available on record rejected the application for DNA Test. Against the order the dated 25.03.2021, the opposite party no.2 filed a Criminal Appeal in the court of Additional Sessions Judge, Court No.12, Sultanpur, which was registered as Criminal Appeal (Juvenile) No.19/2021 (**Shameem @ Bugul Vs. State of U.P.**). During the pendency of such Appeal, the opposite party no.2 filed an application for arrange/impleading the revisionist as opposite party no.2.The Appellate Court without deciding the application for impleadment of the revisionist decided the Appeal finally and passed impugned order on 25.06.2021. In the order dated 25.06.2021 the learned Appellate Court has ignored the provisions of Article 14--21 of the Constitution of India, the Juvenile Justice Board in its order dated 25.03.2021 had observed that the application for examination of child of the prosecution witness moved by the opposite party no.2 can only be moved at the stage when defence witnesses were being examined under Section 313 Cr.P.C. It held that sending the victim child for DNA Test would further delay the Trial which under the provisions of Statute should be concluded as expeditiously as possible.

(5) It has been submitted by the learned counsel for the revisionist that the revisionist and her daughter, the victim had never given any consent for DNA Test which is extremely necessary in such cases. Only because the learned Appellate Court observed that the DNA Test will determine the paternity of the child and would clarify the issue. Such DNA Test cannot be performed without consent of the prosecutrix. The issue involved in the prosecution of the opposite party no.2 was not whether her child was son of the accused. The issue was whether the prosecutrix was raped by the opposite party no.2 which cannot be decided only by determining the paternity of the child who was born much later. As a consequence, learned Appellate Court has erred in recording a finding that conducting of DNA Test will not be performed without the consent of the parties.

(6) Most certainly, the commission of offence under Sections 376, 504, 506 IPC cannot be determined even if DNA Test is verified with and without consent of the prosecutrix. The Supreme Court as well as several High Courts have observed that no Court can bind the prosecutrix to get the DNA Test conducted. It is probable that an adverse inference can be drawn against the prosecutrix. On refusal of the prosecutrix to undergo for DNA Test but no DNA Test can be conducted of the prosecutrix without her consent.

(7) Learned counsel for the opposite party no.2 has pointed out from his counter affidavit that the revisionist herself had given a statement before the Investigating Officer that she was willing to get DNA Test conducted of the child born to the prosecutrix.

(8) Learned counsel appearing for the revisionist in rejoinder affidavit has submitted that only because the prosecutrix's mother had made a statement to the Investigating Officer, such statement cannot bind the prosecutix who has now become major and can decide for her child whether she wants her child to face the risk of being declared a bastard. Learned counsel for the revisionist has placed reliance upon the judgment of the Hon'ble Supreme Court in the case of **Goutam Kundu Vs. State of West Bengal & Another reported in (1993) 3 SCC 418**, where the question involved was with regard to the legitimacy of a born child during marriage of the appellant with the private respondents. The Supreme Court had observed that if the legitimacy is questioned by making out a strong case of non-access of the husband by the person questioning the legitimacy, on whom burden of rebuttal of presumption of legitimacy lies, the Court will also consider the effect of ordering the blood test on the status of the child and the character of the mother. No one can be compelled to give sample of blood for analysis.

(9) Learned counsel for the revisionist has relied upon Paragraph-26 of the judgment in **Goutam Kundu (Supra)** case which is being quoted hereinbelow:-

"26. From the above discussion it emerges :-

(1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis."

(10) Learned counsel for the revisionist has placed reliance on another judgment of the Hon'ble Supreme Court in the case of **Ashok Kumar Vs. Raj Gupta & Others, Civil Appeal No.6153 of 2021 decided on 01.10.2021** and has referred to Paragraph-17 of the judgment which is being quoted hereinebelow:-

"The appellant (plaintiff) as noted earlier, has brought on record the evidence in his support which in his assessment adequately establishes his case. His suit will succeed or fall with those evidence, subject of course to the evidence adduced by the other side. When the plaintiff is unwilling to subject himself to the DNA test, forcing him to undergo one would impinge on his personal liberty and his right to privacy."

(11) Learned counsel for the revisionist has also placed reliance upon a judgment rendered by the **Calcutta High Court Anandmay Bag Vs. State of West Bengal and Another decided on 07.05.2007** where the Court has observed in Paragraphs- 14 & 16 thereof is as follows:-

"14. This is a case under Section 376 of the Indian Penal Code and in a case of Section 376 of the Indian Penal Code, DNA test may be a valid test but not always relevant, more so, when during investigation or during pendency of trial there was no attempt by the prosecution to hold such test. Section 375 of the Indian Penal Code defines rape and Section 376 of the Indian Penal Code is the penal provision of rape. In several decisions the Supreme Court held that in a case of rape medical evidence is not always final but medical evidence plays the role of secondary evidence. If the Court finds that evidence of prosecutrix is sufficient to come to the conclusion that prosecution case was true then there can be conviction on the basis of sole evidence of prosecutrix. In State of Punjab v. Ramdev Singh reported in 2004 SCC (Cri) 307, the Supreme Court held that absence of injury in a case of rape is of no consequence. In State of M.P v. Dayal Sahu, it was held by the Supreme Court that non-examination of doctor in a case of rape is not always fatal to the prosecution when the testimony of the prosecutrix inspires confidence of the Court and non-production of doctor's report is not at all fatal. It was a case of rape on a girl of 13 years and if the learned Trial Court finds that evidence of the prosecutrix is sufficient, the DNA test is not at all necessary. The learned Judge must be aware of the age of the victim and in such a matter consent is of no consequence.

16. In view of the discussion made above it is clear that in this case the prosecution prayer under Section 311 of the Code of Criminal Procedure for holding DNA test cannot be allowed as during investigation or during the stage of charge or during the stage of trial there was no attempt for holding DNA test. After closer of prosecution evidence, examination of accused under Section 313 of Cr. PC and after discloser of entire defence case prosecution prayer to hold DNA test of the victim, her male child and accused cannot be allowed to establish the offence under Section 376 of IPC Whether determination of paternity of the child is relevant or not through DNA test that can be decided in a different forum and not in this case."

(12) Learned counsel for the revisionist has also placed reliance upon a decision of the the Madras High Court in the case of **G. Vasanthi Vs. M. Muneeshwaran delivered on 02.01.2019 and reported Online on** Website of the said High Court. A reference has been made to Paragraph-19 of the said judgment where it has been observed that the learned Trial Court would be justified in drawing an adverse inference against the litigant on refusal to undergo DNA Test. While character of the mother may be exposed the status of the child shall remain in law even if the result of the DNA test does not establish the paternity of the child. Just as identity of the rape victim and that of juvenile in conflict of the law is concealed. Similar protective measures shall be taken in such cases.

(13) It was a case where **G. Vsanthi (Supra)** the parties were fighting an application for dissolution of marriage.

(13) Learned counsel for the revisionist has also placed reliance upon a judgment rendered by Madurai Bench of the Madras High Court of 02.11.2011 in **Muthukutti Vs. The Deputy Director and others decided on 02.11.2011,** DNA Section Forensic Science Department, Mylapore, Chennai and other. The petitioner therein wanted the DNA Test to be conducted of her child within a stipulated time and prayed that

a direction to be issued by the Court with regard to the same. The Madurai Bench referred the observations made by the Supreme Court in the case of **Yedla Srinivasa Rao Vs. State of Andhra Pradesh reported in (2006) 11 SCC 615,** and emphasize that merely because the petitioner had offered to conduct DNA Test it would not mean that the complainant and the minor child can also be subjected to such test without their consent. It was observed that the consent of the complainant and the consent of the minor child was relevant.

(14) This Court having heard the learned counsel for the revisionist and counsel appearing on behalf opposite party no.2 has carefully gone through the judgment rendered by the learned Additional District and Sessions Judge, challenged in this Revision. It is apparent that the learned Additional Sessions Judge has misdirected his energies. The question before the learned Trial Court was not whether the child that was born to the prosecutrix was the child of the opposite party no.2. There was no question for determining the paternity of the child, the question involved in the case was whether rape was committed on the prosecutrix by the opposite party no.2. There was no reason for the prosecutrix to let her child undergo DNA Test.

(15) The order dated 25.06.2021 is **set aside** and the learned Trial Court order dated 25.03.2021 is **affirmed** subject to the modification that the Trial Court's observation regarding such application being moved under Section 313 of the Cr.P.C. would be considered on its merits when it is taken up, shall also not be read against the revisionist that victim of rape can be compelled to undergo DNA test after such long time of the alleged incident.

(16) The Revision stands **allowed.**

(2021)12ILR A160
REVISIONAL JURISDICTION

CRIMINAL SIDE
DATED: LUCKNOW 07.12.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Revision No. 556 of 2021

Siyaram @ Shiva Ram ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Jai Pal Singh

Counsel for the Opposite Parties:
G.A., Vijay Kumar

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397 - Revision - Indian Penal Code, 1860 - Accused person has got legal right to file discharge application - such legal right must be addressed and disposed of by speaking and reasoned order within the four corners of the law - While disposing of the discharge application, application of mind should be reflected in as much as as per trite law, trial court while considering the discharge application is not to act as a mere post office. (Para - 12 ,13)

Discharge application of the revisionist been rejected - hence revision .

HELD:-While disposing of the discharge application, court below has not considered each and every relevant contentions of the discharge application and rejected the same in a cursory manner, a fresh order should be passed by the court below on the discharge application.(Para - 14)

Criminal Revision allowed. (E-7)

List of Cases cited:-

1. M.E. Shivalingamurthy Vs Central Bureau of Investigation, AIR 2020 SC 331

2. Sanjay Kumar Rai Vs St. of U.P., AIR Online 2021 SC 239

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Jai Pal Singh, learned counsel for the revisionist, Sri Aniruddh Kumar Singh, learned AGA-I for the State and Sri Vijay Kumar, learned counsel for opposite party no.2.

2. By means of this criminal revision, the revisionist has prayed for setting aside/ quashing the order dated 17.8.2021 passed by the Additional Sessions Judge, Room No.4, Sultanpur in S.T. No.145 of 2019 (State Vs. Atma Ram and Others) whereby the discharge application of the revisionist has been rejected.

3. Learned counsel for the revisionist has submitted that as per opposite party no.2, her husband was kidnapped by the petitioner on 25.9.2000. The opposite party no.2 has filed an application under Section 156 (3) Cr.P.C. on 9.10.2012 when her grievance was not redressed by the police concerned. Sri Jai Pal Singh has submitted that the opposite party no.2 has not explained the delay of more than 12 years in approaching the court filing application under Section 156 (3) Cr.P.C. However, on such application, an FIR was lodged on 19.1.2013 against the petitioner. The investigating agency carried out investigation and after recording the statements of various persons, some of them were family members and some of them were independent witnesses, submitted a final report on 4.4.2013 (Annexure No.12). Against such final report dated 4.4.2013, opposite party no.2 has filed protest petition on 9.12.2014 (Annexure No.13), therefore, Sri Jai Pal Singh has submitted that even the protest petition has been filed after more than 1 year and 8 months. Such protest petition was allowed by the learned court below on 17.9.2015 (Annexure No.14) and pursuant to the order dated 17.9.2015, further investigation was conducted and the final report was filed in favour of the revisionist.

4. Sri Jai Pal Singh has submitted that actually the issue in question is relating to property dispute within the family and opposite party no.2 has filed an application under Section 156 (3) Cr.P.C. having apprehension that the part of property, which belongs to her husband, might have been usurped by the revisionist and other family members as her husband is missing. Sri Jai Pal Singh has further submitted that the revisionist has already appeared before the court below and obtained bail. After obtaining bail order, he filed discharge application, which has been enclosed as Annexure No.16 to the revision. In the discharge application, the revisionist has categorically indicated that he has not kidnapped the husband of opposite party no.2. He has further submitted that there is no evidence against the revisionist to suggest that he had kidnapped the husband of opposite party no.2. He has categorically submitted that opposite party no.2 has not approached the court for more than 12 years. He has referred some cases being lodged by opposite party no.2 against her husband and he has also submitted that the revisionist is living separately, therefore, he may not be held liable for the kidnapping of the husband of opposite party no.2.

5. Therefore, Sri Singh has submitted that while disposing of the discharge application, learned court below vide impugned order dated 17.8.2021 did not consider any of the submissions and contentions of the discharge application and rejected said application observing that since the husband of opposite party no.2 is missing and specific allegation has been levelled against the revisionist, therefore, prima facie, the case in question is liable to be tried against him.

6. *Per contra*, Sri Vijay Kumar, learned counsel for opposite party no.2 has also drawn attention of this Court towards Annexure No.1 to the counter affidavit, which is an order dated 15.12.2017 passed by the learned court below summoning the revisionist to face trial under Sections 364/120-B IPC. He has submitted that

in the aforesaid order dated 15.12.2017, the learned court below has considered each and every facts in detail. Therefore, Sri Vijay Kumar has submitted that when the learned court below has taken cognizance on 15.12.2017 against the revisionist, the defence so taken by the revisionist can be taken at the stage of trial and while disposing of the discharge application, such evidences may not be appreciated in view of the settled law. Sri Vijay Kumar has drawn attention of this Court towards the decision of the Apex Court in re; **M.E. Shivalingamurthy vs. Central Bureau of Investigation, AIR 2020 SC 331**, referring para-15 thereof, whereby the Apex Court has observed as under:-

"15.The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 CrPC (see State of J&K v. Sudershan Chakkar and another, AIR 1995 SC 1954). The expression, "the record of the case", used in Section 227 CrPC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the police (see State of Orissa v. Debendra Nath Padhi, AIR 2005 SC 359)."

7. Therefore, as per Sri Vijay Kumar, the instant revision may be dismissed.

8. Learned AGA has also submitted that while disposing of the discharge application, defence of the accused may not be looked into. However, looking to the facts and circumstances of the issue in question, any appropriate order may be passed.

9. Sri Jai Pal Singh in his rejoinder argument has cited the recent decision of the Apex Court in re; **Sanjay Kumar Rai vs. State of Uttar Pradesh, AIR Online 2021 SC 239,** referring paras 15, 16 & 18, which reads as under:-

"15. The correct position of law as laid down in Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551, thus, is that orders framing charges or refusing discharge are neither interlocutory nor final in nature and are therefore not affected by the bar of Section 397 (2) of CrPC. That apart, this Court in the above-cited cases has unequivocally acknowledged that the High Court is imbued with inherent jurisdiction to prevent abuse of process or to secure ends of justice having regard to the facts and circumstance of individual cases. As a caveat it may be stated that the High Court, while exercising its afore-stated jurisdiction ought to be circumspect. The discretion vested in the High Court is to be invoked carefully and judiciously for effective and timely administration of criminal justice system. This Court, nonetheless, does not recommend a complete hands off approach. Albeit, there should be interference, may be, in exceptional cases, failing which there is likelihood of serious prejudice to the rights of a citizen. For example, when the contents of a complaint or the other purported material on record is a brazen attempt to persecute an innocent person, it becomes imperative upon the Court to prevent the abuse of process of law.

16. Further, it is well settled that the trial court while considering the discharge application is not to act as a mere post office. The Court has to sift through the evidence in order to find out whether there are sufficient grounds to try the suspect. The court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case and so on. [Union of India v. Prafulla Kumar Samal]. Likewise, the Court has sufficient discretion to order further investigation in appropriate cases, if need be.

18. The High Court has committed jurisdictional error by not entertaining the revision petition on merits and overlooking the fact that 'discharge' is a valuable right provided to the accused. In line with the fact that the High Court and the court below have not examined the fairness of criminal investigation in this case and other related aspects concerning improvement of witness statements, it is necessary for the High Court to reconsider the entire matter and decide the revision petition afresh. Accordingly, we set aside the impugned order dated 28.11.2018 and remand the case back to the High Court for its reconsideration in accordance with law."

10. On the basis of aforesaid decision, Sri Jai Pal Singh has submitted that there is no dispute on such proposition that in the discharge application, the defence of the accused person may not be looked into by the learned court below but it is also true and settled that while disposing of the discharge application, the court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case in question.

11. Having heard learned counsel for the parties and having perused the material available on record as well as the case laws so cited by the learned counsel for the parties, I am of the firm view that while disposing of the discharge application, the court below may not appreciate the defence of the accused as the same should be appreciated at the stage of trial. At the same time, it is also incumbent upon the learned court below to consider and dispose of the contents and contentions of the discharge application and peruse the material available on record as produced by the Investigating Officer.

12. The material available on record e.g. statements of various persons recorded under Section 161 Cr.P.C. etc. should have been considered by the court below carefully inasmuch as the accused person has got legal right to file discharge application and such legal right must be addressed and disposed of by speaking and reasoned order within the four corners of the law.

13. Further, if any specific plea has been taken in the discharge application, which is not directly affecting the trial or if it is at all affecting the trial, the learned court below must consider such contention and address the same by speaking and reasoned order. Learned court below may accept such contentions so raised in the discharge application or may reject the same but both the things should be clear and unambiguous. At least, it should be seen that the learned court below has applied its judicious mind. While disposing of the discharge application, application of mind should be reflected inasmuch as as per trite law, the learned trial court while considering the discharge application is not to act as a mere post office.

14. In view of the above, I find that while disposing of the discharge application vide order dated 17.8.2021, the learned court below has not considered each and every relevant contentions of the discharge application and rejected the same in a cursory manner, therefore, I feel that a fresh order should be passed by the learned court below on the discharge application.

15. Accordingly, the revision is **allowed**. The order dated 17.8.2021 is hereby quashed/ set aside.

16. The learned court below is directed to pass a fresh order on the discharge application of the revisionist by speaking and reasoned order, strictly in accordance with law, by affording an opportunity of hearing to the parties, if it is so required under the law, with expedition, preferably within a period of one month from

the date of production of certified copy of this order.

17. No order as to costs.

(2021)12ILR A164
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Criminal Revision No. 829 of 2021

Suraj Arora ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Vaibhav Gupta, Rakesh Kumar

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 190(A) & 397 - Revision - Indian Penal Code, 1860 - The Drugs and Cosmetic Act 1940 - Section 18 (a) (i) / 27(c) - When the company is the offender, vicarious liability of the Directors cannot be imputed automatically - Magistrate is required to apply its mind when a complaint is filed before him to see as to whether the complaint even if taken to its face value and taken to be correct in its entirety, would lead to the conclusion that the respondents were personally responsible for any offence.(Para - 12,13)

Revisionist resigned on 10.12.2008 - information regarding the same sent to the Directorate Medical Health & Family Welfare on 02.06.2011. (Para - 4)

HELD:-Additional Sessions Judge, not erred in summoning the accused. It is for the accused to file discharge application and show that they had resigned in 2011, and the manufacturing of drug which was found to be sub standard was much later in the year 2018-2019 and as such they cannot be held responsible for such act of the company.(Para - 19)

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. Ravindranatha Bajpe Vs Mangalore Special Economic Zone Ltd. & ors. etc , Criminal Appeal No.1047/1048/2021

2. GHCL Employees Stock Option Trust Vs India Infoline Ltd., (2013) 4 SCC 505

3. Sunil Bharti Mittal Vs C.B.I., (2015) 4 SCC 609

4. Aneeta Hada Vs Godfather Travels & Tours (P) Ltd., 2012 (5) SCC 661

5. Maksud Saiyed Vs St. of Guj., (2008) 5 SCC 668

6. Pepsi Foods Ltd. Vs S.J.M. ,(1998) 5 SCC 749

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard learned counsel for the revisionist and learned A.G.A. for the State.

2. This Revision has been filed against the order dated 22.11.2021 passed by learned Additional Sessions Judge, Ist, Balrampur, in Special Sessions Trial No.17/2021: *State of U.P. Vs. Pramod Arora and others*, under Section 18(a) (i)/27(c) of Drugs and Cosmetic Act 1940 relating to P.S. Pachperwa, Disrict Balrampur.

3. It has been submitted by learned counsel for the revisionist that the revisionist had earlier approached this Court by filing a petition under Section 482 Cr.P.C., namely, Petition No.3227 of 2021: *Suraj Arora Vs. State of U.P. and Another*, challenging the summoning order dated 19.12.2019, relating to same Sessions Trial No.8 of 2019. The Court was satisfied that the cognizance order and the summoning order was issued without application of mind as no facts were mentioned therein. The language of the order did not disclose any facts of the case. The

Court had set aside the order and remanded the matter to the Magistrate to pass a fresh order as per law. After this order was passed by this Court on 17.09.021, the matter was reconsidered by the Court and fresh order was passed on 22.11.2021, which is challenged in this Revision.

4. It has been further submitted by learned counsel for the revisionist that the revisionist had no role to play in the affairs of the company i.e. M/s Corona Pharmaceuticals Pvt. Ltd., Kashipur, Udham Singh Nagar, Uttarakhand, as he had resigned as Director of the Company in the year 2008 and had written a letter to the Director, Medical Health and Family Welfare, Dehradun, Uttarakhand on 02.06.2011 that he had resigned from the post of Director, yet the same was not taken into account by the learned trial court. Learned trial court has erred in law recording the finding that while passing the summoning order/ cognizance order it has only to see a *prima facie* case.

5. This Court has perused the order impugned.

6. It has been pointed out by learned A.G.A. that under Section 190 (A) of the Cr.P.C. for taking cognizance and for summoning the accused only the papers that are submitted by the prosecution has to be taken into account. A *prima facie* case alone has to be seen where the accused can be tried for the offences for which the prosecution proposes that the accused are guilt of.

7. Learned counsel for the revisionist has cited the judgement rendered by Hon'ble Supreme Court in Criminal Appeal No.1047/1048/2021: *Ravindranatha Bajpe Vs. Mangalore Special Economic Zone Ltd. and others etc.*, decided on 27.11.2021, but no appreciation thereof is evident from the order impugned.

8. This Court has carefully gone through the judgement rendered by Hon'ble Supreme Court in Ravindranatha Bajpe (Supra), it appears that the Appellant before the Supreme Court was the original complainant. He had filed the complaint before the Judicial Magistrate Ist Class Mangalore on 24.09.2013 on which summons were issued to the original accused nos. 1 to 8. The original accused approached the Sessions Court in Revision. The Revision was partly allowed by the Sessions Court. Aggrieved against the same, the complainant approached the High Court. The High Court rejected the Revision filed by the appellant Ravindranath Bajpe. The complainant/ appellant thereafter approached the Supreme Court.

9. In the original complainant filed by the appellant there were 13 accused. It was the case of the complainant that he was not absolute owner and in possession of immovable property described in the scheduled attached to the complainant and the scheduled property was surrounded by a stone wall as boundary. The scheduled properties were abutting Mangalore-Bajpe Old Airport Road and valuable trees were situated in the said property. The accused no.1 was a company incorporated under the Companies Act and accused no.2 was the Chairman, the accused no.3 was the Managing Director, the accused no.4 was the Deputy General Manager (Civil & Env.), the accused no.5 was the Planner and Executor of the project work of accused no.1. The accused no.9 was the Site Supervisor, accused no.10 was the Sub Contractor, and accused no.11 to 13 were the employees of the Sub Contractor.

10. The accused no.1 intended to lay water pipeline by the side of Mangalore-Bajpe Old Airport Road abutting the scheduled properties. The accused no.1 engaged the accused no.6 company to do the work. The pipeline instead of being laid under the road or on the side of the road, was laid beneath the scheduled properties

belonging to the complainant. The pipeline trespassed the scheduled property and demolished the compound wall which was having the height of 7 feet and foundation of 2 feet to a distance of 500 metres. The accused had cut and destroyed 100 valuable trees in the process. When the complaint was filed initially before the police in 2012, the accused no.5 had given the statement admitting the guilt and also undertaking to pay compensation to the complainant towards the damages caused to his property but the undertaking was not respected thus the accused committed the criminal breach of trust. The complainant had been examined on oath by the court of the Judicial Magistate, Ist Class, Mangalore, and he summoned accused nos.1 and 8 only. Feeling aggrieved by the summoning order, the original accused 1 to 5 preferred a Criminal Revision which was partly allowed with respect to the Directors of the company. The Judicial Magistrate's order having been set aside the appellant approached the High Court and the High Court affirmed the order passed by the Sessions Court.

11. It had been argued before the Supreme Court that at the stage of summoning the accused only thing that has not be considered is as to whether a *prima facie* case is made out on the basis of statement made by the complainant on oath and the material produced at that stage and detail examination on merit is not required. The specific allegation was that the accused no.1 to 8 has conspired with the Contractor and sub Contractor and caused damages to the property of the appellant.

12. The respondent on the other hand had submitted before the Supreme Court that there was only a bald statement that the company and its Directors has conspired with the Contractor and Sub Contractor and caused damages to the property of the appellant and that issuing summons by the court is a very serious matter. Reference was made to *GHCL Employees Stock Option Trust Vs. India Infoline Limited*, (2013) 4 SCC 505; and *Sunil Bharti Mittal Vs. Central Bureau of Investigation*, (2015) 4 SCC 609; and specific reference was made to paragraph-42 to 44 of the judgement rendered in *Sunil Bharti Mittal* (supra). The Supreme Court had observed that no doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman etc.. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy and no liability can be placed on the Directors unless there is a specific role assigned to such individual who had perpetrated the commission of offence on behalf of the company. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically. Reference was made to the judgment rendered in *Aneeta Hada Vs. Godfather Travels & Tours (P) Ltd.*, 2012 (5) SCC 661, that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is because of statutory intendment making it a deeming fiction. However, where a group of persons that guide the business had intent, that is to be imputed to the body corporate and not the vice-versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company.

13. The Supreme Court referred to the judgment of *Maksud Saiyed Vs. State of Gujarat*, (2008) 5 SCC 668 and *Pepsi Foods Ltd. Vs. Special Judicial Magistrate* (1998) 5 SCC 749, to say that the Magistrate is required to apply its mind when a complaint is filed before him to see

as to whether the complaint even if taken to its face value and taken to be correct in its entirety, would lead to the conclusion that the respondents were personally responsible for any offence. Summoning of an accused in a criminal case being a serious matter, Criminal Law cannot be set into motion as a matter of course. The Magistrate has to examine the nature of the allegation made in the complaint and the evidence both oral and documentary in support thereof, and that it would be sufficient for which the complainant to succeed in bringing charge home to the accused. The Magistrate has to record his *prima facie* satisfaction for initiating criminal proceeding. When there are no specific allegations or averments with respect to the role played by them in their capacity as Chairman, Managing Director, Deputy General Manager, Planner or Executor, they cannot be arrayed as accused. The Supreme Court observed that the High Court had rightly dismissed the Revision filed by the appellant and had rightly affirmed the order passed by the learned Sessions Judge.

14. Having perused the observations made by Hon'ble Supreme Court in the case of *Ravindranatha Bajpe* (supra), this court has carefully gone through the complaint that was filed by the revisionist before the learned Additional Sessions Judge, Gonda, under the Drugs and Cosmetic Act, 1940. It is evident that in February, 2019, the complainant had collected a drug sample of Rabeprazole and Domperidone from a medical store during routine inspection. It was manufactured by M/s Corona Pharmaceuticals Pvt. Ltd., Kashipur, Udham Singh Nagar, Uttarakhand. The test analysis report declared it as sub standard quantity and not conforming to declared formula in respect of its content. The complainant had sent notice to the medical store concerned and on production of invoice of having bought it from the drug distributor concerned, had also sent notice to Manokamna Drug Distributor. The drug distributor sent invoice regard purchase of the same from another distributor and the origin of the drug was traced thereafter to the company itself i.e. M/s Corona Pharmaceuticals Pvt. Ltd., Kashipur, Udham Singh Nagar, Uttarakhand. On notice being sent, the company admitted that it had manufactured the capsule. A notice was sent to it to provide the name and address of the person responsible for day to day activities and Memorandum of Association of the company. The same was provided by the company saying that Pramod Arora and Suraj Arora were Directors of the Company and Mr. Kush Agarwal was the person responsible for day to day activities. A copy of the Memorandum of Association had been filed with the complaint which showed that Pramod Arora and Suraj Arora were Directors. On the basis of such information, the complaint was rightly filed.

15. It is the case of the revisionist herein that they had resigned on 10.12.2008 and information regarding the same was sent to the Directorate Medical Health & Family Welfare, Uttarakhand on 02.06.2011.

16. If such be the case, it can only be considered by the learned trial court at the time of discharge application having been moved by the revisionist.

17. It has been submitted by learned A.G.A. that under Chapter 19 of the Cr.P.C., there are two parts. Part A deals with the case instituted on a police report and Part B deals with the cases instituted otherwise than on a police report. In this case, the complaint case was filed by the Inspector of Drugs, U.P. in the office of the District Magistrate Balrampur after due authorization of the competent authority. It was therefore a complaint case under Drugs and Cosmetic Act which is a special act and therefore was filed before the Special Judge. Under Section 244 and 245 of the Cr.P.C., cognizance can be taken and discharge can be considered by the Sessions Judge.

18. Learned A.G.A. has pointed out that the general provision for filing discharge under Section 227 would apply also in such cases even though filed under the special act therefore the appropriate remedy for the revisionist is to approach the learned trial court and file appropriate discharge application when his case regarding his specific role can also be considered by the learned trial court. The orders summoning the accused in this case can only be passed on the contents of the complaint and *prima facie* role having been assigned by the complainant to the Directors of the company.

19. Having heard the learned counsel for the parties, this Court is of the considered opinion that the Additional Sessions Judge, Gonda, had not erred in summoning the accused. It is now for the accused to file discharge application and show that they had resigned in 2011, and the manufacturing of drug which was found to be sub standard was much later in the year 2018-2019 and as such they cannot be held responsible for such act of the company.

20. The Revision is ***dismissed*** with the liberty to the revisionist to file appropriate discharge application through counsel within three weeks from today. The procedure prescribed in law shall be followed by the learned Additional District and Sessions Judge, Gonda, and reasoned and speaking order thereafter be passed on such application.

(2021)12ILR A168
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Criminal Revision No. 877 of 2021

Ramesh Chandra Mishra ...Revisionist
Versus
U.O.I. ...Opposite Party

Counsel for the Revisionist:
Vinay Kumar Singh

Counsel for the Opposite Party:
Shiv P. Shukla

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397 - Revision - Indian Penal Code, 1860 - SectionS 120-B, 409, 420, 468 & 471 - Prevention of Corruption Act, 1988 - Section 13(1)D - Even after investigation is closed, under Section 173 (8) Cr.P.C., the Investigating Agency can file an application or the trial court can itself direct further investigation. (Para - 9)

Revisionist's application under Section 173 (8) of the Cr.P.C. - for further investigation - rejected - by means of the judgement impugned - hence revision. (Para - 3)

HELD:-At the stage, where the trial had to be still initiated, no application under Section 173 (8) (B) by the accused could have been entertained . No good ground to show interference in this revision.Para - 9,10)

Criminal Revision rejected. (E-7)

List of Cases cited:-

1. Athul Rao Vs St. of Karn. , 2018 (14) SCC 298

2. Amrutbhai Shambhubhai Patel Vs Sumanbhai Kantibhai Patel & ors. ,2017 (4) SCC 177

3. Vinubhai Haribhai Malviya & ors. Vs St. of Guj. & anr. ,2019 (17) SCC 1

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard learned counsel for the revisionist and learned AGA for the State.

2. This revision has been filed challenging the order dated 01.12.2021 passed by the

Additional District & Session Judge/Special Court CBI No.06, Lucknow in Criminal Case No. 3444/2019 Crime No. 09 (A) of 2014 under Section 120-B, 409, 420, 468, 471 I.P.C. and 13 (2) readwith 13(1)D Prevention of Corruption Act.

3. It has been submitted by learned counsel for the revisionist that the revisionist's application under Section 173 (8) of the Cr.P.C. for further investigation has been rejected by means of the judgement impugned.

4. It has been further submitted by the learned counsel for the revisionist that charge-sheet was filed on 15.03.2017 on the basis of records and evidences collected by the Investigating Officer, but in para 16.30 of the charge-sheet the Investigating Officer has mentioned that the opinion/report of the Central Forensic Laboratory(CFSL) Chandigarh in respect of the questioned handwritings and signatures is awaited, which will be submitted in the Court as & when it is received. It has also been submitted that when he be came aware that the CFSL report was sent to the Investigating Officer only on 03.05.2017, and no definite opinion was expressed with regard to certain documents being in the handwriting of the accused/revisionist, the revisionist filed an application on 25.11.2021 for further investigation on the ground that the charge-sheet has been filed without waiting for the CFSL report. Also the CFSL expert has requested for other specimens to be provided to him to submit a definite opinion. Therefore, it can be deemed that no fair investigation was carried out by the Investigating Agency. Only the CFSL report can prove the alleged offences against the revisionist, therefore, a request was made that the learned trial court should direct further investigation by sending other specimen of the accused handwriting for a definite opinion by the CFSL expert.

5. Sri Shiv. P. Shukla, learned counsel for the CBI has pointed from the report of the CFSL Scientist, which has been filed as annexure-03 of the application of interim relief, that in the first page itself, there is a mention of the specimen that were provided of writing of the revisionist. They were mentioned in Sub-para 1 from S1 to S39, S65 to S104, S125 to S129, S136 to S147 and S160 to S171. There were other specimens provided of other accused, namely, Pateshwari Prasad Shukla, Ravindra Kumar Shukla, Arvind Kumar Shukla, Ravi Prakash Mishra, Rajesh Kumar Goel, Raj Kumar Goel, Vishal Kumar Mathur, Rakesh Singh, Ashok Kumar Awasthi, Krishna Tripathi and Mahendra Kumar Jain. It is not with respect to the revisionist alone that the scientist has made observations in paragraph 8, which has been relied upon by the learned counsel for the revisionist. It is with respect to other accused, whereas certain other documents have definitely been found to be written by the accused/revisionist. The opinion that has been expressed by the Scientist is definite with respect to the accused/revisionist only. Some specimens were found questionable, and therefor,e corroboratory evidence are asked for by the CFSL expert.

6. It has been submitted by the learned counsel for the opposite party that no application by the accused under Section 173 (8) of the Cr.P.C. is maintainable. He has read out the entire Section 173 of the Cr.P.C. to show that it is part of a scheme of 8 Sub-Sections. They all relate to the Investigating Agency/Officer making a request for further investigation or a Magistrate on its own Suo-Moto coming to a conclusion that further investigation is necessary, could order the same. There was in the Section itself that if any right of the accused/revisionist to make such an application he has referred to a judgement rendered by the Hon'ble Supreme Court in ***Athul Rao vs. State of Karnataka*** decided on 18.08.2017 reported in ***2018 (14) SCC 298,*** where the Hon'ble Supreme Court relied upon its earlier judgement in ***Amrutbhai Shambhubhai Patel vs. Sumanbhai***

Kantibhai Patel and others 2017 (4) SCC 177 relevant paragraph 50 of the judgement is quoted herein below:-

"The unamended and amended Sub-Section 8 of Section 173 of the Code if read in juxtaposition, would overwhelmingly attest that by the latter, the Investigating Agency/Officer alone has been authorised to conduct further investigation without limiting the stage of the proceedings relatable thereto. The power qua the Investigating Agency/Officer is thus legislatively intended to be available at any stage of the proceedings. The recommendation of the Law Commission in its 41st Report which manifestly heralded the amendment, significantly had limited its proposal to the empowerment of the investigating agency alone."

7. Learned counsel for the revisionist, on the other hand, has placed reliance upon the judgement rendered by the Hon'ble Supreme Court in ***Vinubhai Haribhai Malviya and Others Vs. State of Gujrat and Another 2019 (17) SCC 1.***

8. This Court has considered paragraph 25 of the Judgement which has been relied upon by the learned counsel for the revisionist and finds that there is no specific direction issued by the Hon'ble Supreme Court that even the accused can file an application under Section 173 (8) for further investigation.

9. This Court has also considered the order of the learned trial court rejecting the application of the revisionist. Learned trial court has considered the fact that the discharge application of the revisionist is already pending before it and that charge-sheet had not been submitted only on the basis of the CFSL report, there were other attending circumstances and evidences that were relied upon to submit the said charge-sheet and also that even after investigation is closed, under Section 173 (8), the Investigating Agency can file an application or the learned trial court can itself direct further investigation. It is not as if only the CFSL report shall be relied upon by the learned trial court in convicting the accused. As and when evidences are led in the matter, the accused shall have opportunity to question the report and its validity. It has also been observed by the learned trial court that the accused's file had been separated from the original case file on 24.10.2019, it was received in the trial court on 03.03.2020 alongwith application, the case had been continuously listed since 22.09.2021 for arguments on discharge application of the accused. Therefore, at that stage, where the trial had to be still initiated, no application under Section 173 (8) (B) by the accused could have been entertained. A date has also been fixed for hearing arguments on the discharge application by the learned trial court.

10. This Court finds no good ground to show interference in this revision.

11. Accordingly, this revision stands ***rejected.***

(2021)12ILR A170
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.11.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Criminal Revision No. 2942 of 2021

Ashok Kumar ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Dharmendra Singh

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397 - Revision - Indian Penal Code, 1860 - Power exercised under Section 397/401 of the Code of Criminal Procedure is limited - until and unless the order so challenged therein passed by the Magistrate is perverse or the view taken by the Court wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of record - revisional court is not justified in interfering with the order that too merely because also another view is possible.(Para -17)

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 156(3) - Provisions under Section 156(3) Cr.P.C. should be used sparingly - Should not be used unless there is something unusual and extra ordinary like miscarriage of justice - which warrants a direction to the Police to register a case - Such applications should not be allowed because the law provides them with an alternative remedy of filing a complaint - therefore, recourse should not normally be permitted for availing the provisions of Section 156(3) Cr.P.C.(Para - 27)

Revisionist filed the present revision - challenging the order passed by Additional Judicial Magistrate - court below rejected the application - preferred by the revisionist under Section 156(3) Cr.P.C. - for lodging the first information report against opposite parties no. 2 to 9.

HELD:-Exercise of the powers under Section 156(3) Cr.P.C. should be used sparingly and not in routine manner . Pure findings of fact has been recorded which has not been disputed by the revisionist either by means of arguments or by pleading. (Para - 28,29)

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. K. Chinnaswamy Reddy Vs St. of A.P. & anr., AIR 1962, S.C. 1788

2. Mahendra Pratap Singh Vs Sarju Singh & anr., AIR (55) 1968, S.C. 707

3. Johar & ors. Vs Mangal Prasad & ors. , 2008 Cr. L.J. 1627

4. St. of Kerala Vs Puttumana Illath Jathavedan Namboodiri , 1999(2) SCC 452

5. Sanjaysinh Ramrao Chavan Vs Dattatray Gulabrao Phalke, (2015) 3 SCC 123

6. Kishan Rao Vs Shankargouda , (2018) 8 SCC 165

7. Priyanka Srivastava & ors. Vs St. of U.P. & Ors. , AIR 2015 SC 1758

8. Rambabu Gupta Vs St. of U.P. , Criminal Misc. Writ Petition No.3672 of 2000

9. Sukhbali Vs St. of U.P., 2007 (59) ACC 739

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Dharmendra Singh, learned counsel for the revisionist and learned AGA, who appears for the opposite party no.1.

2. The revisionist has filed the present revision challenging the order dated 4.9.2021 passed by Additional Judicial Magistrate, Moradabad in Misc. Case No.1129 of 2021 Ashok Kumar Vs. Smt. Mohini Mishra, whereby whereunder the court below has rejected the application preferred by the revisionist under Section 156(3) Cr.P.C. for lodging the first information report against opposite parties no. 2 to 9.

3. As per case set up by the revisionist, revisionist is a social worker, who is effectively involved in social work and he continuously prefers application under Right To Information Act, 2005 on account whereof the opposite party no.2 bore personal enmity with him.

4. The revisionist has further come up with the case that the villagers approach him regarding solving their of difficulties and problems. Revisionist was also in aspirant for contesting the elections of the office of Pradhan. However, the same was earmarked as a woman seat, the revisionist made her mother the

contestant on account whereof the opposite party no.2 became annoyed as according to the opposite party no.2 the mother of the revisionist was bound to win the elections of the office of the Pradhan and she would expose opposite party no.2 with respect to misappropriation so committed by the opposite party no.2 with regard to public money.

5. The revisionist has also alleged that on 16.2.2021, the fair price shop agent Sri Mahendra's husband Gajraj, Raju along with a Tangewala arrived on a road in front of the house of the revisionist and he called the revisionist but the mother of the revisionist came out of the house and then the aforesaid persons asked about the whereabouts of the revisionist and when the mother of the revisionist informed them that the revisionist is not in the house then the fair price shop agent husband Gajraj and Tangewala requested the mother of the revisionist to store the food-grains referable to Public Distribution Scheme (PDS) in the house of the revisionist as Tanga is not in a position to move. When the mother of the revisionist resisted then opposite party no.2 and the earlier Pradhan Rajendra spread rumour that the food-grains related to public distribution scheme is in the house of the revisionist and then they informed the police. The mother of the revisionist resisted the said act and omission of the opposite party but Rajendra and Jai Hind had beaten up the mother of the revisionist and they also entered into house forcibly and also had beaten the sister and the younger brother of the revisionist.

6. According to the revisionist, the incident which occurred on 16.2.2021 was informed to the police for registration of the FIR, however, the first information report was not lodged then the revisionist preferred an application under Section 156(3) Cr.P.C. which has been came to be rejected by the order under challenge dated 4.9.2021 passed by Chief Judicial Magistrate, Moradabad in Complaint Case No.1129 of 2021, Ashok Vs. Mohini and others.

7. The revisionist being aggrieved against the order dated 6.9.2021 passed by the Chief Judicial Magistrate, Moradabad in Complaint Case No.1129 of 2001, Ashok Vs. Mohini and others is before this Court while filing the present revision.

8. Before proceeding further it is apt to discuss and analyse the statutory provisions purported to be under Section 397/401 Cr.P.C., 1973 as applicable in the State of U.P.

"397. Calling for records to exercise powers of revision.

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order,- recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.- *All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub- section and of section 398.*

(2) The powers of revision conferred by sub- section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

401. High Court' s Powers of revisions.

(1) In the case of any proceeding the record of which has been called for by itself or Which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code tan appeal lies but an application for revision has been made to the High Court by any person and the High Court Is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice

so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

9. A conjoint reading of the provisions contained under Section 397 as well as 401 of the Code of Criminal Procedure, it will clearly reveal that High Court of any Sessions Judge may call for and examine the record of any proceedings before any inferior criminal court situate within its or its local jurisdiction for the purposes of satisfying itself or himself as to the correctness, legality or probability of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior court.

10. The issue with regard to the scope and the extent of revisional jurisdiction under Section 391 read with Section 401 of the Code of Criminal Procedure, 1973 is no more res integra as the Hon'ble Supreme Court and this Court in catena of decisions interpreted the same which is being recapitulated hereunder:-

11. The Apex Court in the case of **K. Chinnaswamy Reddy Vs. State of Andhra Pradesh and another reported in AIR 1962, S.C. 1788** in para 7 observed as under :-

"7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have though fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of s. 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be : where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished of

produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law.

These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of s. 439.

(4) We have therefore to see whether the order of the High Court setting aside the order of acquittal in this case can be upheld on these principles."

12. The Apex Court in the case of **Mahendra Pratap Singh Vs. Sarju Singh and another reported in AIR (55) 1968, S.C. 707** in para 7 observed as under:-

"7. In revision, the learned Judge in the High Court went into the evidence very minutely. He questioned every single finding of the learned Sessions Judge and gave his own interpretation of the evidence and the inferences to be drawn from it. He discounted the theory that the weapon of attack was a revolver and suggested that it might have been a shot gun or country made pistol which the villagers in the position of Kuldip and Sarju could not distinguish from a revolver. He then took up each single circumstance on which the learned Sessions Judge had found some doubt and interpreting the evidence de novo held, contrary to the opinion of the Sessions Judge that they were acceptable. All the time he appeared to give the benefit of the doubt to the prosecution. The only error of law which the learned Judge found in the Sessions Judge's judgment was a remark by the Sessions Judge that the defence witnesses who were examined by the police before they were brought as defence witnesses ought to have been cross-examined with reference to their previous statements recorded by the police, which obviously is against the provisions of the Code. Except for this error, no defect of procedure or of law was discovered by the learned Judge of the High Court in his appraisal of the judgment of the Sessions Judge. As stated already by us, he seems to have gone into the matter as if an appeal against acquittal was before him making no distinction between the appellate and the revisional powers exercisable by the High Court in matters of acquittal except to the extent that instead of convicting the appellant he only ordered his retrial. In our opinion the learned Judge was clearly in error in proceeding as he did in a revision filed by a private party against the acquittal reached in the Court of Session."

13. The Apex Court in the case of **Johar and Ors. vs. Mangal Prasad and Ors. reported in 2008 Cr. L.J. 1627** in paras 9, 10, 11, 12, 13 has observed as under:-

"9. Revisional jurisdiction of the High Court in terms of Section 397 read with Section 401 of the Code of Criminal Procedure is limited. The High Court did not point out any error of law on the part of the learned Trial Judge. It was not opined that any relevant evidence has been left out of its consideration by the court below or irrelevant material has been taken into consideration. The High Court entered into the merit of the matter. It commented upon the credentiality of the Autopsy Surgeon. It sought to re- appreciate the whole evidence. One possible view was sought to be substituted by another possible view.

10. Sub-section (3) of Section 401 reads as under:

401(3). Nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

Technically, although Ms. Makhija may be correct that the High Court has not converted the judgment of acquittal passed by the learned Trial Court to a judgment of conviction, but for arriving at a finding as to whether the High Court has exceeded its jurisdiction or not, the approach of the High Court must be borne in mind. For the said purpose, we may notice a few precedents.

11. In D. Stephens v. Nosibolla [1951] 1 SCR 284 this Court opined:

10. The revisional jurisdiction conferred on the High Court under Section 439 of the Code of Criminal Procedure is not to be lightly exercised when it is invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under Section 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower court has taken a wrong view of the law or misappreciated the evidence on record.

12. The same principle was reiterated in Logendra Nath Jha and Ors. v. Polailal Biswas [1951 SCR676] stating:

...Though Sub-section (1) of Section 439 authorises the High Court to exercise, in its discretion, any of the powers conferred on a court of appeal by Section 423, Sub-section (4) specifically excludes the power to "convert a finding of acquittal into one of conviction". This does not mean that in dealing with a revision petition by a private party against an order of acquittal the High Court could in the absence of any error on a point of law re-appraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stopped short of finding the accused guilty and passing sentence on him. By merely characterizing the judgment of the trial court as "perverse" and "lacking in perspective", the High Court cannot reverse pure findings of fact based on the trial Court's appreciation of the evidence in the case. That is what the learned Judge in the court below has done, but could not, in our opinion, properly do on an application in revision filed by a private party against acquittal....

13. In the instant case the High Court not only entered into the merit of the matter but also analysed the depositions of all the witnesses examined on behalf of the prosecution. It, in particular, went to the extent of criticizing the testimony of Autopsy Surgeon. It relied upon the evidence of the so called eye witnesses to hold that although appellants herein had inflicted injuries on the head of the deceased, Dr. Y.K. Malaiya, PW-9, deliberately suppressed the same. He was, for all intent and purport, found guilty of the offence under Section 193 and 196 of the Indian Penal Code. The Autopsy Surgeon was not cross-examined by the State. He was not declared hostile. The State did not even prefer any appeal against the judgment."

14. In the case of **State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri reported in 1999(2) SCC 452,** the Hon'ble Supreme Court interpreted the scope and the extent jurisdiction to be exercised by High Court under the provisions contained under Section 397/401 of the Code of Criminal Procedure.

"5..... In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to

reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinizing the impugned judgment of the High Court from the aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the Respondent by reappreciating the oral evidence....."

15. Yet in the case of **Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke, reported in (2015) 3 SCC 123**, Hon'ble Supreme Court observed as under:-

"14..... Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court Under Sections 397 to 401 Code of Criminal Procedure is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."

16. The aforesaid two judgments in the case of **Kishan Rao vs. Shankargouda (2018) 8 SCC 165** in para 14 observed as under:-

"14. In the above case also conviction of the Accused was recorded, the High Court set aside the order of conviction by substituting its own view. This Court set aside the High Court's order holding that the High Court exceeded its jurisdiction in substituting its views and that too without any legal basis."

17. From the legal proposition so culled out by the Hon'ble Apex Court in the aforesaid decisions itself goes to show that the power so exercised under Section 397/401 of the Code of Criminal Procedure is limited and until and unless the order so challenged therein passed by the Magistrate is perverse or the view taken by the Court wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of record, the revisional court is not justified in interfering with the order that too merely because also another view is possible.

18. In nutshell, the Hon'ble Apex Court has cautioned the High Court not to act as an appellate court as the whole purpose of revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal procedure.

19. Now, the present case in hand is to be decided in the light of the principles of the law laid down by the Hon'ble Apex Court while exercising the powers under Section 397/401 of the Code of Criminal Procedure, 1973.

20. Learned counsel for the revisionist had argued that they were sufficient material before the court below for lodging of the first information report under Section 156(3) Cr.P.C. and thus the application preferred by the revisionist for lodging of the FIR has been rejected in illegal manner without going through the documents available on record.

21. Learned AGA has refuted the contention of the revisionist and has supported

the order under challenge while contenting that there was no material available on record so as to warrant issuance of a direction for lodging the FIR under Section 156(3) of the Cr.P.C.

22. Having gone through the pleading on record and after considering the arguments of the learned counsel for the revisionist, the undisputed position emerges that an application was preferred by the revisionist under Section 156(3) Cr.P.C. for lodging of an FIR.

23. The court below has applied its mind while going through the contends of the allegations mentioned in the application under Section 156(3) Cr.P.C. and has recorded a clear cut finding of fact that the present case did not warrant any direction for lodging an FIR as according to the court below. It is clear that already proceedings under Section 3/7 of the Essential Commodities Act, 1955 has been lodged against the revisionist. Further, there is a report of the concerned police station that in the house of the revisionist itself the food-grains of mid day meal was found and thus proceedings were initiated under Section 3/7 of the E.C. Act.

24. For the amongst other grounds, this is also one of the grounds which has been taken note by the court below while rejecting the application preferred by the revisionist.

25. The issue with respect to exercise of powers under Section 156(3) of the Code of Criminal Procedure has also been taken note in the case of **Priyanka Srivastava and Ors. vs. State of U.P. and Ors.** reported in **AIR 2015 SC 1758** wherein para 26 and 27 following has observed:-

"26. 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.

27. 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. We have already indicated that there has to be prior applications Under Section 154(1) and 154(3) while filing a petition Under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application Under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate Under Section 156(3). That apart, we have already stated that the veracity of the same can

also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

26. The Full Bench of this Hon'ble Court in **Criminal Misc. Writ Petition No.3672 of 2000 decided on 27.4.2001,** ***Rambabu Gupta Vs. State of U.P.*** in para 17 observed as under:-

"17. In view of the aforesaid discussion on the legal provisions and decisions of the Supreme Court as on date, it is hereby held that on receiving a complaint, the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to the police station for being registered and investigated. The Magistrate's order must indicate application of mind. If the Magistrate takes cognizance, he proceeds to follow the procedure provided in Chapter XV of Cr P.C. The first question stands answered thus."

27. Yet a Division Bench of this Court in Criminal Misc. Application No.9297 of 2007 decided on 18.9.2007. A Division Bench of this Court in the case of ***Sukhbali Vs. State of Uttar Pradesh*** **reported in 2007 (59) ACC 739** in para 22 has observed as under:-

"22. Applications under Section 156(3) Cr. P.C. are now coming in torrents. Provisions under Section 156(3) Cr.P.C. should be used sparingly. They should not be used unless there is something unusual and extra ordinary like miscarriage of justice, which warrants a direction to the Police to register a case. Such applications should not be allowed because the law provides them with an alternative remedy of filing a complaint, therefore, recourse should not normally be permitted for availing the provisions of Section 156(3) Cr.P.C."

28. A judicial notice has been taken by this Court in the case of ***Sukhbali (Supra)*** that applications under Section 156(3) Cr.P.C. are now coming in torrent and thus exercise of the powers under Section 156(3) Cr.P.C. should be used sparingly and not in routine manner.

29. The Court finds that pure findings of fact has been recorded which has not been disputed by the revisionist either by means of arguments or by pleading.

30. No other point has been raised by learned counsel for the applicant.

31. Accordingly, the application is **dismissed.**

(2021)12ILR A178
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Criminal Revision No. 2992 of 2021

Smt. Suman ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Manoj Kumar Tripathi

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Indian Penal Code, 1860 - Sections 363 & 376 (2) (I) - The Protection of Children From Sexual Offences Act, 2012 - Section 3/4 - The Scheduled Castes/Scheduled Tribes (Prevention from Atrocities) Act, 1989 - Section 3(2)(5) - stage contemplated under section 319 Cr.P.C. - stage before conclusion of trial - Magistrate must be prima facie of the opinion that there are sufficient material and cause for summoning the culprit who is either not named in the FIR or if named, he has not been charge sheeted or discharged. (Para - 18)

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 319 - Power to proceed against other persons appearing to be guilty of offence - once the Magistrate finds that there was sufficient material available on record before it to summon a person in the trial which is proposed to be undertaken then the powers u/s 319 Cr.P.C. are to be invoked.(Para -16)

FIR lodged by father (opposite party no. 2) of victim (minor) - victim forcibly taken away by co-accused - commit rape - Statements of victim recorded u/s 161 and 164 Cr.P.C - charge sheet submitted against co-accused only - not against applicant - sufficient material available on record - applicant also indulged in criminality - application preferred by opposite party no. 2 - came into light in exercise of power contained u/s 319 Cr.P.C. while summoning applicant - revisionist summoned by court below - hence revision .

HELD:-This Court under revisional jurisdiction cannot substitute its own views particularly when there was ample evidence available on record before the court below in exercising the jurisdiction as conferred u/s 319 Cr.P.C. . No material on record to show the findings recorded by the court below while summoning the revisionist suffers, from perversity or manifest illegality.(Para - 24,27)

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. Hardeep Singh Vs St.of Punj. , 2014 (3) SCC 92 S.

2. Mohammad Ispahani Vs Yogendra Chandak & ors. , (2017) 16 SCC 226

3. M/S. Mahalakshmi Oil Mills Vs St.of A.P. , AIR 1989 SC 335

4. Punjab Land Development & Reclamation Corporation Ltd. Chandigarh Vs Presiding Officer, Labour Court, Chandigarh & ors. , (1990) 3 SCC 682

5. P. Kasilingam & ors. Vs P.S.G. collage of Technology & Ors, AIR 1995 SC 1395

6. Hamdard (Wakf) Laboratories Vs Dy. Labour Commissioner & ors., AIR 2008 SC 968

7. Ponds India Ltd. (merged with H.L. Limited) Vs Commissioner of Trade Tax, Lucknow, (2008) 8 SCC 369)

8. Feroze N. Dotivala Vs P.M. Wadhwani & ors, (2003) 1 SCC 433

9. Ameer Trading Corporation Ltd. Vs Shapoorji Data Processing Ltd., AIR 2004 SC 355

10. Omkar Namdeo Jadhao & ors Vs Second Additional Sessions Judge Buldana & anr., AIR 1997 SC 331

11. Ram Swaroop & ors. Vs St.of Raj., AIR 2004 SC 2943

12. Podda Narayana & ors. Vs St.of A.P., AIR 1975 SC 1252

13. Sat Paul Vs Delhi Administration, AIR 1976 SC 294

14. St.(Delhi Administration) Vs Laxman Kumar & ors., AIR 1986 SC 250

15. Lok Ram Vs Nihal Singh & anr., AIR 2006 SC 1892

16. Ramnarayan Mor & anr. Vs The St.of Maharashtra, AIR 1964 SC 949

17. Sunil Mehta & anr. Vs St.of Guj. & anr., JT 2013 (3) SC 328

18. Guriya @ Tabassum Tauquir & ors. Vs St.of Bihar & anr., AIR 2008 SC 95

19. Lal Suraj @ Suraj Singh & anr. Vs St.of Jharkhand, (2009) 2 SCC 696

20. Rajendra Singh Vs St.of U.P. & anr., AIR 2007 SC 2786

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Manoj Kumar Tripathi, learned counsel for the revisionist and learned A.G.A. for the State.

2. The present criminal revision purported to be u/s 397/401 of Cr.P.C. has been instituted challenging the summoning order dated 21.11.2020 passed by learned Additional District and Sessions Judge/Special Judge, POCSO Act, Hapur in Application u/s 319 Cr.P.C. arising out of Special Sessions Trial No. 35 of 2016 as well as case crime no. 218 of 2016, u/s 363, 376 (2) (I) IPC and section 4 of POCSO Act and section 3(2)(5) SC/ST Act, P.S. Hapur Nagar, District Hapur (Sate Vs. Rahul and others) whereby the revisionist has been summoned by the court below in exercise of powers u/s 319 Cr.P.C. 1973.

3. Record reveals that the FIR was lodged by the opposite party no. 2 reporting that the incident took place on 17.01.2016 at 08:35 p.m. wherein the minor daughter being Ms. Chanchal aged about 15 years had gone out of her house to bring sugar and when she did not return after lapsing of sufficient time then the opposite party no. 2 being father of the victim along with other relatives who remain present started searching the victim and after a period of about two months i.e. on 17.03.2016 the victim being Ms. Chanchal herself came back and on making inquiry from her she informed that on 17.01.2016 when she had gone to buy sugar from the nearby shop then Rahul S/o Darshan,R/o Village Achchheja, Hapur Nagar, District Hapur was present there and exerted pressure and force upon the victim and he took her to Keshav Nagar in a house in the Footi Line where the victim was kept in confinement and Rahul S/o Darshan kept on committing rape with her and one day the wife of Rahul being Suman (the applicant) herein came and when the victim requested her that she may be allow to go to her house as she wanted to live with her parents but Suman W/o Rahul did not render any help and told the victim that she has to remain here and she cannot move from there. Thereafter, Suman left the place and Rahul thereafter, kept on committing rape against her wish. Accordingly, the opposite party no. 2, father of the victim had lodged the FIR on 17.03.2016 before the police station Hapur Nagar being case crime no. 218 of 2016 and on 17.03.2016 purported to be u/s 363, 376 (2) (I) , 120-B IPC and Section 3/4 POCSO Act.

4. The statement of the victim (Ms. Chanchal) purported to be under section 161 Cr.P.C. was recorded which was conformity and consonance with the allegation contained in the FIR dated 17.03.2016. Subsequently, on 18.03.2016 the statement of the victim was also recorded u/s 164 Cr. P.C. It has also come on record that the statement of opposite party no. 2 being father of the victim was also recorded. Further this Court finds that during investigation, the Investigating Officer also recorded statements of the witnesses being Satish, Smt. Pooja, Smt. Malti Devi and Shivbaran Singh u/s 161 Cr.P.C. and they have also supported the statement of the victim.

5. Thereafter, on 02.05.2016 a charge sheet was submitted by the Investigating Officer in case crime no. 218 of 2016 bearing no. 196 of 2016, u/s 363, 376 (2) (I) IPC and Section 3/4 POCSO Act and section 3(2)(5) SC/ST Act against the husband of the applicant, namely, Rahul only. However, subsequently, on 20.11.2020 an application was preferred by the opposite party no. 2 that the charge sheet has only been submitted against Rahul not against the applicant being Smt. Suman, Layak Ram and

Raja Ram who were also named in the FIR dated 17.03.2016 and they have been exonerated despite the fact that they had also committed the offence as sought to be revealed in pursuance of lodging of the FIR.

6. The court of Additional District and Sessions Judge/ Special Judge, POCSO Act, Hapur has now exercised its power u/s 319 Cr.P.C. 1973 while summoning the applicants.

7. The applicant being aggrieved against the order dated 21.11.2020 passed by the court u/s 319 Cr.P.C. in the proceedings in Special Sessions Trial No. 35 of 2016, has instituted the present revision.

8. The moot question which falls for consideration before this Court in the proceedings u/s 397/401 of Cr.P.C. is as to whether the order passed by the court below along with the application u/s 319 Cr.P.C. is within the parameters as set out in the said provisions.

9. For the ready reference section 319 of the Cr.P.C. 1973 is quoted hereinunder.

"319. Power to proceed against other persons appearing to be guilty of offence.--

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then--

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

10. The issue with respect to the scope and ambit of the powers so conferred upon the Magistrate u/s 319 Cr.P.C. 1973 is no more res integra as the Constitutional Bench of the Hon'ble Supreme Court in the case of **Hardeep Singh Vs. State of Punjab** reported in **2014 (3) SCC 92** has observed as under:-

"8. The Constitutional mandate under Articles 20 and 21 of the Constitution of India, 1950 (hereinafter referred to as the "Constitution') provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to the society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under the Cr.P.C. indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating

methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.

9. The presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty. Alternatively, certain statutory presumptions in relation to certain class of offences have been raised against the accused whereby the presumption of guilt prevails till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be innocent. These competing theories have been kept in mind by the legislature. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial and in our opinion, in order to achieve this very end that the legislature thought of incorporating provisions of Section 319 Cr.P.C. It is with the said object in mind that a constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the above mentioned avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is subject matter of trial.

10. In order to answer the aforesaid questions posed, it will be appropriate to refer to Section 351 of the Criminal Procedure Code, 1898 (hereinafter referred to as `Old Code'), where an analogous provision existed, empowering the court to summon any person other than the accused if he is found to be connected with the commission of the offence. However, when the new Cr.P.C. was being drafted, regard was had to 41st Report of the Law Commission where in the paragraphs 24.80 and 24.81 recommendations were made to make this provision more comprehensive. The said recommendations read:

"24.80 It happens sometimes, though not very often, that a Magistrate hearing a case against certain accused finds from the evidence that some person, other than the accused before him, is also concerned in that very offence or in a connected offence. It is proper that Magistrate should have the power to call and join him in proceedings. Section 351 provides for such a situation, but only if that person happens to be attending the Court. He can then be detained and proceeded against. There is no express provision in Section 351 for summoning such a person if he is not present in court. Such a provision would make Section 351 fairly comprehensive, and we think it proper to expressly provide for that situation.

24.81 Section 351 assumes that the Magistrate proceeding under it has the power of taking cognizance of the new case. It does not, however, say in what manner cognizance is taken by the Magistrate. The modes of taking cognizance are mentioned in Section 190, and are apparently exhaustive. The question is, whether against the newly added accused, cognizance will be supposed to have been taken on the Magistrates own information under Section 190(1), or only in the manner in which cognizance was first taken of the offence against the accused. The question is important, because the methods of inquiry and trial in the two cases differ. About the true position under the existing law, there has been difference of opinion, and we think it should be made clear. It seems to us that the main purpose of this particular provision is that the whole case against all known suspects should be proceeded with expeditiously and convenience requires that cognizance against the newly added accused should be taken in the same manner against the other accused. We, therefore, propose to recast Section 351 making it comprehensive and providing that there will be no difference in the mode of taking cognizance if a new person is added as an accused during the proceedings. It is, of course, necessary (as is already provided) that in such a situation the evidence must he

reheard in the presence of the newly added accused."

11. Section 319 Cr.P.C. as it exists today, is quoted hereunder:

"319 Cr.P.C. -Power to proceed against other persons appearing to be guilty of offence.-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

12. Section 319 Cr.P.C. springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.

13. It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C.?

14. The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of Cr.P.C. and the judgments that have been relied on for the said purpose. The controversy centers around the stage at which such powers can be invoked by the court and the material on the basis whereof such powers can be exercised.

15. It would be necessary to put on record that the power conferred under Section 319 Cr.P.C. is only on the court. This has to be understood in the context that Section 319 Cr.P.C. empowers only the court to proceed against such person. The word "court" in our hierarchy of criminal courts has been defined under Section 6 Cr.P.C., which includes the Courts of Sessions, Judicial Magistrates, Metropolitan Magistrates as well as Executive Magistrates. The Court of Sessions is defined in Section 9 Cr.P.C. and the Courts of Judicial Magistrates has been defined under Section 11 thereof. The Courts of Metropolitan Magistrates has been defined under Section 16 Cr.P.C. The courts which can try offences committed under the Indian Penal Code, 1860 or any offence under any other law, have been specified under Section 26 Cr.P.C. read with First Schedule. The explanatory note (2) under the heading of "Classification of Offences" under the First Schedule specifies the expression "magistrate of first class' and "any magistrate' to include Metropolitan Magistrates who are empowered to try the offences under the said Schedule but excludes Executive Magistrates.

16. It is at this stage the comparison of the words used under Section 319 Cr.P.C. has to be understood distinctively from the word used under Section 2(g) defining an inquiry other than the trial by a magistrate or a court. Here the legislature has used two words, namely the

magistrate or court, whereas under Section 319 Cr.P.C., as indicated above, only the word "court" has been recited. This has been done by the legislature to emphasise that the power under Section 319 Cr.P.C. is exercisable only by the court and not by any officer not acting as a court. Thus, the magistrate not functioning or exercising powers as a court can make an inquiry in particular proceeding other than a trial but the material so collected would not be by a court during the course of an inquiry or a trial. The conclusion therefore, in short, is that in order to invoke the power under Section 319 Cr.P.C., it is only a Court of Sessions or a Court of Magistrate performing the duties as a court under the Cr.P.C. that can utilise the material before it for the purpose of the said Section.

17. Section 319 Cr.P.C. allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 Cr.P.C. or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

18. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecution."

11. The judgment in the case of **Hardeep Singh (Supra)** has also been considered and taken note in the judgment in the case of **S. Mohammad Ispahani Vs. Yogendra Chandak and Others reported in (2017) 16 SCC 226** wherein paragraph nos. 28 and 29 the Hon'ble Apex Court has observed as under.

"28) Insofar as power of the Court under Section 319 of the Cr.P.C. to summon even those persons who are not named in the charge sheet to appear and face trial is concerned, the same is unquestionable. Section 319 of the Cr.P.C. is meant to rope in even those persons who were not implicated when the charge sheet was filed but during the trial the Court finds that sufficient evidence has come on record to summon them and face the trial. In Hardeep Singh's case, the Constitution Bench of this Court has settled the law in this behalf with authoritative pronouncement, thereby removing the cobweb which had been created while interpreting this provision earlier. As far as object behind Section 319 of the Cr.P.C. is concerned, the Court had highlighted the same as under:

"The court is sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

29) At the same time, the Constitution Bench has clarified that the power under Section 319 of the Cr.P.C. can only be exercised on "evidence' recorded in the Court and not material gathered at the investigation stage, which has already been tested at the stage under Section 190 of the Cr.P.C. and issue of process under Section 204 of the Cr.P.C. This principle laid down in Hardeep Singh's case has been

explained in Brjendra Singh and Others v. State of Rajasthan in the following manner:

"10. It also goes without saying that Section 319 CrPC, which is an enabling provision empowering the Court to 6 (2017) 7 SCC 706 Criminal Appeal No. 1720 of 2017 & Ors. appropriate steps for proceeding against any person, not being an accused, can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage of Sections 207/208 CrPC, the committal, etc. which is only a pre-trial stage intended to put the process into motion.

11. In Hardeep Singh case , the Constitution Bench has also settled the controversy on the issue as to whether the word "evidence" used in Section 319(1) CrPC has been used in a comprehensive sense and indicates the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial. It is held that it is that material, after cognizance is taken by the court, that is available to it while making an inquiry into or trying an offence, which the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court. The word "evidence" has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. It means that the power to proceed against any person after summoning him can be exercised on the basis of any such material as brought forth before it. At the same time, this Court cautioned that the duty and obligation of the court becomes more onerous to invoke such powers consciously on such material after evidence has been led during trial. The Court also clarified that " evidence" under Section 319 CrPC could even be examination-in-chief and the Court is not required to wait till such evidence is tested on cross-examination, as it is the satisfaction of the court which can be gathered from the reasons recorded by the court in respect of complicity of some other person(s) not facing trial in the offence.

12. The moot question, however, is the degree of satisfaction that is required for invoking the powers under Section 319 CrPC and the related question is as to in what situations this power should be exercised in respect of a person named in the FIR but not charge-sheeted. These two aspects were also specifically dealt with by the Constitution Bench in Hardeep Singh case and answered in the following manner: (SCC pp. 135 & 138, paras 95 & 105-106)

"95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench Criminal Appeal No. 1720 of 2017 & Ors. this Court in Vikas v. State of Rajasthan [Vikas v. State of Rajasthan, (2014) 3 SCC 321 : (2014) 2 SCC (Cri) 172] , held that on the [Ed.: The words between two asterisks have been emphasised in original.] objective satisfaction [Ed.: The words between two asterisks have been emphasised in original.] of the court a person may be "arrested" or "summoned", as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

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105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court

that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge , but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words " [Ed.: The words between two asterisks have been emphasised in original.] for which such person could be tried together with the accused [Ed.: The words between two asterisks have been emphasised in original.] ". The words used are not "for which such person could be Criminal Appeal No. 1720 of 2017 & Ors. ". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

13. In order to answer the question, some of the principles enunciated in Hardeep Singh case may be recapitulated: power under Section 319 CrPC can be exercised by the trial court at any stage during the trial i.e. before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some "evidence" against such a person on the basis of which evidence it can be gathered that he appears to be guilty of the offence. The "evidence" herein means the material that is brought before the court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 CrPC. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the court under Section 319 CrPC and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The *prima facie* opinion which is to be formed requires stronger evidence than mere probability of his complicity." *(emphasis supplied)*

12. The legislature was quite conscious while engrafting section 319 Cr.P.C. while employing the words "in the course of any inquiry into, or trial of, an offence, it appears from the evidence". The aforesaid words so employed under section 319 Cr.P.C. itself shows that degree of satisfaction has to be accorded by the Magistrate while exercising powers u/s 319 Cr.P.C.

13. Obviously, degree of satisfaction defers from case to case and according to the degree of satisfaction the test to be applied as one should be more than *prima facie* case at the stage of framing of charges. The Hon'ble Supreme Court in the case of **Hardeep Singh (Supra)** has observed as under:-

"93. Section 319(1) Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court. The word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved". It imparts a lesser degree of probability than proof.

94. In Pyare Lal Bhargava v. The State of Rajasthan, AIR 1963 SC 1094, a four-Judge Bench of this Court was concerned with the meaning of the word "appear'. The court held that the appropriate meaning of the word "appears' is "seems'. It imports a lesser degree of probability than proof. In Ram Singh & Ors. v. Ram Niwas & Anr., (2009) 14 SCC 25, a two-Judge Bench of this Court was again required to examine the importance of the word "appear' as appearing in the Section. The Court held that for the fulfillment of the condition that it appears to the court that a person had committed an offence, the court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary jurisdiction. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as an accused in the case.

95. At the time of taking cognizance, the court has to see whether a *prima facie* case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of *prima facie* case is the same, the degree of satisfaction that is required is much stricter. A two- Judge Bench of this Court in Vikas v. State of Rajasthan, 2013 (11) SCALE 23, held that on the objective satisfaction of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

96. In Rajendra Singh (Supra), the Court observed:

"Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is "may" and not "shall". The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression "appears" indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not."

97. In Mohd. Shafi (Supra), this Court held that it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 Cr.P.C., it must arrive at a satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted.

98. In Sarabjit Singh & Anr. v. State of Punjab & Anr., AIR 2009 SC 2792, while explaining the scope of Section 319 Cr.P.C., a two-Judge Bench of this Court observed:

"....For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.....

Whereas the test of *prima facie* case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction.

Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz. (i) an extraordinary case, and (ii) a case for sparingly

(sic sparing) exercise of jurisdiction, would not be satisfied." (Emphasis added)

99. In Brindaban Das & Ors. v. State of West Bengal, AIR 2009 SC 1248, a two-Judge Bench of this Court took a similar view observing that the court is required to consider whether such evidence would be sufficient to convict the person being summoned. Since issuance of summons under Section 319 Cr.P.C. entails a de novo trial and a large number of witnesses may have been examined and their re-examination could prejudice the prosecution and delay the trial, the trial court has to exercise such discretion with great care and perspicacity.

A similar view has been re-iterated by this Court in Michael Machado & Anr. v. Central Bureau of Investigation & Ors., AIR 2000 SC 1127.

100. However, there is a series of cases wherein this Court while dealing with the provisions of Section 227, 228, 239, 240, 241, 242 and 245 Cr.P.C., has consistently held that the court at the stage of framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of *prima facie* case is to be applied. The Court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further. (Vide: State of Karnataka v. L. Munishwamy & Ors., AIR 1977 SC 1489; All India Bank Officers' Confederation etc. v. Union of India & Ors., AIR 1989 SC 2045; Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia, (1989) 1 SCC 715; State of M.P. v. Dr. Krishna Chandra Saksena, (1996) 11 SCC 439; and State of M.P. v. Mohan Lal Soni.

101.In Dilawar Babu Kurane v. State of Maharashtra AIR 2002 SC 564, this Court while dealing with the provisions of Section 227 and 228 Cr.P.C., placed a very heavy reliance on the earlier judgment of this Court in Union of India v. Prafulla Kumar Samal & Anr., AIR 1979 SC 366 and held that while considering the question of framing the charges, the court may weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out and whether the materials placed before this Court disclose grave suspicion against the accused which has not been properly explained. In such an eventuality, the court is justified in framing the charges and proceeding with the trial. The court has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but court should not make a roving enquiry into the pros and cons of the matter and weigh evidence as if it is conducting a trial.

102 In Suresh v. State of Maharashtra, AIR 2001 SC 1375, this Court after taking note of the earlier judgments in Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya, AIR 1990 SC 1962 and State of Maharashtra v. Priya Sharan Maharaj, AIR 1997 SC 2041, held as under:

"9.....at the stage of Sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the

offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction." (Emphasis supplied)

103. Similarly in State of Bihar v. Ramesh Singh, AIR 1977 SC 2018, while dealing with the issue, this Court held:

".....If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial....."

104. In Palanisamy Gounder & Anr. v. State, represented by Inspector of Police, (2005) 12 SCC 327, this Court deprecated the practice of invoking the power under Section 319 Cr.P.C. just to conduct a fishing inquiry, as in that case, the trial court exercised that power just to find out the real truth, though there was no valid ground to proceed against the person summoned by the court.

105. Power under Section 319 Cr.P.C. is a discretionary and an extra- ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a *prima facie* case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than *prima facie* case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not "for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused."

14. The Hon'ble Apex court in the case of **Hardeep Singh (Supra)** has also analysed the contingencies in what situation can the power u/s 319 Cr.P.C. be exercised in the cases when a persons is not named in the FIR though named in the FIR but not charge sheeted or has been discharged. The Hon'ble Apex Court has observed as under:-

"107. In Joginder Singh & Anr. v. State of Punjab & Anr., AIR 1979 SC 339, a three-Judge Bench of this Court held that as regards the contention that the phrase "any person not being the accused" occurring in Section 319 Cr.P.C. excludes from its operation an accused who has been released by the police under Section 169 Cr.P.C. and has been shown in Column 2 of the charge-sheet, the contention has merely to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Section 319 (1) Cr.P.C. clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court, are included in the said expression.

108. In Anju Chaudhary v. Sate of U.P. & Anr., (2013) 6 SCC 384, a two-Judge Bench of this Court held that even in the cases

where report under Section 173(2) Cr.P.C. is filed in the court and investigation records the name of a person in Column2, or even does not name the person as an accused at all, the court in exercise of its powers vested under Section 319 Cr.P.C. can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law.

109. In Suman v. State of Rajasthan & Anr., AIR 2010 SC 518, a two- Judge Bench of this Court observed that there is nothing in the language of this sub-section from which it can be inferred that a person who is named in the FIR or complaint, but against whom charge-sheet is not filed by the police, cannot be proceeded against even though in the course of any inquiry into or trial of any offence, the court finds that such person has committed an offence for which he could be tried together with the other accused.

110.In Lal Suraj (supra), a two-Judge Bench held that there is no dispute with the legal proposition that even if a person had not been charge-sheeted, he may come within the purview of the description of such a person as contained in Section 319 Cr.P.C. A similar view had been taken in Lok Ram (Supra), wherein it was held that a person, though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added to face the trial.

111. Even the Constitution Bench in Dharam Pal (CB) has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the chargesheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the chargesheet or whose name appears in the FIR and not in the main part of the chargesheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 319 Cr.P.C. can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

112. However, there is a great difference with regard to a person who has been discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation; the court had come to the conclusion that there is not even a *prima facie* case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The Court should keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with section 398 Cr.P.C. without resorting to the provision of Section 319 Cr.P.C. directly.

113. In Sohan Lal & Ors. v. State of Rajasthan, (1990) 4 SCC 580, a two-Judge Bench of this Court held that once an accused has been discharged, the procedure for enquiry envisaged under Section 398 Cr.P.C. cannot be circumvented by prescribing to procedure under Section 319 Cr.P.C.

114. In Municipal Corporation of Dehli v. Ram Kishan Rohtagi & Ors., AIR 1983 SC 67, this Court held that if the prosecution can at any stage produce evidence which satisfies the court that those who have not been arraigned as accused or against whom proceedings have been quashed, have also committed the offence, the

Court can take cognizance against them under Section 319 Cr.P.C. and try them along with the other accused.

115. Power under Section 398 Cr.P.C. is in the nature of revisional power which can be exercised only by the High Court or the Sessions Judge, as the case may be. According to Section 300 (5) Cr.P.C., a person discharged under Section 258 Cr.P.C. shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate. Further, Section 398 Cr.P.C. provides that 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 an inquiry into the case against any person who has already been discharged. Both these provisions contemplate an inquiry to be conducted before any person, who has already been discharged, is asked to again face trial if some evidence appears against him. As held earlier, Section 319 Cr.P.C. can also be invoked at the stage of inquiry. We do not see any reason why inquiry as contemplated by Section 300(5) Cr.P.C. and Section 398 Cr.P.C. cannot be an inquiry under Section 319 Cr.P.C. Accordingly, a person discharged can also be arraigned again as an accused but only after an inquiry as contemplated by Section 300(5) and 398 Cr.P.C. If during or after such inquiry, there appears to be an evidence against such person, power under Section 319Cr.P.C. can be exercised. We may clarify that the word "trial' under Section 319 Cr.P.C. would be eclipsed by virtue of above provisions and the same cannot be invoked so far as a person discharged is concerned, but no more.

116. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C."

15. The Constitutional Bench in the matter of **Hardeep Singh (Supra)** has also considered the scope, ambit and the importance of the word evidence and had analysed the same and held as under:-

58. To answer the questions and to resolve the impediment that is being faced by the trial courts in exercising of powers under Section 319 Cr.P.C., the issue has to be investigated by examining the circumstances which give rise to a situation for the court to invoke such powers. The circumstances that lead to such inference being drawn up by the court for summoning a person arise out of the availability of the facts and material that comes up before the court and are made the basis for summoning such a person as an accomplice to the offence alleged to have been committed. The material should disclose the complicity of the person in the commission of the offence which has to be the material that appears from the evidence during the course of any inquiry into or trial of offence. The words as used in Section 319 Cr.P.C. indicate that the material has to be "where ....it appears from the evidence" before the court.

59. Before we answer this issue, let us examine the meaning of the word "evidence'. According to Section 3 of the Evidence Act, "evidence' means and includes:

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court, such statements are called documentary evidence;

60. According to Tomlin's Law Dictionary, Evidence is "the means from which

an inference may logically be drawn as to the existence of a fact. It consists of proof by testimony of witnesses, on oath; or by writing or records."

61. Bentham defines "evidence' as "any matter of fact, the effect, tendency or design of which presented to mind, is to produce in the mind a persuasion concerning the existence of some other matter of fact- a persuasion either affirmative or disaffirmative of its existence. Of the two facts so connected, the latter may be distinguished as the principal fact, and the former as the evidentiary fact."

62. According to Wigmore on Evidence, evidence represents "any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law, or of logic, on which the determination of the tribunal is to be asked."

63. The provision and the above-mentioned definitions clearly suggest that it is an exhaustive definition. Wherever the words "means and include" are used, it is an indication of the fact that the definition "is a hard and fast definition', and no other meaning can be assigned to the expression that is put down in the definition. It indicates an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expression. **(Vide: M/S. Mahalakshmi Oil Mills v. Stare of A.P. AIR 1989 SC 335; Punjab Land Development and Reclamation Corporation Ltd. Chandigarh v. Presiding Officer, Labour Court, Chandigarh & Ors.,** (1990) 3 SCC 682; **P. Kasilingam & Ors. v. P.S.G. collage of Technology & Ors,** AIR 1995 SC 1395; **Hamdard (Wakf) Laboratories v. Dy. Labour Commissioner & Ors.,** AIR 2008 SC 968; and **Ponds India Ltd. (merged with H.L. Limited) v. Commissioner of Trade Tax, Lucknow,** (2008) 8 SCC 369).

64. **In Feroze N. Dotivala v. P.M. Wadhwani & Ors,** (2003) 1 SCC 433, dealing with a similar issue, this Court observed as under:

"Generally, ordinary meaning is to be assigned to any word or phrase used or defined in a statute. Therefore, unless there is any vagueness or ambiguity, no occasion will arise to interpret the term in a manner which may add something to the meaning of the word which ordinarily does not so mean by the definition itself, more particularly, where it is a restrictive definition. Unless there are compelling reasons to do so, meaning of a restrictive and exhaustive definition would not be expanded or made extensive to embrace things which are strictly not within the meaning of the word as defined.

65. We, therefore proceed to examine the matter further on the premise that the definition of word "evidence" under the Evidence Act is exhaustive.

66. In Kalyan Kumar Gogoi v. Ashutosh Agnihotri & Anr., AIR 2011 SC 760, while dealing with the issue this Court held :

"18. The word "evidence" is used in common parlance in three different senses: (a) as equivalent to relevant, (b) as equivalent to proof, and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc."

67. In relation to a Civil Case, this court in Ameer Trading Corporation Ltd. v. Shapoorji Data Processing Ltd., AIR 2004 SC 355, held that the examination of a witness would include evidence-in- chief, cross-examination or re-examination. In Omkar

Namdeo Jadhao & Ors v. Second Additional Sessions Judge Buldana & Anr., AIR 1997 SC 331; and Ram Swaroop & Ors. v. State of Rajasthan, AIR 2004 SC 2943, this Court held that statements recorded under Section 161 Cr.P.C. during the investigation are not evidence. Such statements can be used at the trial only for contradictions or omissions when the witness is examined in the court.

(See also: **Podda Narayana & Ors. v. State of A.P.,** AIR 1975 SC 1252; **Sat Paul v. Delhi Administration,** AIR 1976 SC 294; and **State (Delhi Administration) v. Laxman Kumar & Ors.,** AIR 1986 SC 250).

68. In Lok Ram v. Nihal Singh & Anr., AIR 2006 SC 1892, it was held that it is evident that a person, even though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added as an accused to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence.

69. The majority view of the Constitution Bench in **Ramnarayan Mor & Anr. v. The State of Maharashtra,** AIR 1964 SC 949 has been as under:

"9. It was urged in the alternative by counsel for the appellants that even if the expression "evidence" may include documents, such documents would only be those which are duly proved at the enquiry for commitment, because what may be used in a trial, civil or criminal, to support the judgment of a Court is evidence duly proved according to law. But by the **Evidence Act** which applies to the trial of all criminal cases, the expression "evidence" is defined in Section 3 as meaning and including all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry and documents produced for the inspection of the Court. There is no restriction in this definition to documents which are duly proved by evidence." (Emphasis added)

70. Similarly, this Court in Sunil Mehta & Anr. v. State of Gujarat & Anr., JT 2013 (3) SC 328, held that "It is trite that evidence within the meaning of the **Evidence Act** and so also within the meaning of Section244 of the Cr.P.C. is what is recorded in the manner stipulated under **Section 138** in the case of oral evidence. Documentary evidence would similarly be evidence only if the documents are proved in the manner recognised and provided for under the Evidence Act unless of course a statutory provision makes the document admissible as evidence without any formal proof thereof."

71. In Guriya @ Tabassum Tauquir & Ors. v. State of Bihar & Anr., AIR 2008 SC 95, this Court held that in exercise of the powers under Section 319 Cr.P.C., the court can add a new accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge sheet or the case diary.

72. In Kishun Singh (Supra), this Court held :

"11. On a plain reading of sub-section (1) of Section 319 there can be no doubt that it must appear from the evidence tendered in the course of any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the accused. This power (under Section 319(1)), it seems clear to us, can be exercised only if it so appears from the evidence at the trial and not otherwise. Therefore, this sub-section contemplates existence of some evidence appearing in the course of trial wherefrom the court can *prima facie* conclude that the person not arraigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police. Even a person who has earlier been discharged would fall within the sweep of the power

conferred by S. 319 of the Code. Therefore, stricto sensu, Section 319 of the Code cannot be invoked in a case like the present one where no evidence has been led at a trial wherefrom it can be said that the appellants appear to have been involved in the commission of the crime along with those already sent up for trial by the prosecution.

12. But then it must be conceded that Section 319 covers the post-cognizance stage where in the course of an inquiry or trial the involvement or complicity of a person or persons not named by the investigating agency has surfaced which necessitates the exercise of the discretionary power conferred by the said provision....."

73. A similar view has been taken by this Court in Raj Kishore Prasad (Supra), wherein it was held that in order to apply Section 319 Cr.P.C., it is essential that the need to proceed against the person other than the accused appearing to be guilty of offence arises only on evidence recorded in the course of an inquiry or trial.

74. In ***Lal Suraj @ Suraj Singh & Anr. v. State of Jharkhand,*** (2009) 2 SCC 696, a two-Judge Bench of this Court held that "a court framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court exercises its jurisdiction under Section 319 Cr.P.C., the power has to be exercised on the basis of the fresh evidence brought before the court. There lies a fine but clear distinction."

75. A similar view has been reiterated by this Court in Rajendra Singh v. State of U.P. & Anr., AIR 2007 SC 2786, observing that court should not exercise the power under Section 319 Cr.P.C. on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence. The word "evidence' in Section 319 Cr.P.C. contemplates the evidence of witnesses given in the court.

76. Ordinarily, it is only after the charges are framed that the stage of recording of evidence is reached. A bare perusal of Section 227 Cr.P.C. would show that the legislature has used the terms "record of the case" and the "documents submitted therewith". It is in this context that the word "evidence' as appearing in Section 319 Cr.P.C. has to be read and understood. The material collected at the stage of investigation can at best be used for a limited purpose as provided under Section 157 of the Evidence Act i.e. to corroborate or contradict the statements of the witnesses recorded before the court. Therefore, for the exercise of power under Section 319 Cr.P.C., the use of word `evidence' means material that has come before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the court is of the opinion that a person not accused before it has also committed the offence, it may summon such person under Section 319 Cr.P.C.

77. With respect to documentary evidence, it is sufficient, as can be seen from a bare perusal of Section 3 of the Evidence Act as well as the decision of the Constitution Bench, that a document is required to be produced and proved according to law to be called evidence. Whether such evidence is relevant, irrelevant, admissible or inadmissible, is a matter of trial.

78. It is, therefore, clear that the word "evidence" in Section 319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation.

79. The inquiry by the court is neither attributable to the investigation nor the prosecution, but by the court itself for collecting information to draw back a curtain that hides something material. It is the duty of the court to

do so and therefore the power to perform this duty is provided under the Cr.P.C.

80. The unveiling of facts other than the material collected during investigation before the magistrate or court before trial actually commences is part of the process of inquiry. Such facts when recorded during trial are evidence. It is evidence only on the basis whereof trial can be held, but can the same definition be extended for any other material collected during inquiry by the magistrate or court for the purpose of Section 319 Cr.P.C.?

81. An inquiry can be conducted by the magistrate or court at any stage during the proceedings before the court. This power is preserved with the court and has to be read and understood accordingly. The outcome of any such exercise should not be an impediment in the speedy trial of the case. Though the facts so received by the magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of Section 319 Cr.P.C. it is an information of complicity. Such material therefore, can be used even though not an evidence in stricto sensuo, but an information on record collected by the court during inquiry itself, as a *prima facie* satisfaction for exercising the powers as presently involved.

82. This pre-trial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material alongwith the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the charge-sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

83. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilize or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. This would harmonise such material with the word "evidence' as material that would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court.

84. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Cr.P.C. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the

evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The "evidence' is thus, limited to the evidence recorded during trial."

16. The proposition of law culled out by the Hon'ble Apex Court itself makes it clear that u/s 319 Cr.P.C. discretion has been bestowed upon the Magistrate to exercise the powers while looking into the facts and the circumstances of a particular case before it while according degree of satisfaction so imperative for invocation of the powers u/s 319 Cr.P.C. The Hon'ble Apex Court has repeatedly cautioned the Courts to exercise the powers under section 319 Cr.P.C. in such a manner that it does not permit an accused to walk away free on the strength of any lacuna attributed by the Investigating Officer. In nutshell, it can be very well said that once the Magistrate finds that there was sufficient material available on record before it to summon a person in the trial which is proposed to be undertaken then the powers u/s 319 Cr.P.C. are to be invoked.

17. Nonetheless, the powers under section 319 Cr.P.C. to summon those persons who are not named in the charge sheet to appear and face trial is unquestionable as the very object of engrafting section 319 Cr.P.C. is that to allow a person who deserves to be tried not to go scot-free.

18. The stage which is contemplated under section 319 Cr.P.C. 1973 is a stage before the conclusion of the trial and thus, only one conclusion can be drawn that the Magistrate must be *prima facie* of the opinion that there are sufficient material and cause for summoning the culprit who is either not named in the FIR or if named, he has not been charge sheeted or discharged.

19. The issue can also be seen from another point of angle that during the course of the inquiry into, or trial of, an offence, it appears from the evidence that any person not being accused has committed the offence or he has not been charge sheeted but there are sufficient material available on record which has not been taken into consideration by the Investigating Officer then the Magistrate in exercise of powers can always summon him in that regard. Sub section (1) of section 319 Cr.P.C. has consciously used the word "during the course of any inquiry into, or trial of" meaning thereby that the powers can be exercised under section 319 Cr.P.C. when there are certain material available on record during the course of inquiry or trial.

20. Coming to the fact of the present case admittedly, the FIR was lodged on 17.03.2016 by the father of the victim who is opposite party no. 2 before the police station Hapur Nagar, District Hapur being case crime no. 0218 of 2016, u/s 363, 376, 120-B IPC read with section ¾ POCSO Act with relation to the incident occurred on 17.01.2016 alleging that on 17.01.2016 the victim was forcibly taken away by the co-accused Rahul to Keshav Nagar in a house in the Footi Line where he used to commit rape and when the victim who is a minor, requested to be set free as she wanted to go back to her parent's house then Smt. Suman (the applicant) did not allow her to go as she was witness of the alleged offence. Statements of the victim were recorded u/s 161 and 164 Cr.P.C. which corroborates and narrates the version of the FIR. Even the father of the victim also got recorded his statement u/s 161 of the Cr.P.C. which supports the statements of the victim. Thereafter, the statements of the witnesses being Satish, Smt. Pooja, Smt. Malti Devi and Shivbaran Singh have also been recorded which also supports the statement of the victim. However, on 25.02.2016 charge sheet was submitted by the Investigating Officer against the co-accused Rahul only and not against the applicant despite the fact that there was

sufficient material available on record to suggest that the applicant had also indulged in criminality. Accordingly, on 20.11.2020 an application was preferred by the opposite party no. 2 which came into light in exercise of power contained u/s 319 Cr.P.C. while summoning the applicant, Raja Ram and Layak Ram.

21. Learned counsel for the revisionist had argued that there is no material available on record so as to implicate the revisionist in the said criminality. Elaborating the said submission, the learned counsel for the revisionist has further argued that there was no material available before the court below for exercising powers u/s 319 Cr.P.C.

22. The learned A.G.A. has drawn the attention of this Court towards the statement of opposite party no. 2 recorded u/s 164 Cr.P.C. so as to contend that specifically the name of the revisionist has been taken during the course of recording of the statement regarding commissioning of the offence by the revisionist.

23. I have carefully gone through the records of the present case and I find that the name of the revisionist has been specifically taken by the opposite party no. 2 in the statement recorded u/s 164 Cr.P.C. The Magistrate has considered each and every aspect of the matter and also analysed the import and the impact of the statement recorded u/s 164 Cr.P.C. of the opposite party no. 2.

24. Needless to point out that this Court under revisional jurisdiction cannot substitute its own views particularly when there was ample evidence available on record before the court below in exercising the jurisdiction as conferred u/s 319 Cr.P.C.

25. Nonetheless, on a pointed query being raised before the learned counsel for the revisionist to point out any perversity committed by the court below or any jurisdictional error, the learned counsel for the revisionist only argued this much that he has not committed any offence and he has been falsely implicated in the present case.

26. The counsel for the revisionist has argued on the factual score that too without any basis. This Court is of the firm opinion that there exist sufficient material available with the court below for invoking the provisions contained u/s 319 Cr.P.C.

27. Learned counsel for the revisionist has not disputed the legal proposition of law so culled out by the Hon'ble Apex Court in relation to the scope and the ambit of the powers u/s 319 Cr.P.C. Further the learned counsel for the revisionist has also not been able to place on record any material to show the findings recorded by the court below while summoning the revisionist suffers, from perversity or manifest illegality.

28. Resultantly, the present revision is wholly misconceived and is liable to be **dismissed.**

29. No order as to costs.

(2021)12ILR A197
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Criminal Revision No. 3036 of 2021

Naveen Agrawal ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:

Sri Gyan Prakash Shrivastava, Sri Shrinath Dwivedi

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 397/401 & 125 - Order for maintenance of wifes , children and parents , The Code of criminal procedure, 1898 - Section 488 - Order of maintenance of wife & children - Constitution of India - Article 15(3) - maintenance in all cases will be awarded from the date of the filing of the application for maintenance.(Para - 37)

Order passed by Additional Family Judge/Family Court under challenge - maintenance awarded to opposite party nos.2 and 3 in the proceedings under Section 125 Cr.P.C. - opposite party no.2 solemnized marriage with the revisionist - demand of dowry of 4 lakhs - applications for maintenance allowed in part - opposite party nos. 2 and 3 claimed maintenance of Rs.30,000/- from revisionist - court below awarded maintenance to opposite party no.2 to the tune of Rs.4000/- and Rs.3000/- to the minor son of revisionist. - hence revision.

HELD:-Sufficient material on record to show that determination so done by court below while awarding Rs.4000/-per month as maintenance to the wife and Rs.3000/- towards maintenance of the minor son per month is not excessive. Findings recorded by the court below cannot be said to be perverse, as onus to prove that the findings are perverse is upon the revisionist and once the revisionist has not assailed the said findings seriously the order cannot be said to be suffering from manifest illegality. No manifest illegality by court below in the order passed by the court of Additional Family Judge/Family Court, in the proceedings under Section 125 Cr.P.C. .(Para - 33,38,40)

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. Captain Ramesh Chander Kaushal Vs Mrs. Veena Kaushal & ors. , (1978) 4 SCC 70

2. Shri Bhagwan Dutt Vs Smt. Kamla Devi & anr. , (1975) 2 SCC 386

3. Chaturbhuj Vs Sita Bai ,(2008) 2 SCC 316

4. Chanmuniya Vs Virendra Kumar Singh Kushwaha & anr., (2011) 1 SCC 141

5. Kamla & ors. Vs M.R. Mohan Kumar , (2019) 11 SCC 491

6. Rajneesh Vs Neha, Criminal Appeal No.730 of 2020

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Srinath Dwivedi, learned counsel for the revisionist as well as learned AGA, who appears for the opposite party no.1 (State of U.P.). In view of the order proposed to be passed, there is no necessity to issue notices to opposite parties no. 2 and 3.

2. Challenge in the present revision purported to be under Section 397 read with Section 401 Cr.P.C., 1973 is to the order dated 12.8.2021 passed by the court of learned Additional Family Judge/Family Court, Court No.1, Kanpur Nagar in the proceedings under Section 125 Cr.P.C. having Case No.460/2019, (CNRI-UPKN0200164/2019, Smt. Shalini and others Vs. Navin Agarwal whereby maintenance awarded to the opposite party nos.2 and 3.

3. Brief facts of the case shorn off unnecessary details as pleaded and set forth before the court below as well as before this Court in the present revision are that the opposite party no.2 solemnized marriage with the revisionist herein on 10.5.2003 as per Hindu ritual and rites at Status Club Cantt., Kanpur city.

4. According to the allegations as set forth in the application under Section 125 of the Cr.P.C. so preferred by the opposite party nos. 2 and 3, it was alleged that consequent to the marriage which was solemnized on 10.5.2003, the opposite party no.2 brought various gifts in the honour of the revisionist and his family but

neither the revisionist nor his parents were happy with the gifts so offered by the family of the opposite party no. 2 and they asked for dowry of 4 lakhs. On 28.10.2004 with the wedlock of the opposite party no.2 and the revisionist, the opposite party no.3 was born. Even after the birth of the opposite party no.3, there was no change in the attitude of either the revisionist or his parents.

5. On 25.10.2007, the revisionist and his parents had thrown away the opposite party nos. 2 and 3 from their house only with the clothes which they were wearing from that point of time whey the were residing with their parents (Matrimonial house). It is further alleged that the opposite party no.2 is/was mentally broken on account whereof she is not able to earn anything and she is completely dependent upon her parents.

6. Further it has been pleaded that the opposite party no.2 has no source of income and it has become virtually impossible for her to sustain herself & minor daughter as according to the opposite party no.2, the revisionist has his own accommodation and he is/was working in Chandra Agency and he is getting huge salary in this regard.

7. On being noticed the revisionist herein filed its objections.

8. Thereafter now an order has been passed by the court of Additional Family Judge, Family Court No.2, Kanpur Nagar on 12.8.2021 whereby the applications so preferred under Section 125 Cr.P.C. for maintenance has been allowed in part and the opposite party no.2 has been awarded maintenance of Rs.4000/- per month as well as the opposite party no.3 being a minor has been awarded maintenance of Rs.3000/- per month totaling to Rs.7000/- per month.

9. Assailing the order dated 12.8.2021 passed in the proceedings under Section 125 Cr.P.C. in the Case No. 460 of 2019, the revisionist is before this Court.

10. Before proceeding to decide the present case, it has to be kept in mind that the present proceedings which have been initiated before this Court is under the provisions contained under Section 397/401 Cr.P.C. being revisional jurisdiction.

11. The scope and the extent of exercise of revisional jurisdiction under Section 397 and 401 Cr.P.C. is no more res integra as this Court can only interfere in the order under challenge when the same is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records as the revisional court is not justified in setting aside the order mainly because another view is possible.

12. In the light of the well settled principle of law as culled out by the Hon'ble Apex Court, the present case is to be decided.

13. Brief background of the statutory enactments so made from time to time are germane for adjudication of the controversy in question and hence the same are reproduced hereinbelow:-

Section 488 of the Cr.P.C. 1898:-

Section 488-Order of maintenance of wife & children

"(1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding fifty rupees in the whole, as such Magistrate thinks fit, and to

pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may mate an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

(4) No wife shall he entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases:

Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case ex parte. Any order so made may be set aside for good cause shown, on application made within three months from the date thereof.

(7) The accused may tender himself as a witness, and in such case shall be examined as such.

(8) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(9) The accused may be proceeded against in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child."

Section 125(1) of the Cr.P.C. 1973

(1) If any person having sufficient means neglects or refuses to maintain.-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Section 125 Cr.P.C. 1973 as amended w.e.f. 24.9.2001 -

Section 125 - Order for maintenance of wives, children and parents

(1) If any person having sufficient means neglects or refuses to maintain.-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate 1[***] as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

[Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.";]

Explanation.-For the purposes of this Chapter.-

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

"(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.";]

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any port of each month's 4[allowance for the maintenance or the interim maintenance and expenses of proceeding , as the case may be] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an 4[allowance for the maintenance or the interim maintenance and expenses of proceeding

, as the case may be] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her, husband, or if they are living separately by mutual consent.

*(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living sep*arately by mutual consent, the Magistrate shall cancel the order.

STATE AMENDMENTS

Uttar Pradesh:

"(6) where in a proceeding under this section it appears to the Magistrate that the person claiming maintenance is in need to immediate relief for his support and the necessary expenses of the proceeding, the Magistrate may, on his application, order the person against whom the maintenance is claimed, to pay to the person claiming the maintenance, during the pendency of the proceeding such monthly allowance not exceeding five thousand rupees and such expenses of the proceeding as the Magistrate consider reasonable and such order shall be enforceable as an order of maintenance."

14. The incorporation of the provisions pertaining to maintenance has been well recognized and the provisions so contained under Section 488 of the Cr.P.C. 1898 which is a pre-constitution enactment has been given recognition and endorsed while giving it up proper place and status in Section 125 of the Cr.P.C., 1973.

15. The laws relating to maintenance have been enacted as a measure for social justice to provide immediate relief to dependent being wives and children for their family support so as to prevent them from falling into destitution and vagrancy.

Article 15(3) of the Constitution of India provides that:

"Nothing in this article shall prevent the State from making any special provision for women and children."

16. Thus it can be safely said that the Constitution of India, 1950 has envisaged a devise setting up a positive role for the State in fostering change towards the empowerment of women leading to amendment in various legislation and introduction of new legislation.

17. As noticed earlier the pre-constitutional law being the Code of Criminal Procedure, 1898 relating to Section 488 has been followed in Section 125 Cr.P.C. before its amendment in the year 2001 as in other words it can be said that Section 125 Cr.P.C. is an incarnation of Section 488 of the old Act except the fact that now parents also are brought into category of persons eligible for maintenance and further legislative cognizance has also been taken of the devaluation of the rupees and escalation of living cost by raising maximum allowance from 100 to 500. However, now after amendments made in the year 2001 the ceiling limit for maintenance has been done away.

18. The Hon'ble Supreme Court in the case of **Captain Ramesh Chander Kaushal Vs. Mrs. Veena Kaushal and others reported in (1978) 4 SCC 70** in para 9 has observed as under:-

"9. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by Courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform

interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the cause--the cause of the derelicts."

19. The basic idea behind insertion of the provisions relating to grant of maintenance is to prevent vagrancy and destitution of the dependents so as to create an atmosphere whereby a dependent is not allowed to starve or lead a life which cannot be termed to be a respectable living.

20. Section 125 of the Cr.P.C. is a self-contained code which finds presence under Chapter IX of 1973 Code for the aid of wife, children and parents in the matter of maintenance that to in summary proceedings. Maintenance under Section 125 of the Cr.P.C. can be claimed by a person irrespective of belonging to any religious community and the object of the said Section is to provide immediate relief to an applicant meaning thereby that it is a beneficial legislation in favour of the dependents.

21. It is not a matter of right that a dependent can claim maintenance under Section 125 Cr.P.C. as there are certain conditions. It is further not matter of mere asking that the maintenance can be claimed by a dependent as for the said purpose, there are certain pre-requisite conditions which have to be satisfied namely;

(i) the husband must have sufficient means;

(ii) the husband neglects to maintain his wife, who is unable to maintain herself

22. Yet the Hon'ble Supreme Court in the case of **Shri Bhagwan Dutt Vs. Smt. Kamla Devi and another reported in (1975) 2 SCC 386** while dealing with the provisions contained under Section 488 of the old Act held as under:-

"19. The object of these provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income, also, is taken into account together with the earnings of the husband and his commitments."

23. The Hon'ble Apex Court had even put a caveat and has cautioned that the proceeding under Section 125 of the Cr.P.C., 1973 is not with an object to punish a person but prevent vagrancy by compelling who can provide support to those who are unable to support themselves.

24. Hon'ble Supreme Court in the case of **Chaturbhuj Vs. Sita Bai (2008) 2 SCC 316** in para 6 has observed as under:-

"6. The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow.

Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors (1978) 4 SCC 70) falls within constitutional sweep of Article 15(3)

reinforced by Article 39 of the Constitution of India, 1950. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat and Ors. (2005) 3 SCC 636."

25. Reiterating the principles of law as laid down in the aforesaid decisions the Hon'ble Apex Court in the case of **Chanmuniya Vs. Virendra Kumar Singh Kushwaha and another (2011) 1 SCC 141** has even gone into the marital status with regard to long cohabitation and in para 42 observed as under :-

"42. We are of the opinion that a broad and expansive interpretation should be given to the term 'wife' to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time, and strict proof of marriage should not be a pre-condition for maintenance under Section 125 of the Cr.P.C., so as to fulfil the true spirit and essence of the beneficial provision of maintenance under Section 125.We also believe that such an interpretation would be a just application of the principles enshrined in the preamble to our Constitution, namely, social justice and upholding the dignity of the individual."

26. In the case of **Kamla and others Vs. M.R. Mohan Kumar reported in (2019) 11 SCC 491** the Hon'ble Apex Court has gone to the extent that long cohabitation between woman and man leads to presumption of marriage entitling maintenance for woman and children born to them.

27. In the touch stone of the principles of law propounded by the Hon'ble Apex Court the present controversy is to be addressed.

28. Learned counsel for the revisionist had manifold submissions:-

(a) The revisionist being the husband of the opposite party no.2 and the father of the opposite party no.3 is not financially sound and rather not in a position to pay maintenance to the dependents.

(b) The opposite party no.2 being the wife of the revisionist is financially sound, she is not entitle to any maintenance from the revisionist.

(c) The proceedings under Section 125 of the Cr.P.C. are not maintainable at the behest of the opposite party nos. 2 and 3 as they have themselves left the home of the revisionist.

(d) Order passed by the court below directing for grant of maintenance from the date of the application is illegal.

29. On the other hand, learned AGA, who appears for the opposite party no.1 has argued that the revisionist was employed as Third Engineer in the Merchant Navy and he voluntarily left the same in order to avoid payment of maintenance and the fact that he also resigned from a private employment in Kanpur shows that he is financially sound.

30. Having gone through the order under challenge, I find that the revisionist was a Third Engineer in Merchant Navy. However, he resigned when the proceedings under Section 125 Cr.P.C. was initiated by the opposite party nos. 2 and 3 thereafter as per the own showing of the revisionist, the revisionist got employment in M/s Chandra Associates, where from he also resigned. The said fact itself shows that the revisionist has adequate financial backing.

31. Further It is also come on record that the revisionist's father was employed with the government and thereafter consequent to his retirement, he was getting pension and after his death, mother of the revisionist getting family pension. Further it is also come on record that the revisionist has his own house and he is the only son living with his mother.

32. The aforesaid facts have not been disputed by the revisionist but only this much has been argued that he is not in a position to maintain his wife and his minor child

33. In absence of any evidence available on record either adduced or pleaded inescapable conclusion follows that the findings recorded by the court below cannot be said to be perverse, as onus to prove that the findings are perverse is upon the revisionist and once the revisionist has not assailed the said findings seriously the order cannot be said to be suffering from manifest illegality.

34. So far as the argument so raised by the revisionist with regard to the fact that the opposite party no.2 is financially sound and she does not need any maintenance is concerned, the revisionist has pleaded and argued this much that the opposite party no.2 has done M.A. B.Ed. and she is earning Rs.20,000/- from R.K. Education Institute and getting income of Rs.10,000/- from tuition. The said fact has been disputed by the opposite party no.2. However, counsel for the revisionist husband has completely failed to show any document to fortify the claim set up by him. The court below has recorded a finding of fact which the revisionist could not prove otherwise. Hence the argument so sought to be raised on the said factual issue deserves to be rejected.

35. The third submission of learned counsel for the revisionist is with regard to the fact that the opposite party no.2 being the wife had left the house voluntarily and on being called repeatedly she did not come to live with her husband. The court below has also analysied said issue and has recorded a finding of fact that the proceedings under Section 13 of the Hindu Marriage Act had been instituted by the revisionist against the opposite party no.2 being bearing No.1372/12, Navin Agarwal Vs. Smt. Shanti. The said institution of the proceedings under Section 13 of the Hindu Marriage itself shows that it is the revisionist who wanted the marriage to be dissolved and thus in the said factual background, it has been rightly held by the court below that the revisionist never wanted to live with his wife.

36. Learned counsel for the revisionist has lastly argued that the maintenance so awarded by the court below is highly excessive and further if assuming without admitting the revisionist is liable to pay maintenance then that should be from the date of order and not from the date of the application. The said argument so sought to be raised by the learned counsel for the revisionist has no basis as recently the Hon'ble Apex Court in **Criminal Appeal No.730 of 2020, Rajneesh Vs. Neha decided on 4.11.2020** has observed as under :-

Discussion and Directions

The judgments hereinabove reveal the divergent views of different High Courts on the date from which maintenance must be awarded.

Even though a judicial discretion is conferred upon the Court to grant maintenance either from the date of application or from the date of the order in S. 125(2) Cr.P.C., it would be appropriate to grant maintenance from the date of application in all cases, including Section 125 Cr.P.C. In the practical working of the provisions relating to maintenance, we find that there is significant delay in disposal of the applications for interim maintenance for years on end. It would therefore be in the interests of justice and fair play that maintenance is awarded from the date of the application.

In Shail Kumari Devi and Ors. v Krishnan Bhagwan Pathak 2008 9 SCC 632, this Court held that the entitlement of maintenance should not be left to the uncertain date of disposal of the case. The enormous delay in disposal of proceedings justifies the award of maintenance from the date of application. In Bhuwan Mohan Singh v Meena61, this Court held that repetitive adjournments sought by the husband in that case resulted in delay of 9 years in the adjudication of the case. The delay in adjudication was not only against human rights, but also against the basic embodiment of dignity of an individual. The delay in the conduct of the proceedings would require grant of maintenance to date back to the date of application.

The rationale of granting maintenance from the date of application finds its roots in the object of enacting maintenance legislations, so as to enable the wife to overcome the financial crunch which occurs on separation from the husband. Financial constraints of a dependant spouse hampers their capacity to be effectively represented before the Court. In order to prevent a dependant from being reduced to destitution, it is necessary that maintenance is awarded from the date on which the application for maintenance is filed before the concerned Court.

In Badshah v Urmila Badshah Godse (2014) 1 SCC 188 , the Supreme Court was considering the interpretation of Section 125 Cr.P.C. The Court held :

"13.3. ...purposive interpretation needs to be given to the provisions of Section 125 CrPC. While dealing with the application of a destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalised sections of the society. The purpose is to achieve "social justice" which is the constitutional vision, enshrined in the Preamble of the Constitution of India. The Preamble to the Constitution of India clearly signals that we have chosen the democratic path under the rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the courts to advance the cause of the social justice. While giving interpretation to a particular provision, the court is supposed to bridge the gap between the law and society." (emphasis supplied)

It has therefore become necessary to issue directions to bring about uniformity and consistency in the Orders passed by all Courts, by directing that maintenance be awarded from the date on which the application was made before the concerned Court. The right to claim maintenance must date back to the date of filing the application, since the period during which the maintenance proceedings remained pending is not within the control of the applicant."

Final Directions

In view of the foregoing discussion as contained of this judgment, I deem it appropriate to pass the following directions in exercise of our powers under Article 142 of the Constitution of India:-

(a).....

(b).....

(c).....

(d) Date from which maintenance is to be awarded

We make it clear that maintenance in all cases will be awarded from the date of filing the application for maintenance."

37. The Hon'ble Apex Court has clearly mandated that maintenance in all cases will be awarded from the date of the filing of the application for maintenance.

38. Perusal of the application under Section 125 of the Cr.P.C. shows that opposite party nos. 2 and 3 had claimed maintenance of Rs.30,000/- from the revisionist. However, the court below in the order under challenge has awarded maintenance to the opposite party no.2 to the tune of Rs.4000/- and Rs.3000/- to the

minor son of the revisionist. This Court finds that there are sufficient material on record to show that the determination so done by the court below while awarding Rs.4000/-per month as maintenance to the wife and Rs.3000/- towards maintenance of the minor son per month is not excessive. The court below has taken note of the income of the revisionist as well as the financial condition of the opposite party no.2 as well as the prevailing circumstances including the inflation. Hence the arguments so raised by the learned counsel on that count deserves to be rejected.

39. No other point has been raised by learned counsel for the revisionist.

40. Resultantly, this Court does not find any manifest illegality by the court below in the order dated 12.8.2021 passed by the court of learned Additional Family Judge/Family Court, Court No.1, Kanpur Nagar in the proceedings under Section 125 Cr.P.C. having Case No.460/2019, (CNRI-UPKN) 0200164/2019, Smt. Shalini and others Vs. Navin Agarwal.

41. Accordingly, the criminal revision is **dismissed.**

(2021)12ILR A207
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Criminal Revision No. 3037 of 2021

Raju @ Rajesh Kumar ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Prem Prakash, Sri Abhay Raj

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Indian Penal Code, 1860 - Section 354-A, 342, 323, 286 - *doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted)* - stage contemplated under section 319 Cr.P.C. - stage before conclusion of trial - Magistrate must be prima facie of the opinion that there are sufficient material and cause for summoning the culprit who is either not named in the FIR or if named, he has not been charge sheeted or discharged. (Para -20)

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 319 - Power to proceed against other persons appearing to be guilty of offence - once the Magistrate finds that there was sufficient material available on record before it to summon a person in the trial which is proposed to be undertaken then the powers u/s 319 Cr.P.C. are to be invoked. (Para - 18)

Aggrieved against non-submission of charge sheet against the applicant - O.P. no.2 preferred an application under Section 319 CrPC - court below summoned revisionist.

HELD:- Court in exercise of the revisional jurisdiction cannot embark upon the inquiry with regard to facts of the case, particularly when the courts below had applied its mind and taken a view, which does not appear to be perverse or palpable while issuing summons. There exist sufficient material which itself shows that the powers exercised by the court below while summoning the applicants, does not suffer from any illegality and infirmity. No good ground to interfere into the order summoning the revisionist. (Para - 28,29)

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. Hardeep Singh Vs St. of Punj. , 2014 (3) SCC 92S

2. Mohammad Ispahani Vs Yogendra Chandak & ors. , (2017) 16 SCC 226

3. M/S. Mahalakshmi Oil Mills Vs St. of A.P. AIR 1989 SC 335

4. Punjab Land Development & Reclamation Corporation Ltd. Chandigarh Vs Presiding Officer, Labour Court, Chandigarh & ors., (1990) 3 SCC 682

5. P. Kasilingam & ors. Vs P.S.G. collage of Technology & ors, AIR 1995 SC 1395

6. Hamdard (Wakf) Laboratories Vs Dy. Labour Commissioner & ors., AIR 2008 SC 968

7. Ponds India Ltd. (merged with H.L. Limited) Vs Commissioner of Trade Tax, Luck., (2008) 8 SCC 369

8. Feroze N. Dotivala Vs P.M. Wadhwani & ors, (2003) 1 SCC 433

9. Ameer Trading Corporation Ltd. Vs Shapoorji Data Processing Ltd., AIR 2004 SC 355

10. Omkar Namdeo Jadhao & ors. Vs Second Additional Sessions Judge Buldana & anr., AIR 1997 SC 331;

11. Ram Swaroop & ors. Vs St. of Raj., AIR 2004 SC 2943

12. Lok Ram Vs Nihal Singh & anr., AIR 2006 SC 1892

13. Podda Narayana & ors. Vs St. of A.P., AIR 1975 SC 1252;

14. Sat Paul Vs Delhi Administration, AIR 1976 SC 294

15. St. (Delhi Administration) Vs Laxman Kumar & ors., AIR 1986 SC 250

16. Ramnarayan Mor & anr. Vs The St. of Mah., AIR 1964 SC 949

17. Sunil Mehta & anr. Vs St. of Guj. & anr., JT 2013 (3) SC 328

18. Guriya @ Tabassum Tauquir & ors. Vs St. of Bihar & anr., AIR 2008 SC 95

19. Rajendra Singh Vs St. of U.P. & anr., AIR 2007 SC 2786

20. Lal Suraj @ Suraj Singh & anr. Vs St. of Jharkhand, (2009) 2 SCC 696

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This is a revision purported to be under Section 397/401 of CrPC challenging the order dated 4.3.2021 passed by Addl. Sessions Judge/ Fast Track Court No.2, Etawah in Session Trial No. 279 of 2017 (State Vs. Manoj Kumar @ Chhange) arising out of Case Crime no.520 of 2016, under Sections 342, 323, 308 IPC, P.S.- Ekdil, District - Etawah.

2. Heard Sri Prem Prakash, learned counsel for the revisionist, as well as Sri K.K. Rajbhar, the learned A.G.A.

3. In view of the order so sought to be passed, there is no need to issue notice to O.P. no.2.

4. Brief facts of the case shorn off unnecessary details are that an FIR was lodged by O.P. no.2 on 24.11.2016 before the Police Station- Ekdil, District Etawah being Case Crime no.520 of 2016, purported to be under Section 354-A, 342, 323, 286 IPC, 1860 against the accused Rajeev son of Shiv Ram Singh, Chhote son of Kayam Singh, Chhange Singh son of Bhogi Ram and unknown persons with regard to the allegations referable to the incident, which occurred on 24.11.2016, whereby it was alleged at about 7:00 in the morning, the O.P. no.2 along with her husband being Kamlesh son of Giriwar Singh, resident of Ramnagar, P.S. Ekdil, Etawah was in their agricultural field with regard to farming activity relating to sowing. At the relevant point of time, Sri Rajeev son of Shiv Raj Singh, R/o Nagla Barra, Chhote son of Kayam Singh resident of Nagla Pancchi, Chhange son of Bhogiram resident of Buapur, P.S. Ekdil, District Etawah along with one unknown person came on a motorcycle armed with rifle and pistol and started manhandling the O.P. no.2, who started screaming and the same gathered attention of other persons, present in the field and the husband of O.P. no.2 tried to

get her released from the clutches of the aforesaid accused, then they took him away and administered beating while taking him on their motorcycle to an unknown place and when the aforesaid accused were confronted with some people, including one Santosh Chaudhary and Shivam Chaudhary, who were standing nearby, then on account of their resistance, then accused left the husband of O.P. no.2 in deplorable condition and they also fired in air.

5. Thereafter the Investigating Officer submitted a charge sheet dated 14/15.8.2017 under Sections 342, 323, 308 IPC in Case Crime no. 520 of 2016, P.S. Ekdil, District Etawah before the court concerned against Manoj Kumar only, and not against the applicant herein.

6. It appears that PW-1 being the O.P. no.2 gave her statement on 8.3.2018, wherein she had specifically taken the name of Rajeev son of Shivraj Singh resident of Nagla Bari, Ekdil, Etawah, Chhote son of Kayam Singh resident of Nagla Panchhi, Ekdil, District Etawah and Chhange son of Bhogiram, resident of Buapur, Ekdil, District Etawah and an unknown person supporting the same incident, which was narrated in the FIR dated 24.11.2016.

7. Kamlesh, the husband of O.P. no.2 also got his statement recorded under Section 161 CrPC on 17.8.2019, wherein he specifically took the name of applicant herein with regard to commission of the offences resulting to lodging of the FIR dated 24.11.2016.

8. Being aggrieved against non-submission of charge sheet against the applicant, the O.P. no.2, thereafter preferred an application under Section 319 CrPC dated 30.9.2019 before the Court of Addl. Sessions Judge, Court No.8, Etawah in S.T. No. 279 of 2017. The aforesaid application so submitted by O.P. No.2 under Section 319 CrPC has been allowed by virtue of order dated 4.3.2021 passed by court below, while issuing summons to the revisionist under Sections 342, 323, 308 IPC.

9. The order dated 4.3.2021 passed by the Court of Addl. Sessions Judge/ Fast Track Court No.2, Etawah in Session Trial No. 279 of 2017 (State Vs. Manoj Kumar @ Chhange) arising out of Case Crime no.520 of 2016, under Sections 342, 323, 308 IPC, P.S.- Ekdil, District - Etawah.

10. The moot question, which falls for consideration before this Court in the proceedings u/s 397/401 of Cr.P.C. is as to whether the order passed by the court below along with the application under Section 319 CrPC is within the parameters as set out in the said provisions.

11. For the ready reference section 319 of the Cr.P.C. 1973 is quoted hereinunder.

"319. Power to proceed against other persons appearing to be guilty of offence.--

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then--

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had

been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

12. The issue with respect to the scope and ambit of the powers so conferred upon the Magistrate u/s 319 Cr.P.C. 1973 is no more *res integra* as the Constitutional Bench of the Hon'ble Supreme Court in the case of ***Hardeep Singh Vs. State of Punjab*** reported in ***2014 (3) SCC 92*** has observed as under:-

"8. The Constitutional mandate under Articles 20 and 21 of the Constitution of India, 1950 (hereinafter referred to as the "Constitution') provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to the society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under the Cr.P.C. indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.

9. The presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty. Alternatively, certain statutory presumptions in relation to certain class of offences have been raised against the accused whereby the presumption of guilt prevails till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be innocent. These competing theories have been kept in mind by the legislature. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial and in our opinion, in order to achieve this very end that the legislature thought of incorporating provisions of Section 319 Cr.P.C. It is with the said object in mind that a constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the above mentioned avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is subject matter of trial.

10. In order to answer the aforesaid questions posed, it will be appropriate to refer to Section 351 of the Criminal Procedure Code, 1898 (hereinafter referred to as `Old Code'), where an analogous provision existed, empowering the court to summon any person other than the accused if he is found to be connected with the commission of the offence. However, when the new Cr.P.C. was being drafted, regard was had to 41st Report of the Law Commission where in the paragraphs 24.80 and 24.81 recommendations were made to make this provision more comprehensive. The said recommendations read:

"24.80 It happens sometimes, though not very often, that a Magistrate hearing a case against certain accused finds from the evidence that some person, other than the accused before him, is also concerned in that very offence or in a connected offence. It is proper that Magistrate should have the power to call and join him in proceedings. Section 351 provides for such a situation, but only if that person happens to be attending the Court. He can then be detained and proceeded against. There is no express provision in Section 351 for summoning such a

person if he is not present in court. Such a provision would make Section 351 fairly comprehensive, and we think it proper to expressly provide for that situation.

24.81 Section 351 assumes that the Magistrate proceeding under it has the power of taking cognizance of the new case. It does not, however, say in what manner cognizance is taken by the Magistrate. The modes of taking cognizance are mentioned in Section 190, and are apparently exhaustive. The question is, whether against the newly added accused, cognizance will be supposed to have been taken on the Magistrates own information under Section 190(1), or only in the manner in which cognizance was first taken of the offence against the accused. The question is important, because the methods of inquiry and trial in the two cases differ. About the true position under the existing law, there has been difference of opinion, and we think it should be made clear. It seems to us that the main purpose of this particular provision is that the whole case against all known suspects should be proceeded with expeditiously and convenience requires that cognizance against the newly added accused should be taken in the same manner against the other accused. We, therefore, propose to recast Section 351 making it comprehensive and providing that there will be no difference in the mode of taking cognizance if a new person is added as an accused during the proceedings. It is, of course, necessary (as is already provided) that in such a situation the evidence must he reheard in the presence of the newly added accused."

11. Section 319 Cr.P.C. as it exists today, is quoted hereunder:

"319 Cr.P.C. -Power to proceed against other persons appearing to be guilty of offence.-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

12. Section 319 Cr.P.C. springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.

13. It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C.?

14. The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of Cr.P.C. and the judgments that have been relied on for the said purpose. The controversy centers around the stage at which such powers can be invoked by the court and the

material on the basis whereof such powers can be exercised.

15. It would be necessary to put on record that the power conferred under Section 319 Cr.P.C. is only on the court. This has to be understood in the context that Section 319 Cr.P.C. empowers only the court to proceed against such person. The word "court" in our hierarchy of criminal courts has been defined under Section 6 Cr.P.C., which includes the Courts of Sessions, Judicial Magistrates, Metropolitan Magistrates as well as Executive Magistrates. The Court of Sessions is defined in Section 9 Cr.P.C. and the Courts of Judicial Magistrates has been defined under Section 11 thereof. The Courts of Metropolitan Magistrates has been defined under Section 16 Cr.P.C. The courts which can try offences committed under the Indian Penal Code, 1860 or any offence under any other law, have been specified under Section 26 Cr.P.C. read with First Schedule. The explanatory note (2) under the heading of "Classification of Offences" under the First Schedule specifies the expression "magistrate of first class' and "any magistrate' to include Metropolitan Magistrates who are empowered to try the offences under the said Schedule but excludes Executive Magistrates.

16. It is at this stage the comparison of the words used under Section 319 Cr.P.C. has to be understood distinctively from the word used under Section 2(g) defining an inquiry other than the trial by a magistrate or a court. Here the legislature has used two words, namely the magistrate or court, whereas under Section 319 Cr.P.C., as indicated above, only the word "court" has been recited. This has been done by the legislature to emphasise that the power under Section 319 Cr.P.C. is exercisable only by the court and not by any officer not acting as a court. Thus, the magistrate not functioning or exercising powers as a court can make an inquiry in particular proceeding other than a trial but the material so collected would not be by a court during the course of an inquiry or a trial. The conclusion therefore, in short, is that in order to invoke the power under Section 319 Cr.P.C., it is only a Court of Sessions or a Court of Magistrate performing the duties as a court under the Cr.P.C. that can utilise the material before it for the purpose of the said Section.

17. Section 319 Cr.P.C. allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 Cr.P.C. or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

18. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecution."

13. The judgment in the case of ***Hardeep Singh (Supra)*** has also been considered and taken note in the judgment in the case of ***S. Mohammad Ispahani Vs. Yogendra Chandak and Others*** reported in **(2017) 16 SCC 226**, wherein paragraph nos. 28 and 29 the Hon'ble Apex Court has observed as under:

"28) Insofar as power of the Court under Section 319 of the Cr.P.C. to summon even those persons who are not named in the charge sheet to appear and face trial is

concerned, the same is unquestionable. Section 319 of the Cr.P.C. is meant to rope in even those persons who were not implicated when the charge sheet was filed but during the trial the Court finds that sufficient evidence has come on record to summon them and face the trial. In Hardeep Singh's case, the Constitution Bench of this Court has settled the law in this behalf with authoritative pronouncement, thereby removing the cobweb which had been created while interpreting this provision earlier. As far as object behind Section 319 of the Cr.P.C. is concerned, the Court had highlighted the same as under:

"The court is sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

29) At the same time, the Constitution Bench has clarified that the power under Section 319 of the Cr.P.C. can only be exercised on "evidence' recorded in the Court and not material gathered at the investigation stage, which has already been tested at the stage under Section 190 of the Cr.P.C. and issue of process under Section 204 of the Cr.P.C. This principle laid down in Hardeep Singh's case has been explained in Brjendra Singh and Others v. State of Rajasthan in the following manner:

"10. It also goes without saying that Section 319 CrPC, which is an enabling provision empowering the Court to 6 (2017) 7 SCC 706 Criminal Appeal No. 1720 of 2017 & Ors. appropriate steps for proceeding against any person, not being an accused, can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage of Sections 207/208 CrPC, the committal, etc. which is only a pre-trial stage intended to put the process into motion.

11. In Hardeep Singh case , the Constitution Bench has also settled the controversy on the issue as to whether the word "evidence" used in Section 319(1) CrPC has been used in a comprehensive sense and indicates the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial. It is held that it is that material, after cognizance is taken by the court, that is available to it while making an inquiry into or trying an offence, which the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court. The word "evidence" has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. It means that the power to proceed against any person after summoning him can be exercised on the basis of any such material as brought forth before it. At the same time, this Court cautioned that the duty and obligation of the court becomes more onerous to invoke such powers consciously on such material after evidence has been led during trial. The Court also clarified that " evidence" under Section 319 CrPC could even be examination-in-chief and the Court is not required to wait till such evidence is tested on cross-examination, as it is the satisfaction of the court which can be gathered from the reasons recorded by the court in respect of complicity of some other person(s) not facing trial in the offence.

12. The moot question, however, is the degree of satisfaction that is required for invoking the powers under Section 319 CrPC and the related question is as to in what situations this power should be exercised in respect of a person named in the FIR but not charge-sheeted. These two aspects were also

specifically dealt with by the Constitution Bench in Hardeep Singh case and answered in the following manner: (SCC pp. 135 & 138, paras 95 & 105-106)

"95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench Criminal Appeal No. 1720 of 2017 & Ors. this Court in Vikas v. State of Rajasthan *[Vikas v. State of Rajasthan, (2014) 3 SCC 321 : (2014) 2 SCC (Cri) 172] , held that on the [Ed.: The words between two asterisks have been emphasised in original.] objective satisfaction [Ed.: The words between two asterisks have been emphasised in original.] of the court a person may be "arrested" or "summoned", as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.*

***

105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge , but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words " [Ed.: The words between two asterisks have been emphasised in original.] for which such person could be tried together with the accused [Ed.: The words between two asterisks have been emphasised in original.] ". The words used are not "for which such person could be Criminal Appeal No. 1720 of 2017 & Ors. ". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

13. In order to answer the question, some of the principles enunciated in Hardeep Singh case may be recapitulated: power under Section 319 CrPC can be exercised by the trial court at any stage during the trial i.e. before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some "evidence" against such a person on the basis of which evidence it can be gathered that he appears to be guilty of the offence. The "evidence" herein means the material that is brought before the court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 CrPC. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the court under Section 319 CrPC and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The degree of satisfaction is

more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity." *(emphasis supplied)*

14. The legislature was quite conscious while engrafting section 319 Cr.P.C. while employing the words "in the course of any inquiry into, or trial of, an offence, it appears from the evidence". The aforesaid words so employed under section 319 Cr.P.C. itself shows that degree of satisfaction has to be accorded by the Magistrate while exercising powers u/s 319 Cr.P.C.

15. Obviously, degree of satisfaction defers from case to case and according to the degree of satisfaction the test to be applied as one should be more than prima facie case at the stage of framing of charges. The Hon'ble Supreme Court in the case of ***Hardeep Singh (Supra)*** has observed as under:-

"93. Section 319(1) Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court. The word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved". It imparts a lesser degree of probability than proof.

94. In Pyare Lal Bhargava v. The State of Rajasthan, AIR 1963 SC 1094, a four-Judge Bench of this Court was concerned with the meaning of the word "appear'. The court held that the appropriate meaning of the word "appears' is "seems'. It imports a lesser degree of probability than proof. In Ram Singh & Ors. v. Ram Niwas & Anr., (2009) 14 SCC 25, a two-Judge Bench of this Court was again required to examine the importance of the word "appear' as appearing in the Section. The Court held that for the fulfillment of the condition that it appears to the court that a person had committed an offence, the court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary jurisdiction. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as an accused in the case.

95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two- Judge Bench of this Court in Vikas v. State of Rajasthan, 2013 (11) SCALE 23, held that on the objective satisfaction of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

96. In Rajendra Singh (Supra), the Court observed:

"Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is "may" and not "shall". The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression "appears" indicates an application of mind by

the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not."

97. In Mohd. Shafi (Supra), this Court held that it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 Cr.P.C., it must arrive at a satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted.

98. In Sarabjit Singh & Anr. v. State of Punjab & Anr., AIR 2009 SC 2792, while explaining the scope of Section 319 Cr.P.C., a two-Judge Bench of this Court observed:

"....For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.....

Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction.

Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz. (i) an extraordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied." (Emphasis added)

99. In Brindaban Das & Ors. v. State of West Bengal, AIR 2009 SC 1248, a two-Judge Bench of this Court took a similar view observing that the court is required to consider whether such evidence would be sufficient to convict the person being summoned. Since issuance of summons under Section 319 Cr.P.C. entails a de novo trial and a large number of witnesses may have been examined and their re-examination could prejudice the prosecution and delay the trial, the trial court has to exercise such discretion with great care and perspicacity.

A similar view has been re-iterated by this Court in Michael Machado & Anr. v. Central Bureau of Investigation & Ors., AIR 2000 SC 1127.

100. However, there is a series of cases wherein this Court while dealing with the provisions of Section 227, 228, 239, 240, 241, 242 and 245 Cr.P.C., has consistently held that the court at the stage of framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of prima facie case is to be applied. The Court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further. (Vide: State of Karnataka v. L. Munishwamy & Ors., AIR 1977 SC 1489; All India Bank Officers' Confederation etc. v. Union of India & Ors., AIR 1989 SC 2045; Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia, (1989) 1 SCC 715; State of M.P. v. Dr. Krishna Chandra Saksena, (1996) 11 SCC 439; and State of M.P. v. Mohan Lal Soni.

101.In Dilawar Babu Kurane v. State of Maharashtra AIR 2002 SC 564, this Court while dealing with the provisions of Section 227 and 228 Cr.P.C., placed a very heavy reliance on the earlier judgment of this Court in Union of India v. Prafulla Kumar Samal & Anr., AIR 1979 SC 366 and held that while considering the question of framing the charges, the court may weigh the evidence for the limited purpose of

finding out whether or not a prima facie case against the accused has been made out and whether the materials placed before this Court disclose grave suspicion against the accused which has not been properly explained. In such an eventuality, the court is justified in framing the charges and proceeding with the trial. The court has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but court should not make a roving enquiry into the pros and cons of the matter and weigh evidence as if it is conducting a trial.

102 In Suresh v. State of Maharashtra, AIR 2001 SC 1375, this Court after taking note of the earlier judgments in Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya, AIR 1990 SC 1962 and State of Maharashtra v. Priya Sharan Maharaj, AIR 1997 SC 2041, held as under:

"9.....at the stage of Sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction." (Emphasis supplied)

103. Similarly in State of Bihar v. Ramesh Singh, AIR 1977 SC 2018, while dealing with the issue, this Court held:

".....If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial....."

104. In Palanisamy Gounder & Anr. v. State, represented by Inspector of Police, (2005) 12 SCC 327, this Court deprecated the practice of invoking the power under Section 319 Cr.P.C. just to conduct a fishing inquiry, as in that case, the trial court exercised that power just to find out the real truth, though there was no valid ground to proceed against the person summoned by the court.

105. Power under Section 319 Cr.P.C. is a discretionary and an extra- ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not "for which such person could be

convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused."

16. The Hon'ble Apex court in the case of ***Hardeep Singh (Supra)*** has also analysed the contingencies in what situation can the power u/s 319 Cr.P.C. be exercised in the cases when a person is not named in the FIR though named in the FIR but not charge sheeted or has been discharged. The Hon'ble Apex Court has observed as under:-

"107. In Joginder Singh & Anr. v. State of Punjab & Anr., AIR 1979 SC 339, a three-Judge Bench of this Court held that as regards the contention that the phrase "any person not being the accused" occurring in Section 319 Cr.P.C. excludes from its operation an accused who has been released by the police under Section 169 Cr.P.C. and has been shown in Column 2 of the charge-sheet, the contention has merely to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Section 319 (1) Cr.P.C. clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court, are included in the said expression.

108. In Anju Chaudhary v. Sate of U.P. & Anr., (2013) 6 SCC 384, a two-Judge Bench of this Court held that even in the cases where report under Section 173(2) Cr.P.C. is filed in the court and investigation records the name of a person in Column 2, or even does not name the person as an accused at all, the court in exercise of its powers vested under Section 319 Cr.P.C. can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law.

109. In Suman v. State of Rajasthan & Anr., AIR 2010 SC 518, a two- Judge Bench of this Court observed that there is nothing in the language of this sub-section from which it can be inferred that a person who is named in the FIR or complaint, but against whom charge-sheet is not filed by the police, cannot be proceeded against even though in the course of any inquiry into or trial of any offence, the court finds that such person has committed an offence for which he could be tried together with the other accused.

110.In Lal Suraj (supra), a two-Judge Bench held that there is no dispute with the legal proposition that even if a person had not been charge-sheeted, he may come within the purview of the description of such a person as contained in Section 319 Cr.P.C. A similar view had been taken in Lok Ram (Supra), wherein it was held that a person, though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added to face the trial.

111. Even the Constitution Bench in Dharam Pal (CB) has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the chargesheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the chargesheet or whose name appears in the FIR and not in the main part of the chargesheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 319 Cr.P.C. can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

112. However, there is a great difference with regard to a person who has been discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation; the court had come to the conclusion that there is not even

a prima facie case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The Court should keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with section 398 Cr.P.C. without resorting to the provision of Section 319 Cr.P.C. directly.

113. In Sohan Lal & Ors. v. State of Rajasthan, (1990) 4 SCC 580, a two-Judge Bench of this Court held that once an accused has been discharged, the procedure for enquiry envisaged under Section 398 Cr.P.C. cannot be circumvented by prescribing to procedure under Section 319 Cr.P.C.

114. In Municipal Corporation of Dehli v. Ram Kishan Rohtagi & Ors., AIR 1983 SC 67, this Court held that if the prosecution can at any stage produce evidence which satisfies the court that those who have not been arraigned as accused or against whom proceedings have been quashed, have also committed the offence, the Court can take cognizance against them under Section 319 Cr.P.C. and try them along with the other accused.

115. Power under Section 398 Cr.P.C. is in the nature of revisional power which can be exercised only by the High Court or the Sessions Judge, as the case may be. According to Section 300 (5) Cr.P.C., a person discharged under Section 258 Cr.P.C. shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate. Further, Section 398 Cr.P.C. provides that 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 an inquiry into the case against any person who has already been discharged. Both these provisions contemplate an inquiry to be conducted before any person, who has already been discharged, is asked to again face trial if some evidence appears against him. As held earlier, Section 319 Cr.P.C. can also be invoked at the stage of inquiry. We do not see any reason why inquiry as contemplated by Section 300(5) Cr.P.C. and Section 398 Cr.P.C. cannot be an inquiry under Section 319 Cr.P.C. Accordingly, a person discharged can also be arraigned again as an accused but only after an inquiry as contemplated by Section 300(5) and 398 Cr.P.C. If during or after such inquiry, there appears to be an evidence against such person, power under Section 319Cr.P.C. can be exercised. We may clarify that the word "trial' under Section 319 Cr.P.C. would be eclipsed by virtue of above provisions and the same cannot be invoked so far as a person discharged is concerned, but no more.

116. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C."

17. The Constitutional Bench in the matter of ***Hardeep Singh (Supra)*** has also considered the scope, ambit and the importance of the word evidence and had analysed the same and held as under:-

58. To answer the questions and to resolve the impediment that is being faced by

the trial courts in exercising of powers under Section 319 Cr.P.C., the issue has to be investigated by examining the circumstances which give rise to a situation for the court to invoke such powers. The circumstances that lead to such inference being drawn up by the court for summoning a person arise out of the availability of the facts and material that comes up before the court and are made the basis for summoning such a person as an accomplice to the offence alleged to have been committed. The material should disclose the complicity of the person in the commission of the offence which has to be the material that appears from the evidence during the course of any inquiry into or trial of offence. The words as used in Section 319 Cr.P.C. indicate that the material has to be "where ....it appears from the evidence" before the court.

59. Before we answer this issue, let us examine the meaning of the word "evidence'. According to Section 3 of the Evidence Act, "evidence' means and includes:

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court, such statements are called documentary evidence;

60. According to Tomlin's Law Dictionary, Evidence is "the means from which an inference may logically be drawn as to the existence of a fact. It consists of proof by testimony of witnesses, on oath; or by writing or records."

61. Bentham defines "evidence' as "any matter of fact, the effect, tendency or design of which presented to mind, is to produce in the mind a persuasion concerning the existence of some other matter of fact- a persuasion either affirmative or disaffirmative of its existence. Of the two facts so connected, the latter may be distinguished as the principal fact, and the former as the evidentiary fact."

62. According to Wigmore on Evidence, evidence represents "any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law, or of logic, on which the determination of the tribunal is to be asked."

63. The provision and the above-mentioned definitions clearly suggest that it is an exhaustive definition. Wherever the words "means and include" are used, it is an indication of the fact that the definition "is a hard and fast definition', and no other meaning can be assigned to the expression that is put down in the definition. It indicates an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expression. (Vide: ***M/S. Mahalakshmi Oil Mills v. Stare of A.P. AIR 1989 SC 335; Punjab Land Development and Reclamation Corporation Ltd. Chandigarh v. Presiding Officer, Labour Court, Chandigarh & Ors.,*** (1990) 3 SCC 682; ***P. Kasilingam & Ors. v. P.S.G. collage of Technology & Ors,*** AIR 1995 SC 1395; ***Hamdard (Wakf) Laboratories v. Dy. Labour Commissioner & Ors.,*** AIR 2008 SC 968; and ***Ponds India Ltd. (merged with H.L. Limited) v. Commissioner of Trade Tax, Lucknow,*** (2008) 8 SCC 369).

64. In ***Feroze N. Dotivala v. P.M. Wadhwani & Ors,*** (2003) 1 SCC 433, dealing with a similar issue, this Court observed as under:

"Generally, ordinary meaning is to be assigned to any word or phrase used or defined in a statute. Therefore, unless there is any vagueness or ambiguity, no occasion will arise to interpret the term in a manner which may add something to the meaning of the word which ordinarily does not so mean by the definition itself, more particularly, where it is a restrictive

definition. Unless there are compelling reasons to do so, meaning of a restrictive and exhaustive definition would not be expanded or made extensive to embrace things which are strictly not within the meaning of the word as defined.

65. We, therefore proceed to examine the matter further on the premise that the definition of word "evidence" under the Evidence Act is exhaustive.

66. In Kalyan Kumar Gogoi v. Ashutosh Agnihotri & Anr., AIR 2011 SC 760, while dealing with the issue this Court held :

"18. The word "evidence" is used in common parlance in three different senses: (a) as equivalent to relevant, (b) as equivalent to proof, and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc."

67. In relation to a Civil Case, this court in Ameer Trading Corporation Ltd. v. Shapoorji Data Processing Ltd., AIR 2004 SC 355, held that the examination of a witness would include evidence-in- chief, cross-examination or re-examination. In Omkar Namdeo Jadhao & Ors v. Second Additional Sessions Judge Buldana & Anr., AIR 1997 SC 331; and Ram Swaroop & Ors. v. State of Rajasthan, AIR 2004 SC 2943, this Court held that statements recorded under Section 161 Cr.P.C. during the investigation are not evidence. Such statements can be used at the trial only for contradictions or omissions when the witness is examined in the court.

(See also: **Podda Narayana & Ors. v. State of A.P.,** AIR 1975 SC 1252; **Sat Paul v. Delhi Administration,** AIR 1976 SC 294; and **State (Delhi Administration) v. Laxman Kumar & Ors.,** AIR 1986 SC 250).

68. In Lok Ram v. Nihal Singh & Anr., AIR 2006 SC 1892, it was held that it is evident that a person, even though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added as an accused to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence.

69. The majority view of the Constitution Bench in **Ramnarayan Mor & Anr. v. The State of Maharashtra**, AIR 1964 SC 949 has been as under:

"9. It was urged in the alternative by counsel for the appellants that even if the expression "evidence" may include documents, such documents would only be those which are duly proved at the enquiry for commitment, because what may be used in a trial, civil or criminal, to support the judgment of a Court is evidence duly proved according to law. But by the **Evidence Act** which applies to the trial of all criminal cases, the expression "evidence" is defined in Section 3 as meaning and including all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry and documents produced for the inspection of the Court. There is no restriction in this definition to documents which are duly proved by evidence." (Emphasis added)

70. Similarly, this Court in Sunil Mehta & Anr. v. State of Gujarat & Anr., JT 2013 (3) SC 328, held that "It is trite that evidence within the meaning of the Evidence Act and so also within the meaning of Section 244 of the Cr.P.C. is what is recorded in the manner stipulated under Section 138 in the case of oral evidence. Documentary evidence would

similarly be evidence only if the documents are proved in the manner recognised and provided for under the Evidence Act unless of course a statutory provision makes the document admissible as evidence without any formal proof thereof."

71. In Guriya @ Tabassum Tauquir & Ors. v. State of Bihar & Anr., AIR 2008 SC 95, this Court held that in exercise of the powers under Section 319 Cr.P.C., the court can add a new accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge sheet or the case diary.

72. In Kishun Singh (Supra), this Court held :

"11. On a plain reading of sub-section (1) of Section 319 there can be no doubt that it must appear from the evidence tendered in the course of any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the accused. This power (under Section 319(1)), it seems clear to us, can be exercised only if it so appears from the evidence at the trial and not otherwise. Therefore, this sub-section contemplates existence of some evidence appearing in the course of trial wherefrom the court can prima facie conclude that the person not arraigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police. Even a person who has earlier been discharged would fall within the sweep of the power conferred by S. 319 of the Code. Therefore, stricto sensu, Section 319 of the Code cannot be invoked in a case like the present one where no evidence has been led at a trial wherefrom it can be said that the appellants appear to have been involved in the commission of the crime along with those already sent up for trial by the prosecution.

12. But then it must be conceded that Section 319 covers the post-cognizance stage where in the course of an inquiry or trial the involvement or complicity of a person or persons not named by the investigating agency has surfaced which necessitates the exercise of the discretionary power conferred by the said provision....."

73. A similar view has been taken by this Court in Raj Kishore Prasad (Supra), wherein it was held that in order to apply Section 319 Cr.P.C., it is essential that the need to proceed against the person other than the accused appearing to be guilty of offence arises only on evidence recorded in the course of an inquiry or trial.

74. In ***Lal Suraj @ Suraj Singh & Anr. v. State of Jharkhand, (2009) 2 SCC 696,*** a two-Judge Bench of this Court held that "a court framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court exercises its jurisdiction under Section 319 Cr.P.C., the power has to be exercised on the basis of the fresh evidence brought before the court. There lies a fine but clear distinction."

75. A similar view has been reiterated by this Court in Rajendra Singh v. State of U.P. & Anr., AIR 2007 SC 2786, observing that court should not exercise the power under Section 319 Cr.P.C. on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence. The word "evidence' in Section 319 Cr.P.C. contemplates the evidence of witnesses given in the court.

76. Ordinarily, it is only after the charges are framed that the stage of recording of evidence is reached. A bare perusal of Section 227 Cr.P.C. would show that the legislature has used the terms "record of the case" and the "documents submitted therewith". It is in this context that the word "evidence' as appearing in Section 319 Cr.P.C. has to be read and understood. The material collected at the stage of investigation can at best be used for a limited purpose as provided under Section 157 of the

Evidence Act i.e. to corroborate or contradict the statements of the witnesses recorded before the court. Therefore, for the exercise of power under Section 319 Cr.P.C., the use of word `evidence' means material that has come before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the court is of the opinion that a person not accused before it has also committed the offence, it may summon such person under Section 319 Cr.P.C.

77. With respect to documentary evidence, it is sufficient, as can be seen from a bare perusal of Section 3 of the Evidence Act as well as the decision of the Constitution Bench, that a document is required to be produced and proved according to law to be called evidence. Whether such evidence is relevant, irrelevant, admissible or inadmissible, is a matter of trial.

78. It is, therefore, clear that the word "evidence" in Section 319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation.

79. The inquiry by the court is neither attributable to the investigation nor the prosecution, but by the court itself for collecting information to draw back a curtain that hides something material. It is the duty of the court to do so and therefore the power to perform this duty is provided under the Cr.P.C.

80. The unveiling of facts other than the material collected during investigation before the magistrate or court before trial actually commences is part of the process of inquiry. Such facts when recorded during trial are evidence. It is evidence only on the basis whereof trial can be held, but can the same definition be extended for any other material collected during inquiry by the magistrate or court for the purpose of Section 319 Cr.P.C.?

81. An inquiry can be conducted by the magistrate or court at any stage during the proceedings before the court. This power is preserved with the court and has to be read and understood accordingly. The outcome of any such exercise should not be an impediment in the speedy trial of the case. Though the facts so received by the magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of Section 319 Cr.P.C. it is an information of complicity. Such material therefore, can be used even though not an evidence in stricto sensuo, but an information on record collected by the court during inquiry itself, as a prima facie satisfaction for exercising the powers as presently involved.

82. This pre-trial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material alongwith the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the charge-sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

83. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilize or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court, who may be on the basis of

such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. This would harmonise such material with the word "evidence' as material that would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court.

84. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Cr.P.C. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The "evidence' is thus, limited to the evidence recorded during trial."

18. The proposition of law culled out by the Hon'ble Apex Court itself makes it clear that u/s 319 Cr.P.C. discretion has been bestowed upon the Magistrate to exercise the powers while looking into the facts and the circumstances of a particular case before it while according degree of satisfaction so imperative for invocation of the powers u/s 319 Cr.P.C. The Hon'ble Apex Court has repeatedly cautioned the Courts to exercise the powers under section 319 Cr.P.C. in such a manner that it does not permit an accused to walk away free on the strength of any lacuna attributed by the Investigating Officer. In nutshell, it can verywell be said that once the Magistrate finds that there was sufficient material available on record before it to summon a person in the trial which is proposed to be undertaken then the powers u/s 319 Cr.P.C. are to be invoked.

19. Nonetheless, the powers under section 319 Cr.P.C. to summon those persons who are not named in the charge sheet to appear and face trial is unquestionable as the very object of engrafting section 319 Cr.P.C. is that to allow a person who deserves to be tried not to go scot-free.

20. The stage which is contemplated under section 319 Cr.P.C. 1973 is a stage before the conclusion of the trial and thus, only one conclusion can be drawn that the Magistrate must be prima facie of the opinion that there are sufficient material and cause for summoning the culprit who is either not named in the FIR or if named, he has not been charge sheeted or discharged.

21. The issue can also be seen from another point of angle that during the course of the inquiry into, or trial of, an offence it appears from the evidence that any person not being accused has committed the offence or he has not been charge sheeted but there are sufficient material available on record which has not been taken into consideration by the investigating officer then the Magistrate in exercise of powers can always summon him in that regard. Sub section (1) of section 319 Cr.P.C. has consciously used the word "course of any inquiry into, or trial of" meaning thereby that the powers can be exercised under section 319

Cr.P.C. when there are certain material available on record during the course of inquiry or trial.

22. Coming to the facts of the present case, this Court finds with relation to the incident, which occurred on 24.11.2016, an FIR was lodged on the same day by the O.P. no.2 narrating the said incident, pursuant whereto the matter was put on motion and the husband of O.P. no.2 being Sri Kamlesh / PW-2 got recorded his statement, wherein he specifically named the applicant to be one of the accused, who was instrumental in commissioning of the offence under Section 342, 323, 308 IPC , a copy of the statement of PW-2 Sri Kamlesh, husband of O.P. no.2 at page 52 of the paper-book. The Investigating Officer submitted charge sheet on 14.8.2017 against Manoj Kumar @ Chhange, but not against Raju @ Rajesh Kumar, whose name specifically found place in the statement of husband of O.P. no.2 by PW-2. Compelled with these circumstances, O.P. no.2 preferred an application, which on 30.9.2019 under Section 319 of CrPC, which came to be allowed by virtue of the order impugned.

23. Learned counsel for the applicant has argued that the order under challenge summoning the applicant is illegal and in excess of the exercise of the power under Section 319 of CrPC, as there is no material available with the court below to have summoned the applicant.

24. Countering the said submission, learned A.G.A, has argued that bare perusal of the statement of Sri Kamlesh husband of O.P. no.2 shows that the applicant had committed the said offence.

25. I have carefully gone through the pleadings on record as well as specially the statement of Sri Kamlesh husband of O.P. no.2. The statement of husband of O.P. no.2, which finds place at page-52 dated 17.8.2019 itself shows that husband of O.P. no.2 had taken the name of Raju @ Rajesh Kumar, who is applicant herein, as he along with others had committed offence. The relevant extract of the same is quoted herein:

"घटना दिनांक 24.11.2016 को खेत पर मैं और मेरी पत्नी समय 7 बजे सुबह काम कर रहे थे। मेरी पत्नी खेती पर शोर मचाने लगी मैंने घूमकर देखा कि मेरी पत्नी को राजीव, छोटे, छंगे व राजू चार लोग बुरी नियत से घसीटने लगे मैने देखा बचाने के लिये गया, मुझे मारते हुये दो मोटर साईकिल पर राजू और छंगे मुझे मार पीट करते हुये, रायफल छोटे के हाथ में थी, तमंचा राजीव और छंगे लिये थे। ये लोग मुझे रेलवे फाटक इकदिल पहुचे तो वहॉ पर कुछ लोगों ने जिसमें संतोष चौधरी, शिवम चौधरी ने शोर मचाया तो ये लोग मुझे वहीं छोड़कर भाग गये। मेरे सिर में चोट थी। जिससे मैं बेहोशी की हालत में हो गया। मेरा इलाज लीलाधर हास्पिटल आगरा में हुआ था। दरोगा जी ने मेरा बयान लिया था।"

26. When the learned counsel for the applicant was confronted with the statement of PW-2 being Sri Kamlesh husband of O.P. no.2 showing the name of the applicant, then the counsel for the applicant could not dispute the said fact, rather to the contrary, the learned counsel for the applicant has sought to argue this much that the applicant has not committed any criminality.

27. On the repeated query, being made to the learned counsel for the revisionist, as to whether there was any jurisdictional error committed by the court below in summoning the revisionist, learned counsel for the revisionist only argued on factual score.

28. This Court in exercise of the revisional jurisdiction cannot embark upon the inquiry with regard to facts of the case, particularly when the courts below had applied its mind and taken a view, which does not appear to be perverse or palpable while issuing summons.

29. The applicant in the present revision, is trying to insist this Court to go into the factual issues which cannot be gone into in the present

facts of the case as this court is of firm opinion that there exist sufficient material which itself shows that the powers exercised by the court below while summoning the applicants, does not suffer from any illegality and infirmity.

30. The learned counsel for the revisionist has also not disputed the legal proposition so culled out by the Hon'ble Apex Court in relation to the scope and ambit of the powers u/s 319 Cr.P.C. and further he has not been able to bring on record any material to show that the findings recorded by the court below while summoning her suffers from any perversity or illegality. For the facts and the reasons noted above, there is no good ground to interfere into the order dated 4.3.2021 summoning the revisionist.

31. Accordingly, the present revision lacks of merit and the same is **dismissed.**

(2021)12ILR A226
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.11.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Criminal Revision No. 3063 of 2021

Ajeet Singh ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Kamlesh Kumar, Sri R.N. Tripathi

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397 - Revision, Section 239 - When accused shall be discharged - Indian Penal Code, 1860 - Section 354B, 506 - Obligation to discharge the accused under Section 239 arises when the Magistrate considers the charge against the accused to be "groundless" - Test applied for determining whether the charge should be considered groundless is that where the materials are such that even if unrebutted, would make out no case whatsoever.(Para - 18,20)

Revisionist moved an application for discharge - under section 239 Cr.P.C. - contention - variance in statements of the opposite party no.2 under Section 161 and Section 164 of the Code with the F.I.R. version - testimony of opposite party no.1 was sought to be impeached - discharge was sought - Magistrate found no material to initiate the proceedings - rejected the application -hence revision. (Para - 2 to 5)

HELD:-No material error, illegality and perversity pointed out in the order passed by the court below so as to warrant interference in exercise of revisional jurisdiction of the Court.(Para - 22)

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. Onkar Nath Mishra & ors. Vs St. (NCT of Delhi) & anr., (2008) 2 SCC 561

2. St. of Mah. Vs Som Nath Thapa, (1996) 4 SCC 659

3. St. of M.P. Vs Mohanlal Soni, (2000) 6 SCC 338

4. Sheoraj Singh Ahlawat & ors. Vs St. of U.P. & anr.,(2013) 13 SCC 476

5. U. O I. Vs Prafulla Kumar Samal & anr., (1979) 3 SCC 4

6. M.E. Shivalingamurthy Vs C.B.I., Bengaluru, (2020) 2 SCC 768

7. Vijayan Vs St. of Kerala, (2010) 2 SCC 398

8. St. of J&K Vs Sudershan Chakkar, (1995) 4 SCC 181

9. St. of Orissa Vs Debendra Nath Padhi, (2005) 1 SCC 568

10. K. Ramakrishna & ors. Vs St. of Bihar & anr., (2000) 8 SCC 547

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

1. Heard Sri R. N. Tripathi, holding brief of Sri Kamlesh Kumar, learned counsel for the revisionist and Ms. Sushma Soni, learned Additional Government Advocate appearing for the State-opposite party.

2. The present revision has been filed against the judgment and order dated 26.10.2021 passed by the learned Additional Chief Judicial Magistrate, Room No.18, Allahabad in Criminal Case No. 762 of 2015 (State vs. Ajeet Singh), whereby the learned Additional Chief Judicial Magistrate, Room No.18, Allahabad rejected the application under Section 239 Cr.P.C. filed by the revisionist.

3. Pleadings in the case indicates that the proceedings in the criminal case were initiated pursuant to an FIR lodged on 20.06.2014 registered as Case Crime No. 149 of 2014, under Section 354 of the Indian Penal Code, 18601 and upon investigation a police report under Sections 354B, 506 of the Penal Code was placed before the Magistrate. The opposite party no.2 in her statement under Section 161 of the Code of Criminal Procedure, 19732 reiterated the FIR version. An application for discharge under Section 239 of the Code was moved primarily

seeking to contend that there was variance in the statements of the opposite party no.2 under Section 161 and Section 164 of the Code with the F.I.R. version, and accordingly the testimony of the opposite party no.1 was sought to be impeached and discharge was sought.

4. The learned Magistrate on considering the facts and circumstances of the case and material on record and the scope of powers to be exercised under Section 239 of the Code, has held that only in a case where the police report submitted under Section 173 of the Code along with the material evidence and documents appended therewith indicate that there is no material to initiate proceedings that the Magistrate can pass an order of discharge. In the facts of the case the learned Magistrate has held that the minor variation in the statements recorded under Sections 161 and 164 of the Code to contradict the FIR version would not be material inasmuch as the FIR is not supposed to be an encyclopedia of facts.

5. Counsel for the applicant has sought to assail the order passed by the court below by seeking to point out the discrepancy between the statements of the prosecutrix recorded under Sections 161 and 164 of the Code and by asserting that the same are in contradiction with the FIR version. Learned Counsel has also referred to the factual aspects of the case and the defence which is to be set up on behalf of the applicant.

6. Learned Additional Government Advocate submits that at the stage of consideration of discharge under Section 239 of the Code only a *prima facie* case is to be seen and the Magistrate having recorded a satisfaction with regard to the existence of a *prima facie* case there cannot be said to be any material error or illegality in the order which is sought to be assailed.

7. In order to appreciate the rival contentions the relevant statutory provisions may be adverted to. The procedure for trial of warrant cases by Magistrate is provided for under Chapter XIX of the Code and Sections 239 and 240 relate to discharge and framing of charge.

8. The primary consideration at the stage of framing of charge is the test of existence of a *prima facie* case, and at this stage, probative value of materials on record are not to be gone into.

9. The provisions which deal with the question of framing of charge or discharge, relatable to : (i) a sessions trial or, (ii) a trial of warrant case, or (iii) a summons case, are

contained in three pairs of sections under the Code. These are Sections 227 and 228 in so far as, sessions trial is concerned; Sections 239 and 240 relatable to trial of warrant cases; and Sections 245 (1) and 245(2) in respect of summons case. The relevant provisions read as follows:-

"**227. Discharge.**--If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

228. Framing of charge.--(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which--

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub- section (1), the charge shall be read and explained to the accused, and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

239. When accused shall be discharged.--If, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

240. Framing of charge.--(1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.

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.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

10. The aforestated sections indicate that the Code contemplates discharge of the accused by the court of sessions under Section 227 in a case triable by it, cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on a police report are dealt with in Section 245. The three sections contain somewhat different provisions in regard to discharge of the accused. As per Section 227, the trial judge is required to discharge the accused if "the Judge considers that there is not

sufficient ground for proceeding against the accused". The obligation to discharge the accused under Section 239 arises when "the Magistrate considers the charge against the accused to be groundless". The power to discharge under Section 245(1) is exerciseable when "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". Sections 227 and 239 provide for discharge being made before recording of evidence and the consideration as to whether the charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the parties to be heard. On the other hand, the stage for discharge under Section 245 is reached only after the evidence referred to in Section 244 has been taken.

11. Despite the slight variation in the provisions with regard to discharge under the three pairs of sections, the settled legal position is that the stage of framing of charge under either of these three situations, is a preliminary one and test of "*prima facie*" case has to be applied -- if the trial court is satisfied that a *prima facie* case is made out, charge has to be framed.

12. The nature of evaluation to be made by the court at the stage of framing of charge came up for consideration in **Onkar Nath Mishra and others Vs. State (NCT of Delhi) and another3,** and referring to the earlier decisions in **State of Maharashtra Vs. Som Nath Thapa4,** and **State of M.P. Vs. Mohanlal Soni5**, it was held that at that stage the Court has to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged and it is not expected to go deep into the probative value of the material on record. The relevant observations made in the judgment are as follows :-

"11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.

xxx

13. Then again in State of Maharashtra Vs. Som Nath Thapa, a three-Judge Bench of this Court, after noting three pairs of sections viz. (i) Sections 227 and 228 insofar as sessions trial is concerned; (ii) Sections 239 and 240 relatable to trial of warrant cases; and (iii) Sections 245(1) and (2) qua trial of summons cases, which dealt with the question of framing of charge or discharge, stated thus: (SCC p. 671, para 32)

"32...if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by

the prosecution has to be accepted as true at that stage."

14. In a later decision in State of M.P. Vs. Mohanlal Soni, this Court, referring to several previous decisions held that: (SCC p. 342, para 7)

"7. The crystallised judicial view is that at the stage of framing charge, the court has to *prima facie* consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused. "

13. Reiterating a similar view in **Sheoraj Singh Ahlawat and others Vs. State of Uttar Pradesh and another6,** it was observed that while framing charges court is required to evaluate materials and documents on record to decide whether facts emerging therefrom taken at their face value would disclose existence of ingredients constituting the alleged offence. At this stage, the court is not required to go deep into the probative value of the materials on record. It needs to evaluate whether there is a ground for presuming that the accused had committed the offence and it is not required to evaluate sufficiency of evidence to convict the accused. It was held that the court at this stage, cannot speculate into the truthfulness or falsity of the allegations and contradictions, inconsistencies in the statement of witnesses cannot be looked into at the stage of discharge.

14. In the context of trial of a warrant case, instituted on a police report, the provisions for discharge are to be governed as per terms of Section 239 which provides that a direction for discharge can be made only for reasons to be recorded by the court where it considers the charge against the accused to be groundless. It would, therefore, follow that as per the provisions under Section 239 what needs to be considered is whether there is a ground for presuming that the offence has been committed and not that a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offences alleged would justify the framing of charge against the accused in respect of that offence, and it is only in a case where the Magistrate considers the charge to be groundless, he is to discharge the accused after recording his reasons for doing so.

15. The legal position with regard to the principles to be applied while considering a discharge, in the context of the provisions under Section 227 of the Code were considered in **Union of India Vs. Prafulla Kumar Samal and Another7**, wherein it was observed as follows:

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a *prima facie* case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

16. The considerations relevant at the stage of discharge in the context of Section 227 were discussed in a recent decision in the case of **M.E. Shivalingamurthy Vs. Central Bureau of Investigation, Bengaluru8** and referring to an earlier decision in **P. Vijayan Vs. State of Kerala9,** and the legal principles governing the exercise of such power were stated as follows:

"Legal principles applicable in regard to an application seeking discharge

17. This is an area covered by a large body of case law. We refer to a recent judgment which has referred to the earlier decisions viz. *P. Vijayan v. State of Kerala* and discern the following principles:

17.1. If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the trial Judge would be empowered to discharge the accused.

17.2. The trial Judge is not a mere post office to frame the charge at the instance of the prosecution.

17.3. The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the police or the documents produced before the Court.

17.4. If the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, "cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial".

17.5. It is open to the accused to explain away the materials giving rise to the grave suspicion.

17.6. The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

17.7. At the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true.

17.8. There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.

18. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 CrPC (see *State of J&K v. Sudershan Chakkar10*). The expression, "the record of the case", used in Section 227 CrPC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the police (see *State of Orissa v. Debendra Nath Padhi11)."*

17. The provisions of discharge under Section 239 of the Code fell for consideration in

K. Ramakrishna and others Vs. State of Bihar and Another12, and it was held that questions regarding the sufficiency or reliability of the evidence to proceed further are not required to be considered by the trial court under Section 239 and the High Court under Section 482. It was observed as follows:

"4. The trial court under Section 239 and the High Court under Section 482 of the Code of Criminal Procedure is not called upon to embark upon an inquiry as to whether evidence in question is reliable or not or evidence relied upon is sufficient to proceed further or not. However, if upon the admitted facts and the documents relied upon by the complainant or the prosecution and without weighing or sifting of evidence, no case is made out, the criminal proceedings instituted against the accused are required to be dropped or quashed. As observed by this Court in *Rajesh Bajaj v. State NCT of Delhi13,* the High Court or the Magistrate are also not supposed to adopt a strict hypertechnical approach to sieve the complaint through a colander of finest gauzes for testing the ingredients of offence with which the accused is charge. Such an endeavour may be justified during trial but not during the initial stage."

18. The ambit and scope of exercise of power under Sections 239 and 240 of the Code, are therefore fairly well settled. The obligation to discharge the accused under Section 239 arises when the Magistrate considers the charge against the accused to be "groundless". The section mandates that the Magistrate shall discharge the accused recording reasons, if after (i) considering the police report and the documents sent with it under Section 173, (ii) examining the accused, if necessary, and (iii) giving the prosecution and the accused an opportunity of being heard, he considers the charge against the accused to be groundless, i.e. either there is no legal evidence or that the facts are such that no offence is made out at all. No detailed evaluation of the materials or meticulous consideration of the possible defences need be undertaken at this stage nor any exercise of weighing materials in golden scales is to be undertaken at this stage - the only consideration at the stage of Section 239/240, is as to whether the allegation/charge is groundless.

19. This would not be the stage for weighing the pros and cons of all the implications of the materials, nor for sifting the materials placed by the prosecution- the exercise at this stage is to be confined to considering the police report and the documents to decide whether the allegations against the accused can be said to be "groundless'.

20. The word "ground" according to **Black's Law Dictionary14** connotes foundation or basis, and in the context of prosecution in a criminal case, it would be held to mean basis for charging the accused or foundation for the admissibility of evidence. Seen in the context, the word "groundless" would connote no basis or foundation in evidence. The test which may therefore be applied for determining whether the charge should be considered groundless is that where the materials are such that even if unrebutted, would make out no case whatsoever.

21. Counsel for the revisionist has not been able to dispute the aforesaid legal position with regard to the scope of powers to be exercised at the stage of discharge.

22. No material error, illegality and perversity has been pointed out in the order passed by the court below so as to warrant interference in exercise of revisional jurisdiction of this Court.

23. The contention sought to be put forward with regard to minor discrepancies in

the material evidence or the other factual aspects of the case including the defence which is sought to be set up on behalf of the accused, cannot be considered at this stage of the proceedings where only the test of a *prima facie* case has to be applied.

24. No other point was urged.

25. The revision stands **dismissed** accordingly.

(2021)12ILR A233
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.12.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Criminal Revision No. 3145 of 2021

Munni Devi & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Mahesh Chandra Maurya, Sri Santosh Kr. Singh Paliwal

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Indian Penal Code, 1860 - Sections 363 366, 370-A, 376 & 120-B - The Protection of Children From Sexual Offences Act, 2012 - Section 3/4 , 16/17 - stage contemplated under section 319 Cr.P.C. - stage before conclusion of trial - Magistrate must be prima facie of the opinion that there are sufficient material and cause for summoning the culprit who is either not named in the FIR or if named, he has not been charge sheeted or discharged - only when strong and cogent evidence occurs against a person from the evidence the power under Section 319 Cr.P.C. should be exercised - Power cannot be exercised in a casual and cavalier manner. (Para - 16)

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 319 - Power to proceed against other persons appearing to be guilty of offence - once the Magistrate finds that there was sufficient material available on record before it to summon a person in the trial which is proposed to be undertaken then the powers u/s 319 Cr.P.C. are to be invoked.(Para - 14)

Application preferred by opposite party no. 2 (mother of victim) - under section 319 of Cr.P.C. - name of applicants be also included in the criminal proceedings - sufficient materials available for prosecuting them with regard to conviction - court below summoned the applicants for the offence under IPC and POCSO Act - Challenging order, now the revisionist are before this Court .(Para - 3,4,5)

HELD:-Court below while passing the order summoning the applicants considered the statements of the victim as well as opposite party no. 2 both under section 161 and 164 of Cr.P.C. and also the statement during proceeding also and has recorded the satisfaction which according to court is more than the prima facie. There is no manifest illegality committed by the court below while passing the impugned order.(Para - 22,23)

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. Hardeep Singh Vs St. of Punj. , 2014 (3) SCC 92

2. S. Mohammad Ispahani Vs Yogendra Chandak & ors. , (2017) 16 SCC 226

3. Niranjan Singh Karam Singh Punj. Vs Jitendra Bhimraj Bijjaya, AIR 1990 SC 1962

4. St. of Mah. Vs Priya Sharan Maharaj, AIR 1997 SC 2041

5. M/S. Mahalakshmi Oil Mills Vs St. of A.P., AIR 1989 SC 335

6. Punj. Land Development & Reclamation Corp. Ltd. Chandigarh Vs Presiding Officer, Labour Court, Chandigarh & ors., (1990) 3 SCC 682

7. P. Kasilingam & ors. Vs P.S.G. collage of Technology & ors, AIR 1995 SC 1395

8. Hamdard (Wakf) Laboratories Vs Dy. Labour Commissioner & ors., AIR 2008 SC 968

9. Ponds India Ltd. (merged with H.L. Limited) Vs Commissioner of Trade Tax, Lucknow, (2008) 8 SCC 369

10. Feroze N. Dotivala Vs P.M. Wadhwani & ors, (2003) 1 SCC 433

11. Podda Narayana & ors. Vs St. of A.P., AIR 1975 SC 1252

12. Sat Paul Vs Delhi Administration, AIR 1976 SC 294

13. St. (Delhi Administration) Vs Laxman Kumar & ors., AIR 1986 SC 250

14. Ramnarayan Mor & anr. Vs The St. of Mah., AIR 1964 SC 949

15. Guriya @ Tabassum Tauquir & ors. Vs St. of Bihar & anr., AIR 2008 SC 95

16. Lal Suraj @ Suraj Singh & anr. Vs St. of Jhar., (2009) 2 SCC 696

17. Rajendra Singh Vs St. of U.P. & anr., AIR 2007 SC 2786

18. Ramesh Chandra Srivastava Vs St. of U.P. & anr. , Criminal Appeal No. 990 of 2021

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Shri Santosh Kumar Singh Paliwal and learned counsel for the revisionists and Sri L. D. Rajbhar learned A.G.A. for the state.

2. The present criminal revision purported to be under section 397/401 of Cr.P.C. has been preferred for challenging the order dated 8.10.2021 passed by the Additional Sessions Judge/Special Judge (POCSO Act), Court No. 1, Bareilly, in Special Case No. 09 of 2020 (State Vs. Vedram), Case Crime No. 168 of 2019 under sections 363 366, 370-A, 376 and 120-B IPC and section 16/17 POCSO Act, P.S. Cantt. District Bareilly, where by the applicants have been summoned in exercise of power as conferred under section 319 Cr.P.C.

3. Brief facts of the case shorn off unnecessary details are that the FIR was lodged by the opposite party no. 2 being mother of the victim on 21.05.2019 being FIR no. 168 u/s 363, 366 of IPC against one Vedram alleging that when the opposite party no. 2 who happens to be the mother of the victim while returning after purchasing vegetables on 11.12.2017 at 6:00 p.m. then she found that the victim being Ms. Khushboo who is aged about 14 years was missing from the house. Therefore, after constant search was being made to trace her whereabouts but she was not found however, three days before the lodging of the FIR i.e 21.05.2019 the victim made a phone call on the mobile number on her brother Pushpendra bearing number 9027989065 as well as in the mobile number of the opposite party bearing number 8057233073 and also in the mobile number 7453092181 and 7060193554 informing that that Vedram R/o Vandia, P.S. Fatehganj (East) had misguided the victim and he has taken her away to Kasba being Lalkua. It was also alleged in the FIR that Vedram used to treat her badly and harass her and when the victim got an opportunity while being alone, she has made the said call. A copy of the FIR has been annexed as annexure-1 of the paper book. It appears that the statements of the Khushbu, the victim was recorded on 12-6-2019 under section 161 of Cr.P.C. wherein the victim has stated that she is aged about 25 years and she developed friendship with Vedram thereafter, they used to meet each other. She further stated that for about one year back she had called Vedram to her house and she had gone with him according to her will and she got married about 1 year back in Arya Samaj Mandir and she has given birth to a female child about 3 months back and she had

also come to know that her mother being opposite party no. 2 has lodged an FIR against Vedram, therefore, she has come to the police station and stated that Vedram is not guilty at all. Thereafter, it appears that the statement of the victim recorded under section 164 Cr.P.C. on 19-6-2019 wherein she has stated that her aunty being applicant no. 1 and the applicant no. 2 Suresh had sold her to Vedram for an amount of Rs. 1 Lakh and Vedram took her to Ghaziabad wherein she was confined in a room for more than one and half year and she was not allowed to go out and the bad act of rape was being committed with her by Vedram which resulted into the birth of female child and She further stated that threats were also administered to her that she should not disclose this to anybody about the truth otherwise she would be killed and further, she never wants to remain with Vedram and she has never got married with him. A copy of the statement recorded under section 164 CrPC is annexed as annexure-4 of the paper book. It has also come on record that the medical examination of the victim was also done wherein her age were determined to be 17 years and consequently, the Investigating Officer included the offence under section 376 of IPC and ¾ POCSO Act. Thereafter, it appears that charge sheet was submitted by the Investigating Officer on 08.07.2019 under section 363, 366, 376 IPC and POCSO Act against Vedram. However during the trial, the opposite party no. 2 being Smt. Nanhi Devi was examined as P.W. 1 on 24.10.2019 in Special Case No. 959 of 2019 wherein the opposite party no. 2 has stated that the applicant no. 1 being Smt. Munni Devi W/o Guddu Sharma is living for a period of more than 10 to 12 years with the applicant no. 2 being Suresh and both of them had misguided her daughter and taken her away. It has further been submitted that the applicant number 2 is an occultist and he also had sold 2-4 girls. On 28.01.2021 the victim being P.W. 2 had also given an statement which is at page 62 of a paper book wherein she has specifically stated that the applicant no. 1 who happens to be her aunty, called the victim on the roof where the applicant no. 2 was also present and the applicant no. 1 made the victim unconscious by putting something on the handkerchief and when she smelled it then she became semi-conscious and she was sold to Vedram for an amount of Rs. 1 Lakh, thereafter, Vedram took her in four wheeler and the applicants accompanied them and took her to Lalkuan where Vedram kept her lock in a house and despite of protest, she was raped. She has further recorded her statement that a girl was born and all sorts of harassment and beating was administered to her. She further submits that once she had found mobile of brother of Vedram and there was nobody present at that point of time so the victim had made a call to her mother in this regard. Even during her cross-examination on 04.02.2021 the victim specifically stated that at no point of time she got married with Vedram.

4. Thereafter, it appears that an application was preferred by the opposite party no. 2 under *section 319* of Cr.P.C. with the request that the name of the applicants be also included in the criminal proceedings as there were sufficient materials available for prosecuting them with regard to conviction in respect of the aforesaid offence. The court below has now proceeded to pass an order dated 08.10.2021 summoning the applicants for the offence under section 363, 366, 370-A, 376 and 120-B IPC and section 16 and 17 POCSO Act.

5. Challenging this said order, now the revisionist are before this Court.

6. The moot question which falls for consideration before this Court in the proceedings u/s 397/401 of Cr.P.C. is as to whether the order passed by the court below along with the application u/s 319 Cr.P.C. is within the parameters as set out in the said provisions.

7. For the ready reference *section 319* of the Cr.P.C. 1973 is quoted hereinunder.

"319. Power to proceed against other persons appearing to be guilty of offence.--

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then--

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

08. The issue with respect to the scope and ambit of the powers so conferred upon the Magistrate u/s 319 Cr.P.C. 1973 is no more res integra as the Constitutional Bench of the Hon'ble Supreme Court in the case of **Hardeep Singh Vs. State of Punjab** reported in **2014 (3) SCC 92** has observed as under:-

"8. The Constitutional mandate under Articles 20 and 21 of the Constitution of India, 1950 (hereinafter referred to as the "Constitution') provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to the society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under the Cr.P.C. indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.

9. The presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty. Alternatively, certain statutory presumptions in relation to certain class of offences have been raised against the accused whereby the presumption of guilt prevails till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be innocent. These competing theories have been kept in mind by the legislature. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial and in our opinion, in order to achieve this very end that the legislature thought of incorporating provisions of Section 319 Cr.P.C. It is with the said object in mind that a constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the above mentioned avowed object and purpose to try the person to the satisfaction of the court as an accomplice in

the commission of the offence that is subject matter of trial.

10. In order to answer the aforesaid questions posed, it will be appropriate to refer to Section 351 of the Criminal Procedure Code, 1898 (hereinafter referred to as `Old Code'), where an analogous provision existed, empowering the court to summon any person other than the accused if he is found to be connected with the commission of the offence. However, when the new Cr.P.C. was being drafted, regard was had to 41st Report of the Law Commission where in the paragraphs 24.80 and 24.81 recommendations were made to make this provision more comprehensive. The said recommendations read:

"24.80 It happens sometimes, though not very often, that a Magistrate hearing a case against certain accused finds from the evidence that some person, other than the accused before him, is also concerned in that very offence or in a connected offence. It is proper that Magistrate should have the power to call and join him in proceedings. Section 351 provides for such a situation, but only if that person happens to be attending the Court. He can then be detained and proceeded against. There is no express provision in Section 351 for summoning such a person if he is not present in court. Such a provision would make Section 351 fairly comprehensive, and we think it proper to expressly provide for that situation.

24.81 Section 351 assumes that the Magistrate proceeding under it has the power of taking cognizance of the new case. It does not, however, say in what manner cognizance is taken by the Magistrate. The modes of taking cognizance are mentioned in Section 190, and are apparently exhaustive. The question is, whether against the newly added accused, cognizance will be supposed to have been taken on the Magistrates own information under Section 190(1), or only in the manner in which cognizance was first taken of the offence against the accused. The question is important, because the methods of inquiry and trial in the two cases differ. About the true position under the existing law, there has been difference of opinion, and we think it should be made clear. It seems to us that the main purpose of this particular provision is that the whole case against all known suspects should be proceeded with expeditiously and convenience requires that cognizance against the newly added accused should be taken in the same manner against the other accused. We, therefore, propose to recast Section 351 making it comprehensive and providing that there will be no difference in the mode of taking cognizance if a new person is added as an accused during the proceedings. It is, of course, necessary (as is already provided) that in such a situation the evidence must he reheard in the presence of the newly added accused."

11. Section 319 Cr.P.C. as it exists today, is quoted hereunder:

"319 Cr.P.C. -Power to proceed against other persons appearing to be guilty of offence.-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

12. Section 319 Cr.P.C. springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.

13. It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C.?

14. The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of Cr.P.C. and the judgments that have been relied on for the said purpose. The controversy centers around the stage at which such powers can be invoked by the court and the material on the basis whereof such powers can be exercised.

15. It would be necessary to put on record that the power conferred under Section 319 Cr.P.C. is only on the court. This has to be understood in the context that Section 319 Cr.P.C. empowers only the court to proceed against such person. The word "court" in our hierarchy of criminal courts has been defined under Section 6 Cr.P.C., which includes the Courts of Sessions, Judicial Magistrates, Metropolitan Magistrates as well as Executive Magistrates. The Court of Sessions is defined in Section 9 Cr.P.C. and the Courts of Judicial Magistrates has been defined under Section 11 thereof. The Courts of Metropolitan Magistrates has been defined under Section 16 Cr.P.C. The courts which can try offences committed under the Indian Penal Code, 1860 or any offence under any other law, have been specified under Section 26 Cr.P.C. read with First Schedule. The explanatory note (2) under the heading of "Classification of Offences" under the First Schedule specifies the expression "magistrate of first class' and "any magistrate' to include Metropolitan Magistrates who are empowered to try the offences under the said Schedule but excludes Executive Magistrates.

16. It is at this stage the comparison of the words used under Section 319 Cr.P.C. has to be understood distinctively from the word used under Section 2(g) defining an inquiry other than the trial by a magistrate or a court. Here the legislature has used two words, namely the magistrate or court, whereas under Section 319 Cr.P.C., as indicated above, only the word "court" has been recited. This has been done by the legislature to emphasise that the power under Section 319 Cr.P.C. is exercisable only by the court and not by any officer not acting as a court. Thus, the magistrate not functioning or exercising powers as a court can make an inquiry in particular proceeding other than a trial but the material so collected would not be by a court during the course of an inquiry or a trial. The conclusion therefore, in short, is that in order to invoke the power under Section 319 Cr.P.C., it is only a Court of Sessions or a Court of Magistrate performing the duties as a court under the Cr.P.C. that can utilise the material before it for the purpose of the said Section.

17. Section 319 Cr.P.C. allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 Cr.P.C. or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not

investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

18. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecution."

09. The judgment in the case of **Hardeep Singh (Supra)** has also been considered and taken note in the judgment in the case of **S. Mohammad Ispahani Vs. Yogendra Chandak and Others** reported in **(2017) 16 SCC 226** wherein paragraph nos. 28 and 29 the Hon'ble Apex Court has observed as under.

"28) Insofar as power of the Court under Section 319 of the Cr.P.C. to summon even those persons who are not named in the charge sheet to appear and face trial is concerned, the same is unquestionable. Section 319 of the Cr.P.C. is meant to rope in even those persons who were not implicated when the charge sheet was filed but during the trial the Court finds that sufficient evidence has come on record to summon them and face the trial. In Hardeep Singh's case, the Constitution Bench of this Court has settled the law in this behalf with authoritative pronouncement, thereby removing the cobweb which had been created while interpreting this provision earlier. As far as object behind Section 319 of the Cr.P.C. is concerned, the Court had highlighted the same as under:

"The court is sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

29) At the same time, the Constitution Bench has clarified that the power under Section 319 of the Cr.P.C. can only be exercised on "evidence' recorded in the Court and not material gathered at the investigation stage, which has already been tested at the stage under Section 190 of the Cr.P.C. and issue of process under Section 204 of the Cr.P.C. This principle laid down in Hardeep Singh's case has been explained in Brjendra Singh and Others v. State of Rajasthan in the following manner:

"10. It also goes without saying that Section 319 CrPC, which is an enabling provision empowering the Court to 6 (2017) 7 SCC 706 Criminal Appeal No. 1720 of 2017 & Ors. appropriate steps for proceeding against any person, not being an accused, can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage of Sections 207/208 CrPC, the committal, etc. which is only a pre-trial stage intended to put the process into motion.

11. In Hardeep Singh case , the Constitution Bench has also settled the controversy on the issue as to whether the word "evidence" used in Section 319(1) CrPC has been used in a comprehensive sense and indicates the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial. It is held that it is that material, after cognizance is taken by the court, that is available to it while making an inquiry into or trying an offence, which the court can utilise or take into consideration for

supporting reasons to summon any person on the basis of evidence adduced before the court. The word "evidence" has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. It means that the power to proceed against any person after summoning him can be exercised on the basis of any such material as brought forth before it. At the same time, this Court cautioned that the duty and obligation of the court becomes more onerous to invoke such powers consciously on such material after evidence has been led during trial. The Court also clarified that " evidence" under Section 319 CrPC could even be examination-in-chief and the Court is not required to wait till such evidence is tested on cross-examination, as it is the satisfaction of the court which can be gathered from the reasons recorded by the court in respect of complicity of some other person(s) not facing trial in the offence.

12. The moot question, however, is the degree of satisfaction that is required for invoking the powers under Section 319 CrPC and the related question is as to in what situations this power should be exercised in respect of a person named in the FIR but not charge-sheeted. These two aspects were also specifically dealt with by the Constitution Bench in Hardeep Singh case and answered in the following manner: (SCC pp. 135 & 138, paras 95 & 105-106)

"95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench Criminal Appeal No. 1720 of 2017 & Ors. this Court in Vikas v. State of Rajasthan [Vikas v. State of Rajasthan, (2014) 3 SCC 321 : (2014) 2 SCC (Cri) 172] , held that on the [Ed.: The words between two asterisks have been emphasised in original.] objective satisfaction [Ed.: The words between two asterisks have been emphasised in original.] of the court a person may be "arrested" or "summoned", as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

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105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge , but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words " [Ed.: The words between two asterisks have been emphasised in original.] for which such person could be tried together with the accused [Ed.: The words between two asterisks have been emphasised in original.] ". The words used are not "for which such person could be Criminal Appeal No. 1720 of 2017 & Ors. ". There is, therefore, no scope for the court

acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

13. In order to answer the question, some of the principles enunciated in Hardeep Singh case may be recapitulated: power under Section 319 CrPC can be exercised by the trial court at any stage during the trial i.e. before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some "evidence" against such a person on the basis of which evidence it can be gathered that he appears to be guilty of the offence. The "evidence" herein means the material that is brought before the court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 CrPC. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the court under Section 319 CrPC and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity." (emphasis supplied)

10. The legislature was quite conscious while engrafting section 319 Cr.P.C. while employing the words "in the course of any inquiry into, or trial of, an offence, it appears from the evidence". The aforesaid words so employed under section 319 Cr.P.C. itself shows that degree of satisfaction has to be accorded by the Magistrate while exercising powers u/s 319 Cr.P.C.

11. Obviously, degree of satisfaction defers from case to case and according to the degree of satisfaction the test to be applied as one should be more than prima facie case at the stage of framing of charges. The Hon'ble Supreme Court in the case of **Hardeep Singh (Supra)** has observed as under:-

"93. Section 319(1) Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court. The word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved". It imparts a lesser degree of probability than proof.

94. In Pyare Lal Bhargava v. The State of Rajasthan, AIR 1963 SC 1094, a four-Judge Bench of this Court was concerned with the meaning of the word "appear'. The court held that the appropriate meaning of the word "appears' is "seems'. It imports a lesser degree of probability than proof. In Ram Singh & Ors. v. Ram Niwas & Anr., (2009) 14 SCC 25, a two-Judge Bench of this Court was again required to examine the importance of the word "appear' as appearing in the Section. The Court held that for the fulfillment of the condition that it appears to the court that a person had committed an offence, the court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary jurisdiction. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as an accused in the case.

95. At the time of taking cognizance, the court has to see whether a prima facie case

is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two- Judge Bench of this Court in Vikas v. State of Rajasthan, 2013 (11) SCALE 23, held that on the objective satisfaction of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

96. In Rajendra Singh (Supra), the Court observed:

"Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is "may" and not "shall". The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression "appears" indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not."

97. In Mohd. Shafi (Supra), this Court held that it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 Cr.P.C., it must arrive at a satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted.

98. In Sarabjit Singh & Anr. v. State of Punjab & Anr., AIR 2009 SC 2792, while explaining the scope of Section 319 Cr.P.C., a two-Judge Bench of this Court observed:

"....For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.....

Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction.

Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz. (i) an extraordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied." (Emphasis added)

99. In Brindaban Das & Ors. v. State of West Bengal, AIR 2009 SC 1248, a two-Judge Bench of this Court took a similar view observing that the court is required to consider whether such evidence would be sufficient to convict the person being summoned. Since issuance of summons under Section 319 Cr.P.C. entails a de novo trial and a large number of witnesses may have been examined and their re-examination could prejudice the prosecution and delay the trial, the trial court has to exercise such discretion with great care and perspicacity.

A similar view has been re-iterated by this Court in Michael Machado & Anr. v. Central Bureau of Investigation & Ors., AIR 2000 SC 1127.

100. However, there is a series of cases wherein this Court while dealing with the provisions of Section 227, 228, 239, 240, 241, 242 and 245 Cr.P.C., has consistently held that the court at the stage of framing of the charge has to apply its mind to the question whether or

not there is any ground for presuming the commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of prima facie case is to be applied. The Court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further. (Vide: State of Karnataka v. L. Munishwamy & Ors., AIR 1977 SC 1489; All India Bank Officers' Confederation etc. v. Union of India & Ors., AIR 1989 SC 2045; Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia, (1989) 1 SCC 715; State of M.P. v. Dr. Krishna Chandra Saksena, (1996) 11 SCC 439; and State of M.P. v. Mohan Lal Soni.

101.In Dilawar Babu Kurane v. State of Maharashtra AIR 2002 SC 564, this Court while dealing with the provisions of Section 227 and 228 Cr.P.C., placed a very heavy reliance on the earlier judgment of this Court in Union of India v. Prafulla Kumar Samal & Anr., AIR 1979 SC 366 and held that while considering the question of framing the charges, the court may weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out and whether the materials placed before this Court disclose grave suspicion against the accused which has not been properly explained. In such an eventuality, the court is justified in framing the charges and proceeding with the trial. The court has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but court should not make a roving enquiry into the pros and cons of the matter and weigh evidence as if it is conducting a trial.

*102 In Suresh v. State of Maharashtra, AIR 2001 SC 1375, this Court after taking note of the earlier judgments in **Niranjan Singh Karam Singh Punjab v. Jitendra Bhimraj Bijjaya, AIR 1990 SC 1962 and State of Maharashtra v. Priya Sharan Maharaj, AIR 1997 SC 2041,** held as under:*

"9.....at the stage of Sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction." (Emphasis supplied)

103. Similarly in State of Bihar v. Ramesh Singh, AIR 1977 SC 2018, while dealing with the issue, this Court held:

".....If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial....."

104. In Palanisamy Gounder & Anr. v. State, represented by Inspector of Police, (2005) 12 SCC 327, this Court deprecated the practice of invoking the power under Section 319 Cr.P.C. just to conduct a fishing inquiry, as in that case, the trial court exercised that power just to find out the real truth, though there was no valid ground to proceed against the person summoned by the court.

105. Power under Section 319 Cr.P.C. is a discretionary and an extra- ordinary power.

It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not "for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused."

12. The Hon'ble Apex court in the case of **Hardeep Singh (Supra)** has also analysed the contingencies in what situation can the power u/s 319 Cr.P.C. be exercised in the cases when a persons is not named in the FIR though named in the FIR but not charge sheeted or has been discharged. The Hon'ble Apex Court has observed as under:-

"107. In Joginder Singh & Anr. v. State of Punjab & Anr., AIR 1979 SC 339, a three-Judge Bench of this Court held that as regards the contention that the phrase "any person not being the accused" occurring in Section 319 Cr.P.C. excludes from its operation an accused who has been released by the police under Section 169 Cr.P.C. and has been shown in Column 2 of the charge-sheet, the contention has merely to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Section 319 (1) Cr.P.C. clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court, are included in the said expression.

108. In Anju Chaudhary v. Sate of U.P. & Anr., (2013) 6 SCC 384, a two-Judge Bench of this Court held that even in the cases where report under Section 173(2) Cr.P.C. is filed in the court and investigation records the name of a person in Column 2, or even does not name the person as an accused at all, the court in exercise of its powers vested under Section 319 Cr.P.C. can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law.

109. In Suman v. State of Rajasthan & Anr., AIR 2010 SC 518, a two- Judge Bench of this Court observed that there is nothing in the language of this sub-section from which it can be inferred that a person who is named in the FIR or complaint, but against whom charge-sheet is not filed by the police, cannot be proceeded against even though in the course of any inquiry into or trial of any offence, the court finds that such person has committed an offence for which he could be tried together with the other accused.

110.In Lal Suraj (supra), a two-Judge Bench held that there is no dispute with the legal proposition that even if a person had not been charge-sheeted, he may come within the purview of the description of such a person as contained in Section 319 Cr.P.C. A similar view had been

taken in Lok Ram (Supra), wherein it was held that a person, though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added to face the trial.

111. Even the Constitution Bench in Dharam Pal (CB) has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the chargesheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the chargesheet or whose name appears in the FIR and not in the main part of the chargesheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 319 Cr.P.C. can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

112. However, there is a great difference with regard to a person who has been discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation; the court had come to the conclusion that there is not even a prima facie case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The Court should keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with section 398 Cr.P.C. without resorting to the provision of Section 319 Cr.P.C. directly.

113. In Sohan Lal & Ors. v. State of Rajasthan, (1990) 4 SCC 580, a two-Judge Bench of this Court held that once an accused has been discharged, the procedure for enquiry envisaged under Section 398 Cr.P.C. cannot be circumvented by prescribing to procedure under Section 319 Cr.P.C.

114. In Municipal Corporation of Dehli v. Ram Kishan Rohtagi & Ors., AIR 1983 SC 67, this Court held that if the prosecution can at any stage produce evidence which satisfies the court that those who have not been arraigned as accused or against whom proceedings have been quashed, have also committed the offence, the Court can take cognizance against them under Section 319 Cr.P.C. and try them along with the other accused.

115. Power under Section 398 Cr.P.C. is in the nature of revisional power which can be exercised only by the High Court or the Sessions Judge, as the case may be. According to Section 300 (5) Cr.P.C., a person discharged under Section 258 Cr.P.C. shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate. Further, Section 398 Cr.P.C. provides that 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 an inquiry into the case against any person who has already been discharged. Both these provisions contemplate an inquiry to be conducted before any person, who has already been discharged, is asked to again face trial if some evidence appears against him. As held earlier, Section 319 Cr.P.C. can also be invoked at the stage of inquiry. We do not see any reason why inquiry

as contemplated by Section 300(5) Cr.P.C. and Section 398 Cr.P.C. cannot be an inquiry under Section 319 Cr.P.C. Accordingly, a person discharged can also be arraigned again as an accused but only after an inquiry as contemplated by Section 300(5) and 398 Cr.P.C. If during or after such inquiry, there appears to be an evidence against such person, power under Section 319Cr.P.C. can be exercised. We may clarify that the word "trial' under Section 319 Cr.P.C. would be eclipsed by virtue of above provisions and the same cannot be invoked so far as a person discharged is concerned, but no more.

116. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C."

13. The Constitutional Bench in the matter of **Hardeep Singh (Supra)** has also considered the scope, ambit and the importance of the word evidence and had analysed the same and held as under:-

58. To answer the questions and to resolve the impediment that is being faced by the trial courts in exercising of powers under Section 319 Cr.P.C., the issue has to be investigated by examining the circumstances which give rise to a situation for the court to invoke such powers. The circumstances that lead to such inference being drawn up by the court for summoning a person arise out of the availability of the facts and material that comes up before the court and are made the basis for summoning such a person as an accomplice to the offence alleged to have been committed. The material should disclose the complicity of the person in the commission of the offence which has to be the material that appears from the evidence during the course of any inquiry into or trial of offence. The words as used in Section 319 Cr.P.C. indicate that the material has to be "where ....it appears from the evidence" before the court.

59. Before we answer this issue, let us examine the meaning of the word ''evidence'. According to Section 3 of the Evidence Act, ''evidence' means and includes:

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court, such statements are called documentary evidence;

60. According to Tomlin's Law Dictionary, Evidence is "the means from which an inference may logically be drawn as to the existence of a fact. It consists of proof by testimony of witnesses, on oath; or by writing or records."

61. Bentham defines ''evidence' as "any matter of fact, the effect, tendency or design of which presented to mind, is to produce in the mind a persuasion concerning the existence of some other matter of fact- a persuasion either affirmative or disaffirmative of its existence. Of the two facts so connected, the latter may be distinguished as the principal fact, and the former as the evidentiary fact."

62. According to Wigmore on Evidence, evidence represents "any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a

proposition, not of law, or of logic, on which the determination of the tribunal is to be asked."

63. The provision and the above-mentioned definitions clearly suggest that it is an exhaustive definition. Wherever the words "means and include" are used, it is an indication of the fact that the definition "is a hard and fast definition', and no other meaning can be assigned to the expression that is put down in the definition. It indicates an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expression. (Vide: ***M/S. Mahalakshmi Oil Mills v. Stare of A.P. AIR 1989 SC 335; Punjab Land Development and Reclamation Corporation Ltd. Chandigarh v. Presiding Officer, Labour Court, Chandigarh & Ors.,*** *(1990) 3 SCC 682;* ***P. Kasilingam & Ors. v. P.S.G. collage of Technology & Ors,*** *AIR 1995 SC 1395;* ***Hamdard (Wakf) Laboratories v. Dy. Labour Commissioner & Ors.,*** *AIR 2008 SC 968; and* ***Ponds India Ltd. (merged with H.L. Limited) v. Commissioner of Trade Tax, Lucknow,*** *(2008) 8 SCC 369).*

64. In ***Feroze N. Dotivala v. P.M. Wadhwani & Ors,*** *(2003) 1 SCC 433, dealing with a similar issue, this Court observed as under:*

"Generally, ordinary meaning is to be assigned to any word or phrase used or defined in a statute. Therefore, unless there is any vagueness or ambiguity, no occasion will arise to interpret the term in a manner which may add something to the meaning of the word which ordinarily does not so mean by the definition itself, more particularly, where it is a restrictive definition. Unless there are compelling reasons to do so, meaning of a restrictive and exhaustive definition would not be expanded or made extensive to embrace things which are strictly not within the meaning of the word as defined.

65. We, therefore proceed to examine the matter further on the premise that the definition of word "evidence" under the Evidence Act is exhaustive.

66. In Kalyan Kumar Gogoi v. Ashutosh Agnihotri & Anr., AIR 2011 SC 760, while dealing with the issue this Court held :

"18. The word "evidence" is used in common parlance in three different senses: (a) as equivalent to relevant, (b) as equivalent to proof, and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc."

67. In relation to a Civil Case, this court in Ameer Trading Corporation Ltd. v. Shapoorji Data Processing Ltd., AIR 2004 SC 355, held that the examination of a witness would include evidence-in- chief, cross-examination or re-examination. In Omkar Namdeo Jadhao & Ors v. Second Additional Sessions Judge Buldana & Anr., AIR 1997 SC 331; and Ram Swaroop & Ors. v. State of Rajasthan, AIR 2004 SC 2943, this Court held that statements recorded under Section 161 Cr.P.C. during the investigation are not evidence. Such statements can be used at the trial only for contradictions or omissions when the witness is examined in the court.

(See also: ***Podda Narayana & Ors. v. State of A.P.,*** *AIR 1975 SC 1252;* ***Sat Paul v. Delhi Administration,*** *AIR 1976 SC 294; and* ***State (Delhi Administration) v. Laxman Kumar & Ors.,*** *AIR 1986 SC 250).*

68. In Lok Ram v. Nihal Singh & Anr., AIR 2006 SC 1892, it was held that it is evident that a person, even though had initially been named in the FIR as an accused, but not charge-

sheeted, can also be added as an accused to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge- sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence.

69. The majority view of the Constitution Bench in ***Ramnarayan Mor & Anr. v. The State of Maharashtra,*** *AIR 1964 SC 949 has been as under:*

"9. It was urged in the alternative by counsel for the appellants that even if the expression "evidence" may include documents, such documents would only be those which are duly proved at the enquiry for commitment, because what may be used in a trial, civil or criminal, to support the judgment of a Court is evidence duly proved according to law. But by the ***Evidence Act*** *which applies to the trial of all criminal cases, the expression "evidence" is defined in Section 3 as meaning and including all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry and documents produced for the inspection of the Court. There is no restriction in this definition to documents which are duly proved by evidence." (Emphasis added)*

70. Similarly, this Court in Sunil Mehta & Anr. v. State of Gujarat & Anr., JT 2013 (3) SC 328, held that "It is trite that evidence within the meaning of the Evidence Act and so also within the meaning of Section 244 of the Cr.P.C. is what is recorded in the manner stipulated under ***Section 138*** *in the case of oral evidence. Documentary evidence would similarly be evidence only if the documents are proved in the manner recognised and provided for under the* ***Evidence Act*** *unless of course a statutory provision makes the document admissible as evidence without any formal proof thereof."*

71. In Guriya @ Tabassum Tauquir & Ors. v. State of Bihar & Anr., AIR 2008 SC 95, this Court held that in exercise of the powers under Section 319 Cr.P.C., the court can add a new accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge sheet or the case diary.

72. In Kishun Singh (Supra), this Court held :

"11. On a plain reading of sub-section (1) of Section 319 there can be no doubt that it must appear from the evidence tendered in the course of any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the accused. This power (under Section 319(1)), it seems clear to us, can be exercised only if it so appears from the evidence at the trial and not otherwise. Therefore, this sub-section contemplates existence of some evidence appearing in the course of trial wherefrom the court can prima facie conclude that the person not arraigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police. Even a person who has earlier been discharged would fall within the sweep of the power conferred by S. 319 of the Code. Therefore, stricto sensu, Section 319 of the Code cannot be invoked in a case like the present one where no evidence has been led at a trial wherefrom it can be said that the appellants appear to have been involved in the commission of the crime along with those already sent up for trial by the prosecution.

12. But then it must be conceded that Section 319 covers the post-cognizance stage where in the course of an inquiry or trial the involvement or complicity of a person or persons not named by the investigating agency has surfaced which necessitates the exercise of the discretionary power conferred by the said provision....."

73. A similar view has been taken by this Court in Raj Kishore Prasad (Supra), wherein it was held that in order to apply Section 319 Cr.P.C., it is essential that the need to proceed against the person other than the accused appearing to be guilty of offence arises only on evidence recorded in the course of an inquiry or trial.

74. In ***Lal Suraj @ Suraj Singh & Anr. v. State of Jharkhand,*** *(2009) 2 SCC 696, a two-Judge Bench of this Court held that "a court framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court exercises its jurisdiction under Section 319 Cr.P.C., the power has to be exercised on the basis of the fresh evidence brought before the court. There lies a fine but clear distinction."*

75. A similar view has been reiterated by this Court in Rajendra Singh v. State of U.P. & Anr., AIR 2007 SC 2786, observing that court should not exercise the power under Section 319 Cr.P.C. on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence. The word "evidence' in Section 319 Cr.P.C. contemplates the evidence of witnesses given in the court.

76. Ordinarily, it is only after the charges are framed that the stage of recording of evidence is reached. A bare perusal of Section 227 Cr.P.C. would show that the legislature has used the terms "record of the case" and the "documents submitted therewith". It is in this context that the word "evidence' as appearing in Section 319 Cr.P.C. has to be read and understood. The material collected at the stage of investigation can at best be used for a limited purpose as provided under Section 157 of the Evidence Act i.e. to corroborate or contradict the statements of the witnesses recorded before the court. Therefore, for the exercise of power under Section 319 Cr.P.C., the use of word `evidence' means material that has come before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the court is of the opinion that a person not accused before it has also committed the offence, it may summon such person under Section 319 Cr.P.C.

77. With respect to documentary evidence, it is sufficient, as can be seen from a bare perusal of Section 3 of the Evidence Act as well as the decision of the Constitution Bench, that a document is required to be produced and proved according to law to be called evidence. Whether such evidence is relevant, irrelevant, admissible or inadmissible, is a matter of trial.

78. It is, therefore, clear that the word "evidence" in Section 319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation.

79. The inquiry by the court is neither attributable to the investigation nor the prosecution, but by the court itself for collecting information to draw back a curtain that hides something material. It is the duty of the court to do so and therefore the power to perform this duty is provided under the Cr.P.C.

80. The unveiling of facts other than the material collected during investigation before the magistrate or court before trial actually commences is part of the process of inquiry. Such facts when recorded during trial are evidence. It is evidence only on the basis whereof trial can be held, but can the same definition be extended for any other material collected during inquiry by the magistrate or court for the purpose of Section 319 Cr.P.C.?

81. An inquiry can be conducted by the magistrate or court at any stage during the proceedings before the court. This power is preserved with the court and has to be read and

understood accordingly. The outcome of any such exercise should not be an impediment in the speedy trial of the case. Though the facts so received by the magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of Section 319 Cr.P.C. it is an information of complicity. Such material therefore, can be used even though not an evidence in stricto sensuo, but an information on record collected by the court during inquiry itself, as a prima facie satisfaction for exercising the powers as presently involved.

82. This pre-trial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material alongwith the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the charge-sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

83. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilize or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. This would harmonise such material with the word "evidence' as material that would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court.

84. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Cr.P.C. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The "evidence' is thus, limited to the evidence recorded during trial."

14. The proposition of law culled out by the Hon'ble Apex Court itself makes it clear that u/s 319 Cr.P.C. discretion has been bestowed upon the Magistrate to exercise the powers while looking into the facts and the circumstances of a particular case before it while according degree of satisfaction so imperative for invocation of the powers u/s 319 Cr.P.C. The Hon'ble Apex Court has repeatedly cautioned the Courts to exercise the powers under *section 319* Cr.P.C. in such a manner that it does not permit an accused

to walk away free on the strength of any lacuna attributed by the Investigating Officer. In nutshell, it can be very well said that once the Magistrate finds that there was sufficient material available on record before it to summon a person in the trial which is proposed to be undertaken then the powers u/s 319 Cr.P.C. are to be invoked.

15. Nonetheless, the powers under *section 319* Cr.P.C. to summon those persons who are not named in the charge sheet to appear and face trial is unquestionable as the very object of engrafting *section 319* Cr.P.C. is that to allow a person who deserves to be tried not to go scot-free.

16. The stage which is contemplated under *section 319* Cr.P.C. 1973 is a stage before the conclusion of the trial and thus, only one conclusion can be drawn that the Magistrate must be prima facie of the opinion that there are sufficient material and cause for summoning the culprit who is either not named in the FIR or if named, he has not been charge sheeted or discharged.

The learned counsel for the revisionist has made the following submission:-

(1) The FIR has been lodged on 21-5-2019 for the offence which have been committed on 11.06.2017 and in the FIR the applicants names do not find place thus, there was no occasion for the court below to have exercise powers under *section 319* Cr.P.C. for summoning the applicants

(2) There are contradictions in the statements of the victim recorded under section 161 and 164 Cr.P.C. as well as the other statement also, thus, it is not a fit case for the court below to exercise its power under *section 319* Cr.P.C.

(3) It is a case of counter blast as the applicant no. 1 had already made a complaint against the opposite party no. 2 before the Senior Superintendent of Police District Bareilly with respect to harassment meted to her.

17. On the other hand the learning A.G.A. has supported the order under challenged and has argued that the order dated 08.10.2021 passed by the court below summoning the applicants is perfectly valid and needs no interference as the court below has applied its mind and the said order is in conformity and consonance with the judgment of constitutional Bench in the case of **Hardeep Singh (Supra)**.

18. Elaborating the first statement so made by the learnt counsel for the applicants has argued that the FIR was lodged on 21-5-2019 as well as the incident alleged to have been occurred for commissioning of the offence and order dated 11.06.2017 thus, the exercise of powers under *section 319* Cr.P.C. by the court below is illegal. The said submission so sought to be raised by the learned counsel for the revisionists deserves to be **rejected** in view of the fact that delay in lodging of the FIR cannot be construed to be a ground to hold the exercise of powers under *section 319* Cr.P.C. is illegal particularly, in view of the fact that in the present case there are sufficient material available on record before the court concerned with respect to the fact that the applicants were involved in the commission of the offence that too prima-facie, a perusal of the statement recorded under section 164 Cr.P.C. of the victim dated 19.06.2019 wherein the victim herself had stated that the applicant had sold her to Vedram for an amount of Rs.1 lakh. However in the cross-examination the victim being P.W. 2 dated 28.01.2021 an specific reference has been made with respect to the fact that the applicant no. 1 had called the victim on the roof and thereafter, some substance was to be in the handkerchief and when the same was put on the mouth of the victim, she became semi-conscious and thereafter, the applicant no. 1 along with the applicant no. 2 sold her to Vedram and both of

them accompanied Vedram while kidnapping her and taking her to a different place where Vedram committed the bad act of rape. The said evidences on record are more than prima-facie sufficient for invoking the powers under *section 319* Cr.P.C. as mandated by the Hon'ble Apex Court in the case of **Hardeep Singh (Supra)**.

19. So far as, the second limb of the argument of the learned counsel for the applicants with regard to the fact that there are inconsistency in the statement recorded by the victim as well as the opposite party no. 2 are concerned the same is wholly misplaced and misconceived for the reason that in the statement recorded under section 164 Cr.P.C. as well as the statement recorded on 28.01.2021 itself shows that there is no contradiction rather to the contrary the statements are inconformity and consonance with the statement given by the victim herself.

20. So far as they argument so sought to be raised by the learned counsel for the applicants with regard to the fact that prior to the lodging of the FIR and inclusion of the name of the applicants in the said proceeding, the applicant no. 1 had also filed a complaint before the police authority regarding the harassment meted to her by opposite party no. 2 is concerned and the same is not liable to be considered at all at the stage when the question before this court is with regard to summoning all the applicants under *section 319* Cr.P.C..

21. Lastly the learned counsel for the applicants has argued that there is no prima facie satisfaction accorded by the court below while summoning the applicants.

22. Needless to point out that degree of satisfaction differs from case to case and according to the degree of satisfaction that is to be applied as one which should be more then prima facie case at the stage of framing of charges. Herein in the present case the Court finds that the court below while passing the order dated 08.10.2021 summoning the applicants has considered the statements of the victim as well as opposite party no. 2 both under section 161 and 164 of Cr.P.C. and also the statement during proceeding also and has recorded the satisfaction which according to court is more than the prima facie.

23. The Hon'ble Apex Court as already observed hereinabove has cautioned the Magistrate to the said extent that the order should not be cyclostyled order but there should be some satisfaction which should be more than prima-facie. In view of said factual position, there is no manifest illegality committed by the court below while passing the impugned order herein.

24. The learned counsel for the applicant has relied upon the judgment in the case of ***Ramesh Chandra Srivastava Vs. State of U.P. and Another*** decided on ***13.09.2021*** in ***Criminal Appeal No. 990 of 2021*** so as to contend that there has to be strong and cogent evidences available with the Magistrate while invoking the powers u/s 319 Cr.P.C. The relevant extract of the judgment is being quoted below:-

"The test as laid down by the Constitution Bench of this Court for invoking power under Section 319 Cr.P.C. inter alia includes the principle that only when strong and cogent evidence occurs against a person from the evidence the power under Section 319 Cr.P.C. should be exercised. The power cannot be exercised in a casual and cavalier manner. The test to be applied, as laid down by this Court, is one which is more than prima facie case which is applied at the time of framing of charges.

It will all depend upon the evidence which is tendered in a given case as to whether there is a strong ground within the meaning of paragraph 105."

25. A perusal of the judgment in the case of ***Ramesh Chandra Srivastava (Supra)*** itself reiterates the law laid down by the Hon'ble Apex Court in the case of ***Hardeep Singh (Supra)***. In the present case, the court finds there were sufficient materials available with the court below while exercising the powers u/s 319 Cr.P.C. Thus, this Court further finds that the court below was satisfied while passing the order under challenge that it was a fit case wherein provisions contained u/s 319 Cr.P.C. are to be invoked.

26. Resultantly, the present revision is devoid of merit and it is accordingly, **dismissed** as this court finds that there has been no manifest error of law committed by the court below while passing the order which is under challenge.

(2021)12ILR A253
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Criminal Revision No. 3154 of 2021

Mudassir Khan ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Brajesh Kumar Solanki

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Section 125 - Order for maintenance of wives , children and parents - power exercised under Section 397/401 of the Code of Criminal Procedure is limited - until and unless the order so challenged therein passed by the Court is perverse or the view taken by the Court wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of record - revisional court is not justified in interfering with the order that too merely because also another view is possible. (Para -8)

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 125 - laws relating to maintenance - measure for social justice to provide immediate relief to dependent being wives and children for their family support so as to prevent them from falling into destitution and vagrancy - not a matter of right that a dependent can claim maintenance under Section 125 Cr.P.C. as there are certain conditions - strict proof of marriage should not be a pre-condition for maintenance under Section 125 of the Cr.P.C - long cohabitation between woman and man leads to presumption of marriage entitling maintenance for woman and children born to them. (Para - 20,26,30,31)

Wife (O.P. no.2) preferred an application under Section 125 CrPC - seeking maintenance to the tune of Rs.15,000/- per month - court below pass the order granting maintenance to the tune of Rs.5000/- to O.P. no.2 - from the date of the filing of application - Aggrieved against the order - hence revision by Husband (revisionist).

HELD:-Grant of a maintenance is beneficial legislation for the purposes of granting benefit to the dependent, who are on the verge of the starvation and who have been meted with a treatment, which she was never intended to be given . Present case is not a fit case, wherein this Court may exercise its jurisdiction under Section 397/401 CrPC while setting aside the order dated 27.10.2021, hence the present criminal revision is liable to be dismissed. (Para - 32,34)

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. Rajnesh Vs Neha , Criminal Appeal No. 730 of 2020

2. Captain Ramesh Chander Kaushal Vs Mrs. Veena Kaushal , 1978 (4) SCC 70

3. Shri Bhagwan Dutt Vs Smt. Kamla Devi Vs anr. , (1975) 2 SCC 386

4. Chaturbhuj Vs Sita Bai ,(2008) 2 SCC 316

5. Chanmuniya Vs Virendra Kumar Singh Kushwaha Vs anr., 2011 (1) SCC 141

6. Kamla Vs others Vs M.R. Mehar , 2019 (2) SCC 491

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri V.K. Solanki, learned counsel for the revisionist and Sri K.K. Rajbhar, the learned A.G.A, for O.P. no.1.

2. Challenge in the present revision purported to be under Section 397/401 of CrPC is to order dated 27.10.2021 passed by the Principal Judge, Family Court, Budaun, District Budaun, in Criminal Case No. 1307/2019, (Smt. Tabassum Vs. Mudassir), in the proceedings under Section 125 of CrPC, P.S. Wazirganj, District Budaun.

3. Brief facts of the case shorn off unnecessary details set forth in the application purported to be under Section 125 of CrPC is to the effect that the O.P. no.2 being Smt. Tabassum wife of Mudassir Khan and daughter of Wazir Khan, got married with the applicant herein on 11.5.2018 according to the rites and rituals as enshrined under the Muslim Law. Consequent to the solemnization of the marriage, the inlaws of O.P. no.2 as well as the revisionist, who happens to be the husband demanded dowry as according to them, the gifts, which the family of the O.P. no.2 had given to them was not commensurating to the status of the inlaws. Resultantly, threats were being sought to be administered upon O.P. no.2 and she was being harassed in all possible manner. When the O.P. no.2 narrated the entire story to her mother, then the mother of O.P. no.2 along with near relatives approached the revisionist and their parents requesting them that her daughter may not be harassed. It is also narrated in the application purported to be under Section 156(3) CrPC that on 20.9.2018, the inlaws of the O.P. no.2 as well as the husband of O.P. no.2 being the revisionist took O.P. no.2 to Bombay on 27.6.2018 and thereafter consequent to return from Bombay to Sahaswan on 20.9.2018, again O.P. no.2 administered beating and attempts were also made to kill her. Again the process of mediation for creating an environment, whereby the O.P. no.2 and the revisionist may live together peacefully, was undertaken. Again on 23.9.2018, at 8:00 O'clock in the morning beating was administered to O.P. no.2 and all the jewellery, which was available with the O.P. no.2 was taken away by the inlaws and she was ousted from the house with only the cloth, which she was wearing and she was sent from her inlaws' place in a hired taxi. Constraint with the same, the O.P. no.2, thereafter, preferred an application purported to be under Section 125 CrPC before the court below, which was numbered as Criminal Case No.1307 of 2019, CNR No. UPBN 02-001952-2019, seeking maintenance to the tune of Rs.15,000/- per month. The said application was presented before the court below on 28.9.2019. On being noticed, the revisionist filed its reply refuting the allegations and the averments contained in the application under Section 125 CrPC instituted by O.P. no.2. The O.P. no.2 also filed necessary documentary evidence in support of her case. Nonetheless, so far as revisionist is concerned, he did not submit any documentary evidence fortifying his stand.

4. Thereafter the court below has now proceeded to pass the order dated 24.10.2021, while granting maintenance to the tune of Rs.5000/- to O.P. no.2 from the date of the filing of application.

5. Aggrieved against the order dated 27.10.2021 passed by the Court of Principal Judge, Family Court, Budaun, District Budaun,

in Criminal Case No. 1307/2019, (Smt. Tabassum Vs. Mudassir), in the proceedings under Section 125 of CrPC, P.S. Wazirganj, District Budaun, now the revisionist is before this Court.

6. Before proceeding further it is apt to reproduce the provisions contained under Section 397/401 CrPC, which reads as under: -

"397. Calling for records to exercise powers of revision.

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order,- recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.*- All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub- section and of section 398.*

(2) The powers of revision conferred by sub- section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

401. High Court' s Powers of revisions.

(1) In the case of any proceeding the record of which has been called for by itself or Which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code tan appeal lies but an application for revision has been made to the High Court by any person and the High Court Is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

7. A conjoint reading of the provisions contained under Section 397 as well as 401 of the Code of Criminal Procedure, it will clearly reveal that High Court of any Sessions Judge may call for and examine the record of any proceedings before any inferior criminal court situate within its or its local jurisdiction for the purposes of satisfying itself or himself as to the correctness, legality or probability of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior court.

8. It is well settled that the legal proposition so culled out by the Hon'ble Apex

Court that the power so exercised under Section 397/401 of the Code of Criminal Procedure is limited and until and unless the order so challenged therein passed by the Court is perverse or the view taken by the Court wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of record, the revisional court is not justified in interfering with the order that too merely because also another view is possible.

9. In nutshell, the Hon'ble Apex Court has cautioned the High Court not to act as an appellate court as the whole purpose of revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal procedure.

10. In the light of the principles so enunciated by the Hon'ble Apex Court or by this Court, now the present case is to be dealt with.

11. Learned counsel for the revisionist has made manifold submissions, which are as under:-

(a) The court below has committed manifest error of law in awarding maintenance to the tune of Rs.5000/- per month as there was no determination of the actual income of the applicant/revisionist.

(b) The O.P. no.2 (wife) has sufficient means to sustain herself, thus she is not entitled to maintenance.

(c) Assuming without admitting that the O.P. no.2 is entitled to maintenance, then the same should be from the date of passing of the order and not from the date of filing of the application..

12. Learned A.G.A, who appears for O.P. no.1 has supported the order under challenge, while contending that there is no error apparent on the face of record committed by the court below in passing the order under challenge, particularly in the proceedings under revisional jurisdiction has pure finding of fact based on documentary evidence on record is there.

13. Learned counsel for the revisionist has firstly argued that the revisionist is a labour, whose monthly income varies from Rs.7000/- to 8000/- per month and thus the imposition of a condition for payment of maintenance to the O.P. no.2 (wife) to the tune of Rs.5000/- is quite excessive and not commensurate to the income of the revisionist.

14. In order to buttress the said submission, the learned counsel for the revisionist has referred to various paragraphs of the judgment under challenge so as to contend that the allegations so sought to be made by O.P. no.2 to the extent that the revisionist has a business of effecting POP on the ceiling as well as a Dharamkanta by the name of Anjum is factually incorrect. The court below after analyzing the evidence available on record in paragraph-35 of the order dated 27.10.2021, which is under challenge has taken note of the fact that the revisionist during the cross-examination admitted the fact that he has a Dharamkanta by the name of Anjum Dharamkanta. Further the court below has also recorded a finding that the revisionist is a hale and hearty person having sufficient means to sustain himself and also to provide maintenance to his wife being O.P. no.2.

15. The learned counsel for the revisionist on pointed query made to him could not dispute the said factual aspect. As from the perusal of the pleadings setforth before the court below as before this Court, there is no document to show that the finding is perverse or incorrect. As already noticed earlier, this Court cannot substitute its own finding while upsetting the finding of the court below, even if another view is possible. Obviously, exception is to the said

effect that there should be material available on record to show perversity committed by the court below.

16. The learned counsel for the revisionist has next argued that O.P. no.2 (wife) has sufficient means to sustain herself, and she cannot be made dependent upon maintenance, which is to be granted to her by the revisionist. The court below has dealt with the said issue and in paragraph-22 of the order under challenge has recorded a categorical finding that the allegations so made by the revisionist with regard to the fact that the O.P. no.2 had taken jewellery and money for running the business of distribution of milk was found to be incorrect has the revisionist had completely failed to produce any document to the said effect. Rather to the contrary, it was the consistent case of O.P. no.2 that she is not doing any business and she is also not well-versed with the art of knitting also. Accordingly, the court below found it proper to award her maintenance.

17. Lastly, the learned counsel for the revisionist has argued that assuming without admitting that the O.P. no.2 is entitled to maintenance, then the maintenance can be granted from the date of passing of the order and not from the date of the application. The said argument so raised by the learned counsel for the revisionist appears to be attractive, but is liable to be rejected, particularly, in view of the fact that now the Hon'ble Apex Court in the case of ***Rajnesh Vs. Neha*** decided in **Criminal Appeal No. 730 of 2020** on **4.11.2020,** has clearly mandated that maintenance is to be granted from the date of application and not from the date of the order. The operative portion of the order dated 4.11.2020 is quoted hereinunder:-

" Discussion and Directions

The judgments hereinabove reveal the divergent views of different High Courts on the date from which maintenance must be awarded.

Even though a judicial discretion is conferred upon the Court to grant maintenance either from the date of application or from the date of the order in S. 125(2) Cr.P.C., it would be appropriate to grant maintenance from the date of application in all cases, including Section 125 Cr.P.C. In the practical working of the provisions relating to maintenance, we find that there is significant delay in disposal of the applications for interim maintenance for years on end. It would therefore be in the interests of justice and fair play that maintenance is awarded from the date of the application.

In Shail Kumari Devi and Ors. v Krishnan Bhagwan Pathak 2008 9 SCC 632, this Court held that the entitlement of maintenance should not be left to the uncertain date of disposal of the case. The enormous delay in disposal of proceedings justifies the award of maintenance from the date of application. In Bhuwan Mohan Singh v Meena61, this Court held that repetitive adjournments sought by the husband in that case resulted in delay of 9 years in the adjudication of the case. The delay in adjudication was not only against human rights, but also against the basic embodiment of dignity of an individual. The delay in the conduct of the proceedings would require grant of maintenance to date back to the date of application.

The rationale of granting maintenance from the date of application finds its roots in the object of enacting maintenance legislations, so as to enable the wife to overcome the financial crunch which occurs on separation from the husband. Financial constraints of a dependant spouse hampers their capacity to be effectively represented before the Court. In order to prevent a dependant from being reduced to destitution, it is necessary that maintenance is awarded from the date on which the application for maintenance is filed before the concerned Court.

In Badshah v Urmila Badshah Godse (2014) 1 SCC 188 , the Supreme Court was

considering the interpretation of Section 125 Cr.P.C. The Court held :

"13.3. ...purposive interpretation needs to be given to the provisions of Section 125 CrPC. While dealing with the application of a destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalised sections of the society. The purpose is to achieve "social justice" which is the constitutional vision, enshrined in the Preamble of the Constitution of India. The Preamble to the Constitution of India clearly signals that we have chosen the democratic path under the rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the courts to advance the cause of the social justice. While giving interpretation to a particular provision, the court is supposed to bridge the gap between the law and society." (emphasis supplied)

It has therefore become necessary to issue directions to bring about uniformity and consistency in the Orders passed by all Courts, by directing that maintenance be awarded from the date on which the application was made before the concerned Court. The right to claim maintenance must date back to the date of filing the application, since the period during which the maintenance proceedings remained pending is not within the control of the applicant."

Final Directions

In view of the foregoing discussion as contained of this judgment, I deem it appropriate to pass the following directions in exercise of our powers under Article 142 of the Constitution of India:-

(a).....

(b).....

(c).....

(d) Date from which maintenance is to be awarded

We make it clear that maintenance in all cases will be awarded from the date of filing the application for maintenance."

18. Brief background of the statutory enactments so made from time to time are germane for adjudication of the controversy in question and hence the same are reproduced hereinbelow:-

Section 488 of the Cr.P.C. 1898:-

Section 488-Order of maintenance of wife & children

"(1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding fifty rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may mate an order under this

section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

(4) No wife shall he entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases:

Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case ex parte. Any order so made may be set aside for good cause shown, on application made within three months from the date thereof.

(7) The accused may tender himself as a witness, and in such case shall be examined as such.

(8) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(9) The accused may be proceeded against in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child."

Section 125(1) of the Cr.P.C. 1973

(1) If any person having sufficient means neglects or refuses to maintain.-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Section 125 Cr.P.C. 1973 as amended w.e.f. 24.9.2001 -

Section 125 - Order for maintenance of wives, children and parents

(1) If any person having sufficient means neglects or refuses to maintain.-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate 1[***] as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

[Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.";]

Explanation.-For the purposes of this Chapter.-

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

"(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.";]

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any port of each month's 4[allowance for the maintenance or the interim maintenance and expenses of proceeding , as the case may be] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an 4[allowance for the maintenance or the interim maintenance and expenses of proceeding , as the case may be] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her, husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

STATE AMENDMENTS

Uttar Pradesh:

"(6) where in a proceeding under this section it appears to the Magistrate that the person claiming maintenance is in need to immediate relief for his support and the necessary expenses of the proceeding, the Magistrate may, on his application, order the person against whom the maintenance is claimed, to pay to the person claiming the

maintenance, during the pendency of the proceeding such monthly allowance not exceeding five thousand rupees and such expenses of the proceeding as the Magistrate consider reasonable and such order shall be enforceable as an order of maintenance."

19. The incorporation of the provisions pertaining to maintenance has been well recognized and the provisions so contained under Section 488 of the Cr.P.C. 1898 which is a pre-constitution enactment has been given recognition and endorsed while giving it up proper place and status in Section 125 of the Cr.P.C., 1973.

20. The laws relating to maintenance have been enacted as a measure for social justice to provide immediate relief to dependent being wives and children for their family support so as to prevent them from falling into destitution and vagrancy.

Article 15(3) of the Constitution of India provides that:

"Nothing in this article shall prevent the State from making any special provision for women and children."

21. Thus it can be safely said that the Constitution of India, 1950 has envisaged a devise setting up a positive role for the State in fostering change towards the empowerment of women leading to amendment in various legislation and introduction of new legislation.

22. As noticed earlier the pre-constitutional law being the Code of Criminal Procedure, 1898 relating to Section 488 has been followed in Section 125 Cr.P.C. before its amendment in the year 2001 as in other words it can be said that Section 125 Cr.P.C. is an incarnation of Section 488 of the old Act except the fact that now parents also are brought into category of persons eligible for maintenance and further legislative cognizance has also been taken of the devaluation of the rupees and escalation of living cost by raising maximum allowance from 100 to 500. However, now after amendments made in the year 2001 the ceiling limit for maintenance has been done away.

23. The Hon'ble Supreme Court in the case of **Captain Ramesh Chander Kaushal Vs. Mrs. Veena Kaushal** reported in **1978 (4) SCC 70** in para 9 has observed as under:-

"9. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by Courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the cause--the cause of the derelicts."

24. The basic idea behind insertion of the provisions relating to grant of maintenance is to prevent vagrancy and destitution of the dependents so as to create an atmosphere whereby a dependent is not allowed to starve or lead a life which cannot be termed to be a respectable living.

25. Section 125 of the Cr.P.C. is a self-contained code which finds presence under Chapter IX of 1973 Code for the aid of wife, children and parents in the matter of maintenance that to in summary proceedings. Maintenance under Section 125 of the Cr.P.C. can be claimed by a person irrespective of belonging to any religious community and the object of the said Section is to provide

immediate relief to an applicant meaning thereby that it is a beneficial legislation in favour of the dependents.

26. It is not a matter of right that a dependent can claim maintenance under Section 125 Cr.P.C. as there are certain conditions. It is further not matter of mere asking that the maintenance can be claimed by a dependent as for the said purpose, there are certain pre-requisite conditions which have to be satisfied namely;

(i) the husband must have sufficient means;

(ii) the husband neglects to maintain his wife, who is unable to maintain herself

27. Yet the Hon'ble Supreme Court in the case of **Shri Bhagwan Dutt Vs. Smt. Kamla Devi and another** reported in **(1975) 2 SCC 386** while dealing with the provisions contained under Section 488 of the old Act held as under:-

"20. The object of these provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income, also, is taken into account together with the earnings of the husband and his commitments."

28. The Hon'ble Apex Court had even put a caveat and has cautioned that the proceeding under Section 125 of the Cr.P.C., 1973 is not with an object to punish a person but prevent vagrancy by compelling who can provide support to those who are unable to support themselves.

29. Hon'ble Supreme Court in the case of **Chaturbhuj Vs. Sita Bai (2008) 2 SCC 316** in para 6 has observed as under:-

6. The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow.

Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors (1978) 4 SCC 70) falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India, 1950. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat and Ors. (2005) 3 SCC 636.

30. Reiterating the principles of law as laid down in the aforesaid decisions the Hon'ble Apex Court in the case of **Chanmuniya Vs. Virendra Kumar Singh Kushwaha and another 2011 (1) SCC 141** has even gone into the marital status with regard to long cohabitation and in para 42 observed as under :-

"42. We are of the opinion that a broad and expansive interpretation should be given to the term 'wife' to include even those

cases where a man and woman have been living together as husband and wife for a reasonably long period of time, and strict proof of marriage should not be a pre-condition for maintenance under Section 125 of the Cr.P.C., so as to fulfil the true spirit and essence of the beneficial provision of maintenance under Section 125.We also believe that such an interpretation would be a just application of the principles enshrined in the preamble to our Constitution, namely, social justice and upholding the dignity of the individual."

31. In the case of ***Kamla and others Vs. M.R. Mehar*** reported in **2019 (2) SCC 491** the Hon'ble Apex Court has gone to the extent that long cohabitation between woman and man leads to presumption of marriage entitling maintenance for woman and children born to them.

32. Hence it can be safely said that the grant of a maintenance is beneficial legislation for the purposes of granting benefit tot he dependent, who are on the verge of the starvation and who have been meted with a treatment, which she was never intended to be given.

33. Further no other point has been raised by the learned counsel for the revisionist.

34. Looking in the totality of the matter, this Court finds that the present case is not a fit case, wherein this Court may exercise its jurisdiction under Section 397/401 CrPC while setting aside the order dated 27.10.2021, hence the present criminal revision is liable to be dismissed.

35. The revision is accordingly **dismissed.**

36. No order as to cost.

(2021)12ILR A263

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.12.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Criminal Revision No. 3260 of 2021

Mishri Lal ...Revisionist

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Kamal Dev Rai

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397 - Revision - Indian Penal Code, 1860 - Sections 307, 504 - a person whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the charge-sheet, can still be summoned by the court provided the conditions under the section stand fulfilled. (Para - 7)

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 319 - Power to proceed against other persons appearing to be guilty of ofence - discretionary and an extra-ordinary power - doctrine *judex damnatur cum nocens absolvitur* (Judge is condemned when guilty is acquitted) - Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it..(Para - 3)

Revisionist named in F.I.R. - assigned a role in the incident - testimony of P.W.-1 and P.W.-2 - indicative of the complicity of the revisionist - present at spot - licensed weapon of the revisionist used by principal accused for causing firearm injuries - court below summoned revisionist under section 319 Cr.P.C. - on an application moved by opposite party no.2 - hence revision.

HELD:-The power under Section 319 of the Code to summon even those persons who are not named in

the charge-sheet to appear and face trial, being unquestionable and the object of the provision being not to allow a person who deserves to be tried to go scot-free by being not arraigned in the trial inspite of possibility of his complicity which can be gathered from the evidence during the course of trial, the order passed under Section 319 of the Code summoning the revisionist does not contain any material error so as to warrant inference. (Para - 20)

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. Hardeep Singh & ors. Vs St. of Punj., (2014) 3 SCC 92

2. S. Mohammed Ispahani Vs Yogendra Chandak & ors., (2017) 16 SCC 226

3. Rajesh & ors.Vs St. of Har., (2019) 6 SCC 368

4. Saeeda Khatoon Arshi Vs St. of U.P. & anr., (2020) 2 SCC 323

5. Adesh Tyagi Vs St. of U.P. & anr., 2021 (117) ACC 484

6. Upendra @ Mohit Vs St. of U.P. & anr., Criminal Revision no. 1981 of 2021

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

1. Heard Sri Kamal Dev Rai, learned counsel for the applicant and Sri Arvind Kumar, learned Additional Government Advocate appearing for the State-opposite party.

2. The present criminal revision has been filed seeking to set aside the judgement and order dated 17.11.2021 passed by Additional Sessions Judge, Court No. 1, Mainpuri in Session Trial No. 316 of 2014 (State vs. Anoj Kumar), under Sections 307, 504 I.P.C., Police Station-Kishni, District-Mainpuri, arising out of Case Crime No. 266 of 2014, on the application of the opposite party no.2 filed under Section 319 of the Code of Criminal Procedure, 19731.

3. Learned counsel for the revisionist has sought to assail the order passed by the court below by referring to the factual aspects of the case to contend that the revisionist has been falsely implicated in the criminal case. He has submitted that the jurisdiction under Section 319 of the Code is to be exercised in an extra-ordinary situation where there is a strong possibility of the conviction of the accused, who is proposed to be summoned, and the powers are not to be exercised in a routine manner. It is further pointed out that the Investigating Officer did not find any material against the revisionist and no charge-sheet having been submitted against him, there was no further material on the basis of which the trial court could have summoned the revisionist.

4. Learned Additional Government Advocate-I has controverted the assertions made by the counsel for the revisionist by drawing attention to the fact that the revisionist herein was named in the FIR and as per the FIR version he was assigned a specific role. Attention has been drawn to the fact that the testimony of PW-1 and PW-2 during the course of trial have pointed to the complicity of the revisionist and his clear role in the incident. It is also contended that the testimony before the trial judge would have to be given more weight than the report submitted by the Investigating Officer pursuant to the investigation.

5. The ambit and scope of the powers of the Magistrate under Section 319 of the Code were considered in the Constitution Bench judgment of the Supreme Court in **Hardeep Singh and Others vs. State of Punjab2.** Referring to the object of the provision it was held that the object of the provision is that the real culprit should not get away unpunished and

in a situation where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. It was stated thus :-

"8.The constitutional mandate under Articles 20 and 21 of the Constitution of India, 1950 provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under CrPC indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.

9. The presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty. Alternatively, certain statutory presumptions in relation to certain class of offences have been raised against the accused whereby the presumption of guilt prevails till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be innocent. These competing theories have been kept in mind by the legislature. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial and in our opinion, in order to achieve this very end that the legislature thought of incorporating provisions of Section 319 Code of Criminal Procedure. It is with the said object in mind that a constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the abovementioned avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is the subject matter of trial.

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12. Section 319 Code of Criminal Procedure springs out of the doctrine *judex damnatur cum nocens absolvitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 CrPC.

It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC.

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17. Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 Code of Criminal Procedure or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

18. The legislature cannot be presumed to have imagined all the

circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecution.

19. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

6. As regards the degree of satisfaction required for invoking the powers under Section 319 of the Code, it was held that the test that has to be applied is one which is more than *prima facie* case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. It was observed as follows :-

"105. Power under Section 319 Code of Criminal Procedure is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a *prima facie* case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than *prima facie* case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Code of Criminal Procedure. In Section 319 Code of Criminal Procedure the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused." The words used are not "for which such person could be convicted". There is, therefore, no scope for the Court acting under Section 319 Code of Criminal Procedure to form any opinion as to the guilt of the accused.

7. The question as to in what situations the power under the section can be exercised in respect of persons not named in the FIR or named in the FIR, but not charge-sheeted or discharged was also considered, and it was held that a person whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the charge-sheet, can still be summoned by the court provided the conditions under the section stand fulfilled. It was observed as follows :-

"111. Even the Constitution Bench in Dharam Pal (CB) has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the chargesheet,

once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the chargesheet or whose name appears in the FIR and not in the main part of the chargesheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193 Code of Criminal Procedure can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

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117.6 A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under Section 319 Code of Criminal Procedure provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Code of Criminal Procedure has to be complied with before he can be summoned afresh. "

8. The word 'evidence' as used under Section 319(1) of the Code was also considered and it was held as follows :-

"84. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Code of Criminal Procedure.The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Code of Criminal Procedure. The "evidence" is thus, limited to the evidence recorded during trial. "

9. The principles with regard to exercise of power by the court to summon an accused under Section 319 of the Code were reiterated in **S. Mohammed Ispahani Vs. Yogendra Chandak and others3,** and it was held that the power under Section 319 to summon even those persons who are not named in the charge-sheet to appear and face trial, is unquestionable. It was observed thus :-

"28.Insofar as power of the Court Under Section 319 of the Code of Criminal Procedure, to summon even those persons who are not named in the charge sheet to appear and face trial is concerned, the same is unquestionable. Section 319 of the Code of Criminal Procedure, is meant to rope in even those persons who were not implicated when the charge sheet was filed but during the trial the Court finds that sufficient evidence has come on record to summon them and face the trial. In Hardeep Singh's case, the Constitution Bench of this Court has settled the law in this behalf with authoritative pronouncement, thereby removing the cobweb which had been created while interpreting this provision earlier. As far as object behind Section 319 of the Code of Criminal Procedure, is concerned, the Court had highlighted the same as under:

19 .The court is sole repository of justice and a duty is cast upon it to uphold the Rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The

desire to avoid trial is so strong that an Accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence. '

10. The power to proceed against persons named in FIR with specific allegations against them, but not charge-sheeted, was reiterated in **Rajesh and others Vs. State of Haryana,4** and it was held that persons named in the FIR but not implicated in charge-sheet can be summoned to face trial, provided during the trial some evidence surfaces against the proposed accused.

11. The exercise of powers under Section 319 of the Code for summoning an additional accused again came up for consideration in **Saeeda Khatoon Arshi Vs. State of Uttar Pradesh and another5** and it was held that it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot-free by being not arraigned in the trial inspite of the possibility of his complicity which can be gathered from the documents presented by the prosecution.

12. In the facts of the present case the court below has taken note of the fact that the revisionist was not only named in the F.I.R. but he was also assigned a role in the incident. The testimony of P.W.-1 and P.W.-2 being indicative of the complicity of the revisionist have also been referred and in particular their statements that at the time of the incident, the revisionist was present at the spot and it was the licensed weapon of the revisionist which was used by the principal accused for causing the firearm injuries. Upon considering the settled legal position with regard to exercise of powers under Section 319, the court below has passed the order summoning the revisionist.

13. The FIR version as also the evidence before the trial judge being indicative of the complicity of the revisionist, though not arraigned as an accused in the charge-sheet, it was open to the trial court to form a view that the revisionist be tried together with the other accused, and for the said purpose summon the revisionist in exercise of powers under Section 319 of the Code.

14. The broad principles which have been laid down for exercise of powers under Section 319 of the Code underline the object of the enactment that the real perpetrator of the offence should not get away unpunished and in a situation where the investigating agency for any reason does not array any culprit as an accused the court would not be powerless in calling the accused to face trial; rather it would be duty of the court to do justice by punishing the real culprit.

15. The test which has been laid down with regard to the degree of satisfaction required for invoking the powers under Section 319 is one which is more than *prima facie* case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction.

16. The power to proceed under Section 319 has also been held to be exerciseable in respect of persons though named in the FIR but not charge-sheeted provided the court is satisfied that the conditions provided under the section stand fulfilled.

17. Section 319 (1) of the Code envisages that where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

18. The word evidence used under Section 319 (1) of the Code has been held to be understood to refer to the evidence recorded during trial, and also any material that has been received by the court after cognizance is taken and before the trial commences, to be utilized for corroboration and to support the evidence recorded by the court.

19. The evidence recorded by the court during trial is thus to be accorded primacy and for the purpose of exercise of power under Section 319 of the Code would have to be given weight over the material which was collected during the course of investigation. The contention which has been sought to be raised placing reliance upon the material collected by the investigating officer during the course of investigation, for the purpose of exercise of powers under Section 319 of the Code, thus cannot be accepted.

20. The power under Section 319 of the Code to summon even those persons who are not named in the charge-sheet to appear and face trial, being unquestionable and the object of the provision being not to allow a person who deserves to be tried to go scot-free by being not arraigned in the trial inspite of possibility of his complicity which can be gathered from the evidence during the course of trial, the order passed under Section 319 of the Code summoning the revisionist does not contain any material error so as to warrant inference.

21. The aforementioned legal position has been considered in detail in recent decisions of this Court in **Adesh Tyagi vs. State of U.P. and Another6 and Upendra @ Mohit vs. State of U.P. and Another7.**

22. Counsel for the applicant at this stage submits that he does not dispute the aforementioned legal position with regard to the exercise of powers under Section 319 of the Code and states that the applicant would submit to the jurisdiction of the court below and seek bail.

23. It goes without saying that in case any such application is moved, the court below would be expected to dispose it of in accordance with the settled principles of law.

24. Subject to the aforesaid observation, the revision stands **dismissed.**

(2021)12ILR A269
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.12.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Criminal Revision No. 3280 of 2021

Chand Patrakar & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Ajay Kumar Mishra

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Section 311 - Power to summon material witness, or examine person -power conferred under Section 311 should be invoked by the court only to meet the ends of justice - Power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection - power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law - Prevention of Corruption Act, 1988 - Section 8/9 .(Para -23)

Application preferred by revisionist - under Section 311 of the Cr.P.C. - for re-examination of PW1

(O.P.2) - grounds - Certain important facts could not be asked from the PW1 - facts were necessary for adjudication of the criminal case in question - court below rejected the application - hence revision.

HELD:-Grounds taken in application under Section 311 of the Cr.P.C. are not only vague but they do not disclose any of the conditions which are necessary for recalling the witness. Merely on asking the application under Section 311 of the Cr.P.C. cannot be allowed as there has to be sufficient reasons behind it. Order passed by the court below does not suffer from any manifest illegality in exercise of revisional jurisdiction. Court cannot substitute its own view, once another view is possible, that too when there is nothing on record to show that the view taken by the court below suffers from manifest error or is palpably illegal.(Para - 28,31)

Criminal Revision dismissed. (E-7)

List of Cases cited:-

1. Jamatraj Kewalji Govani Vs St. of Mah., AIR 1968 SC 178.

2. Mohanlal Shamji Soni Vs U.O.I. & anr., 1991 Supp (1) SCC 271

3. Zahira Habibulla H. Sheikh & anr. Vs St. of Guj. & ors., (2004)4 SCC 158

4. U.T. of Dadra & Haveli & anr. Vs Fatehsinh Mohansinh Chauhan, Appeal (Crl.) No. 834 of 2006

5. Vijay Kumar Vs St. of U.P. & anr., 2011 (8) SCC 136

6. P. Sanjeeva Rao Vs St. of A.P., 2012(7) SCC 56

7. Natasha Singh Vs C.B.I., 2013(5) SCC 741

8. Rajaram Prasad Yadav Vs St. of Bihar & anr., 2013(14) SCC 461

9. Mannan Shaikh & ors. Vs St. of W. B. & anr., (2014) 13 SCC 59

10. St. (NCT of Delhi) Vs Shiv Kumar Yadav, 2016(2) SCC 402

11. Ratan Lal Vs Prahlad Jat & ors. , (2017) 9 SCC 340

12. Swapan Kumar Chatterjee Vs C.B.I., 2019 (14) SCC 328

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Ajay Kumar Mishra, learned counsel for the revisionist as well as Sri L.D. Rajbhar, who appears for the opposite party no.1.

2. This is a revision under Section 397/401 of the Cr.P.C. challenging the order dated 13.10.2021 passed by Special Judge (P.C.Act) Court No.2/Additional Sessions Judge, Bareilly in Special Case No. 3 of 2018 arising out of Case Crime No.154 of 2016 under Section 8/9 Prevention of Corruption Act (State Vs Chand Patrakar and another), P.S. Hasanpur, District Amroha by which the court below has rejected the application preferred by the revisionist under Section 311 of the Cr.P.C.

3. Briefly stated facts are that an FIR was lodged by the opposite party no.2 against the revisionists, who are two in numbers, on 10.4.2016 before the P.S. Hasanpur, District Amroha being Case Crime No.154 of 2016 with an allegation that against the opposite party no.2 and their relatives, a case relating to dowry was lodged and which was under investigation by C.O. Hasanpur and about 7 to 8 days prior to the lodging of the present FIR one Latif (Milkman) had recommended the name of the revisionist and a meeting also arranged with them wherein the issue with regard to the expunging the name of the opposite party no.2 and her daughters was discussed in lieu of payment of certain amounts. A demand of Rs.1,00,000/- was raised by the revisionist and the opposite party no.2 thereafter pledged her jewellery and paid an amount of Rs.30,000/- to the revisionist and an amount of Rs.70,000/- was balance which was to be paid subsequently. However, the proceedings went against the opposite party no.2 and her family despite the fact according to the opposite party

no.2, she had made the payment for expunging away her name from the criminal proceedings as nothing was done by the revisionist, so above noted FIR was lodged.

4. The investigation was conducted by the Investigating Officer and charge sheet was submitted against the revisionist on 5.5.2016 in Case Crime No.154 of 2016, 8/9 of the Prevention of Corruption Act reference whereof has been given in para-4 of the application.

5. It appears that the statement of the PW1 Atarkali (opposite party no.2) was recorded on 19.4.2018 itself and thereafter the statements of PW2 to PW7 have also been recorded. The revisionists as per own showing have annexed annexure-3 at page 40 of the paper book an application purported to be under Section 311 of the Cr.P.C. for recalling and re-examine of PW1 (O.P. No.2) The said application has now been rejected while passing the order dated 13.10.2021 which is under challenge. \

6. Before the proceeding further it is apt to quote the provisions contained in Section 311 of the Cr.P.C:

"311. Power to summon material witness, or examine person present. *Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."*

7. A plain reading of Section 311 of the Cr.P.C. itself shows that any court may, at any stage of any inquiry, trial or other proceedings under said Code, summon any person as a witness or examine any person in attendance, though not summoned as a witness, recall and reexamine any person already examined and the court shall summon, examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

8. The legislature was quiet conscious about the employment of the word "at any stage of any inquiry", "trial or other proceedings under this Code" as well as "if his evidence appears to it to be essential to the just decision of the case."

9. Section 311 of the Code of Criminal Procedure, 1973 is the incarnation of the provisions contained under Section 540 under Chapter XLVI of the Code of Criminal Procedure, 1898 (hereinafter referred to as the Old Code).

10. Section 540 of the Old Code is being quoted hereinunder:

"540 Power to summon material witness, or examine person present. - *Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."*

11. The provisions contained under Section 540 of the Old Code was subject matter of consideration in the case of ***Jamatraj Kewalji Govani Vs. State of Maharashtra,*** reported in **AIR 1968 SC 178.**

The Hon'ble Apex Court in paragraph-10 of the said case has held as under:-

"10. Section 540 *is intended to be wide as the repeated use of the word 'any' throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. Under the first part, which is permissive, the court may act in one of three ways : (a) summon any person as a witness,*

(b) examine any person present in court although not sum- moned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution."

12. In the case of ***Mohanlal Shamji Soni Vs. Union of India and another,*** reported in **1991 Supp (1) SCC 271,** the Hon'ble Apex Court in paragraphs 7, 9, 10 and 27 has observed as under:

"7. Section 540 *was found in Chapter XLVI of the old Code of 1898 under the heading 'Miscellaneous'. But the present corresponding* Section 311 *of the new Code is found among other Sections in Chapter XXIV under the heading 'General Provisions as to Enquiries and Trials'.* Section 311 *is an almost verbatim reproduction of* Section 540 *of the old Code except for the insertion of the words 'to be' before the word "essential" occurring in the old Section. This section is manifestly in two parts. Whereas the word 'used' in the first part is 'may' the word used in the second part is 'shall'. In consequence, the first part which is permissive gives purely discretionary authority to* the Criminal Code *and enables it at any stage of enquiry, trial or other proceedings' under* the Code *to act in one of the three ways, namely, (1) to summon any person as a witness or (2) to examine any person in attendance, though not summoned as a witness, or (3) to recall and re-examine any person already examined.*

9. The very usage of the words such as 'any court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. *The second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.*

10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code *to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties with-holds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the court can draw a presumption under illustration (g) to* Section 114 *of the Evidence Act. In such a situation a*

question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 *of the Code (*Section 311 *of the New Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate,, inconclusive and speculative presentation of facts, the ends of justice would be defeated.*

27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command and examination of any person which would depend on the facts and circumstances of each case.

13. In the case of ***Zahira Habibulla H. Sheikh and another Vs. State of Gujarat and others,*** reported in **(2004)4 SCC 158,** the Hon'ble Apex Court in paragraphs- 43 and 46 has observed as under: -

"43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 *of the Code and* Section 165 *of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness."*

"46. Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 *of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering*

relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case."

14. In the case of U.T. of ***Dadra & Haveli & another Vs. Fatehsinh Mohansinh Chauhan,*** **in Appeal (Crl.) No. 834 of 2006,** decided on 14.8.2006, the Hon'ble Supreme Court had in paragraph observed as under:

"12. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the Court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused resulting in miscarriage of justice."

15. In the case of ***Vijay Kumar vs. State of U.P. and another,*** reported in **2011 (8) SCC 136,** the provisions contained under Section 311 of the Code of Criminal Procedure was considered and the Hon'ble Court in paragraphs-14 and 17 has held as under: -

"14. There is no manner of doubt that the power under Section 311 of Code of Criminal Procedure is a vast one. This power can be exercised at any stage of the trial. Such a power should be exercised provided the evidence which may be tendered by a witness is germane to the issue involved, or if proper evidence is not adduced or relevant material is not brought on record due to any inadvertence. It hardly needs to be emphasized that power under Section 311 should be exercised for the just decision of the case. The wide discretion conferred on the court to summon a witness must be exercised judicially, as wider the power, the greater is the necessity for application of the judicial mind. Whether to exercise the power or not would largely depend upon the facts and circumstances of each case. As is provided in the Section, power to summon any person as a witness can be exercised if the court forms an opinion that the examination of such a witness is essential for just decision of the case.

17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt. Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

16. In the case of ***P. Sanjeeva Rao Vs. State of Andhra Pradesh,*** reported in **2012(7) SCC 56,** the Hon'ble Apex Court has observed as under:

"19. The nature and extent of the power vested in the Courts under Section 311 Cr.P.C. to recall witnesses was examined by this Court in Hanuman Ram v. The State of Rajasthan & Ors. (2008) 15 SCC 652. This Court held that the object underlying Section 311 was to prevent failure of justice on account of a mistake of either party to bring on record

valuable evidence or leaving an ambiguity in the statements of the witnesses. This Court observed:

"7. ... "26. ... This is a supplementary provision enabling, and in certain circumstances imposing on the Court, the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind." (emphasis supplied)

20. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar (2000) 10 SCC 430. The following passage is in this regard apposite:

"In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible." (emphasis supplied)

21. The extent and the scope of the power of the Court to recall witnesses was examined by this Court in Mohanlal Shamji Soni v. Union of India & Anr. 1991 Supp (1) 271, where this Court observed:

"27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command and examination of any person which would depend on the facts and circumstances of each case." (emphasis supplied)

22. Discovery of the truth is the essential purpose of any trial or enquiry, observed a three-Judge Bench of this Court in Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria through LRs. 2012 (3) SCALE 550. A timely reminder of that solemn duty was given, in the following words:

"What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice."

23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

17. In the matter of ***Natasha Singh Vs. CBI,*** reported in **2013(5) SCC 741,** the Hon'ble Apex Court after analyzing the law relating to Section 311 of the CrPC in paragraphs- 20, 21 and 22 has observed as under: -

"20. Undoubtedly, an application filed under Section 311 Cr.P.C. must be allowed if fresh evidence is being produced to facilitate a just decision, however, in the instant case, the learned Trial Court prejudged the evidence of the witness sought to be examined by the appellant, and thereby cause grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping with the provisions of Section 311 Cr.P.C. By doing so, the Trial Court reached the conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Such an assumption is wholly misconceived, and is not tenable in law as the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution. The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case. The examination of the hand-writing expert may therefore be necessary to rebut the evidence of Rabi Lal Thapa (PW.40), and a request made for his examination ought not to have been rejected on the sole ground that the opinion of the hand-writing expert would not be conclusive. In such a situation, the only issue that ought to have been considered by the courts below, is whether the evidence proposed to be adduced was relevant or not. Identical is the position regarding the panchnama witness, and the court is justified in weighing evidence, only and only once the same has been laid before it and brought on record. Mr. B.B. Sharma, thus, may be in a position to depose with respect to whether the documents alleged to have been found, or to have been seized, were actually recovered or not, and therefore, from the point of view of the appellant, his examination might prove to be essential and imperative for facilitating a just decision of the case.

21. The High Court has simply quoted relevant paragraphs from the judgment of the Trial Court and has approved the same without giving proper reasons, merely observing that the additional evidence sought to be brought on record was not essential for the purpose of arriving at a just decision. Furthermore, the same is not a case where if the application filed

by the appellant had been allowed, the process would have taken much time. In fact, disallowing the said application, has caused delay. No prejudice would have been caused to the prosecution, if the defence had been permitted to examine said three witnesses.

22. In view of above, the appeal succeeds and is allowed. The judgment and order of the Trial Court, as well as of the High Court impugned before us, are set aside. The application under Section 311 Cr.P.C. filed by the appellant is allowed. The parties are directed to appear before the learned Trial Court on the 17th of May, 2013, and the learned Trial Court is requested to fix a date on which the appellant shall produce the three witnesses, and the same may thereafter be examined expeditiously in accordance with law, and without causing any further delay. Needless to say that the prosecution will be entitled to cross examine them."

18. Further in the matter of ***Rajaram Prasad Yadav vs. State of Bihar and another,*** reported in **2013(14) SCC 461,** the Hon'ble Supreme Court had considered the provisions contained under Section 311 and has held in paragraph-14 as under:

A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

19. In the matter of ***Mannan Shaikh and others vs. State of West Bengal and another***, reported in **(2014) 13 SCC 59**, the Hon'ble Apex Court had the occasion to further consider the

provision contained under Section 311 of CrPC and in paragraphs-12, 16 and 17, has observed as under: -

"12. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word "shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words "essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re- examination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.

16. If we view the present case in light of the above judgments, we will have to sustain the High Court's order. PW15-SI Dayal Mukherjee stated in the court that he had recorded the statement of deceased Rupchand Sk. Thus, this fact was known to the defence. He was cross-examined by the defence. Inadvertently, the said statement was not brought on record through PW15-SI Dayal Mukherjee. Rupchand Sk died after the said statement was recorded. The said statement, therefore, became very vital to the prosecution. It is obvious that the prosecution wants to treat it as a dying declaration. Undoubtedly, therefore, it is an essential material to the just decision of the case. Though, the fact of the recording of this statement is deposed to by PW15-SI Dayal Mukherjee, since due to oversight it was not brought on record, application was made under Section 311 of the Code praying for recall of PW15-SI Dayal Mukherjee. This cannot be termed as an inherent weakness or a latent wedge in the matrix of the prosecution case. No material is tried to be brought on record surreptitiously to fill-up the lacuna. Since the accused knew that such a statement was recorded by PW15-SI Dayal Mukherjee, no prejudice can be said to have been caused to the accused, who will undoubtedly get a chance to cross-examine PW15-SI Dayal Mukherjee.

17. It is true that PW15-SI Dayal Mukherjee was once recalled but that does not matter. It does not prevent his further recall. Section 311 of the Code does not put any such limitation on the court. He can still be recalled if his evidence appears to the court to be essential to the just decision of the case. In this connection we must revisit Rajendra Prasad where this Court has clarified that the court can exercise power of re- summoning any witness even if it has exercised the said power earlier. Relevant observations of this Court run as under:

"We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled

down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at."

20. In the case of **State (NCT of Delhi) Vs. Shiv Kumar Yadav,** reported in **2016(2) SCC 402**, the Hon'ble Apex Court in paragraph-27 has held as under:-

"It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 Cr.P.C. is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined."

21. In the matter of ***Ratan Lal Vs. Prahlad Jat and others*** reported in **(2017) 9 SCC 340**, the Hon'ble Apex Court in paragraph-17 has observed as under: -

"In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to 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 failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order."

22. Yet in the case of ***Swapan Kumar Chatterjee vs. Central Bureau of Investigation,*** reported in **2019 (14) SCC 328,** the Hon'ble Apex Court in paragraphs-11 and 12 has observed as under: -

"11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this Section to even recall witnesses for reexamination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier is not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision."

23. From the proposition of law culled out in the aforesaid judgments an inescapable conclusion comes in light that the powers under Section 311 of the CrPC can only be invoked by the Court just in order meet the ends of justice for strong and valid reason and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and therefore, the ground of fair and proper opportunity to the persons concerned may be ensured being a constitutional goal as well as the human rights.

24. Now, in the light of the aforesaid principles of law culled down by the Hon'ble Apex Court, the present case is to be decided.

25. Learned counsel for the revisionist has argued that it was a fit case wherein the application so preferred by the revisionist under Section 311 of the Cr.P.C. ought to have been allowed as the facts of the case necessitated for the same.

26. Countering the said submission, learned AGA, who appears for the State, has argued that from the perusal of the application under Section 311 of the Cr.P.C. preferred by the revisionist dated 30.10.2021 itself shows that the same was only with the purpose to linger on the proceedings as it is very vague and does not even disclose any solid reasons for filing of the same.

27. I have perused the order dated 30.10.2021 passed by the court below under challenge and I find that in the application so preferred by the revisionist under Section 311 of the Cr.P.C. for re-examination of the PW1 (O.P.2) has been filed with on following grounds:-

(a) Certain important facts could not be asked from the PW1.

(b) The facts were necessary for adjudication of the criminal case in question.

28. This Court finds that the aforesaid grounds so taken in the application under Section 311 of the Cr.P.C. or not only vague but they do not disclose any of the conditions which are necessary for recalling the witness. Merely on asking the application under Section 311 of the Cr.P.C. cannot be allowed as there has to be sufficient reasons behind it.

29. Needless to point out that though the application under Section 311 of the Cr.P.C. can be allowed at any stage namely at the stage of inquiry, trial or other proceedings as

contemplated under the Code of Criminal Procedure, 1973, however, the same is always subject to the valid grounds and reasons necessitating for allowing the same.

30. The application so preferred by the revisionist also does not give any specific details as to what are the questions which are to be raised in the cross-examination of PW-1 as only bald and vague assertion has been made that certain questions relating to the occurrence of the incident were left to be asked. In the absence of any pleadings set-forth by the revisionist before the court below seeking re-examination / recall of the witness as well as canvasing of any argument to show that the order under challenge is illegal, perverse and palpably unjust, this Court cannot interfere.

31. Accordingly, this Court is of the firm opinion that the order passed by the court below does not suffer from any manifest illegality in exercise of revisional jurisdiction. This court cannot also substitute its own view, once another view is possible, that too when there is nothing on record to show that the view taken by the court below suffers from manifest error or is palpably illegal.

32. Resultantly, the present revision is wholly misconceived and is liable to be dismissed.

33. Accordingly, the revision is **dismissed.**

34. Cost made easy.

(2021)12ILR A281
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.10.2021

BEFORE

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

Government Appeal No. 7 of 2020

State of U.P. ...Appellant
Versus
Rajesh Bind ...Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:

A. Practice & Procedure - It is a settled position of law in acquittal appeals that the appellate Court is not required to rewrite the judgment or to give fresh reasoning, when the reasons assigned by the Court below are found to be just and proper. (Para 15)

Appeal Rejected. (E-10)

List of Cases cited:

1. Rai Sandeep @ Deeput Vs. St. of NCT Delhi Crl. Appeal No. 2486 of 2009

2. M.S. Narayana Menon @ Mani Vs. St. of Kerala & anr. (2006) 6 S.C.C. 39

3. Chandrappa Vs. St. of Karn.(2007) 4 S.C.C. 415

4. St. of Goa Vs. Sanjay Thakran & anr. (2007) 3 S.C.C. 75

5. St. of U.P. Vs. Ram Veer Singh & ors. 2007 A.I.R. S.C.W. 5553

6. Girja Prasad (Dead) by L.R.s Vs. St. of M.P. 2007 A.I.R. S.C.W. 5589

7. Mookkiah & nr. Vs. St., Rep. by the Inspector of Police, Tamil Nadu AIR 2013 SC 321

8. St. of Karn. Vs. Hemareddy AIR 1981 SC 1417

9. Shivasharanappa & ors. Vs. St. of Karn.a JT 2013 (7) SC 66

10. St. of Punjab Vs. Madan Mohan Lal Verma (2013) 14 SCC 153

11. Shailendra Rajdev Pasvan Vs. St. of Gujarat (2020) 14 SC 750

12. Samsul Haque Vs. St. of Assam (2019) 18 SCC 161

13. Mahadeo S/o Kerka Maske Vs. St. of Mah. & Anr. (2013) 14 SCC 637

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

1. Heard learned AGA for the State and perused the record.

2. This appeal, at the behest of the State, has been preferred against the judgment and order dated 13.09.2019, passed by the Additional Sessions Judge/ F.T.C., Jaunpur, acquitting accused-respondent, who has been tried for commission of offence under Sections 363, 368, 376 and 120-B I.P.C.

3. The brief facts of the case of the prosecution, as set out before the trial Court, are that a complaint being Police Case No.352 of 2011 for commission of offence under Sections 363, 368, 376 and 120-B I.P.C. was sent for investigation under Section 156 (3) Cr.P.C., wherein allegations were that the prosecutrix was married in June 2011 in Jaunpur, she was aged about 16 years and when she had gone to the school, the accused along with his friends took her in the Bolero Caar and when the girl did not come back to her home, father of the prosecutrix after searched out her daughter in all places, he complaint the report at the police station and conveyed that she had gone with Rajesh Bindu. On the basis of F.I.R. dated 2.11.2011, the prosecutrix recorded the statement under Section 161 and then coming to the conclusion that prima facie offences under Sections 363, 368 were made out. Later on, the charge sheet was submitted by the Magistrate under Sections 363, 368, 376 and 120-B of the I.P.C. The police did not carried out any investigation and, therefore, complaint to the court was made, which culminated into fresh investigation and the police submitted the charge-sheet.

4. Learned Magistrate committed the case to the court of session as it was a sessions trial. The learned Sessions Judge summoned the accused and questioned him. The accused pleaded not guilty and wanted to be tried. The Sessions Judge framed the charges of the accused as the accused pleaded not guilty and wanted to be tried. The State examined several witnesses and also produced documents. The genesis of the complaint also shows that all of them did unnatural act with her. The medical evidence showed that no rape was committed on her. This was what the doctor opined as there was no male sperm found.

5. After recording the evidence of the witnesses and perusing the material on record, the trial Court passed the impugned order. Hence, the present appeal.

6. Learned AGA for the appellant-State, vehemently submitted that the trial Court committed a grave error in passing the impugned judgment and order, inasmuch as it failed to appreciate the material on record in its proper perspective. It is submitted that taking into consideration the oral evidence of the witnesses examined by the prosecution as well as the documentary evidences produced by it, the trial Court ought to have held the accused guilty of the charges leveled against them. It is, therefore, prayed that the appeal be allowed.

7. On the basis of the aforesaid evidence, we are unable to accept the submission of counsel for the State. This is a case where we need to call the accused to this Court and retry him and then decide the matter. At the first blush, when the judgment in the case of **Rai Sandeep @ Deeput vs. State of NCT Delhi, decided on 7.8.2012 in Crl. Appeal No.2486 of 2009** goes to show that the judgment of the

court-below is not perverse. We are unable to persuade ourselves to allow the appeal.

8. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of **"M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39,** the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

9. Further, in the case of **"CHANDRAPPA Vs. STATE OF KARNATAKA", reported in (2007) 4 S.C.C. 415,** the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

10. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

11. Even in the case of **"STATE OF GOA Vs. SANJAY THAKRAN & ANR.",** reported in **(2007) 3 S.C.C. 75,** the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

12. Similar principle has been laid down by the Apex Court in cases of **"STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553 and in "GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP", 2007 A.I.R. S.C.W. 5589.** Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

13. In the case of **"LUNA RAM VS. BHUPAT SINGH AND ORS."**, reported in **(2009) SCC 749,** the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

14. Even in a recent decision of the Apex Court in the case of **"MOOKKIAH AND ANR. VS. STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU",** reported in AIR 2013 SC 321, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth

of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

15. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of **"STATE OF KARNATAKA VS. HEMAREDDY", AIR 1981, SC 1417,** wherein it is held as under:

"...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

16. In a recent decision, the Hon'ble Apex Court in **"SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA", JT 2013 (7) SC 66** has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

17. Further, in the case of **"STATE OF PUNJAB VS. MADAN MOHAN LAL VERMA", (2013) 14 SCC 153,** the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

18. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219,*** has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10.It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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 the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

19. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750,*** has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

20. The learned Judge while considering the factual data has considered that the medical evidence of the prosecutrix need not prove that she was subjected to recent sexual intercourse, the vaginal smear did not show any **spermatozoa**. Dr. Ravindra Kumar Gupta has categorically mentioned that it cannot be opined that there was sexual intercourse with the prosecutrix and that there was raped committed. The FIR was belated and there was internal injury on the part of the prosecutrix, there were contradictions which were not minor in the evidence of all the witnesses. The learned judge has given judgment which cannot be said to be in any way perverse. The learned Judge while deciding the matter has relied on the decision of the Apex Court in the case of ***Mahadeo S/o***

Kerka Maske v. State of Maharashtra and another, (2013) 14 SCC 637. She had moved from one place to another with the accused at least 17 days but she has not raised any alarm during that period. With all these observations, it cannot be said that the findings of facts are perverse.

21. In view of the above judgments and facts as discussed above, it would not permit us to take a different view that taken by the learned Judge who has acquitted the accused, the parameters are considered by us. The evidence on record also will not permit us to take a different view. Thus, the above-mentioned decisions will not permit this Court to take a different view. In this case it is not proved beyond doubt that the original accused Respondents, herein, indulged into adulteration. Hence, the present appeal deserves to be dismissed.

22. While going through the record and the impugned judgment, the principle enunciated by the Apex Court for entertaining appeal against the acquittal, which are reproduced herein above, will not permit this Court to grant leave to appeal.

23. Leave Refused.

24. In the result, this appeal fails and is **DISMISSED**. The judgment and order of the trial Court, Dated : 13.09.2019, stands CONFIRMED. Bail bonds of the accused, if any, on bail, stands discharged. Lower Court Record be sent back to the concerned trial Court, forthwith.

(2021)12ILR A287

REVISIONAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 27.11.2021

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

S.C.C. Revision No. 115 of 2021

Amit Gupta ...Revisionist

Versus

Gulab Chandra Kanodia ...Respondent

Counsel for the Revisionist:
Sri Rohan Gupta

Counsel for the Respondent:
Sri Saurabh Srivastava

(A) Civil Law - Provincial Small Cause Courts Act, 1887 - Section 25 - Revision of decrees and orders of courts of small causes , Code of Civil Procedure ,1908 - Order VI, Rule 17 - Amendment of pleadings , Proviso to Order VI, Rule 17 - no application for amendment shall be allowed after the trial has commenced, unless the court comes to conclusion that inspite of due diligence, the parties could not have raised the matter before commencement of trial , Order VII, Rule 11 -Rejection of plaint , Order VIII, Rule 5 - Specific denial - once the trial has commenced the proviso to Order VI, Rule 17 would be applicable. (Para - 15)

Plaintiff-respondent filed a suit for arrears of rent and ejectment - default committed by defendant in payment of rent - Defendant-revisionist contested suit by filing written statement - in para 3 of written statement averment made in para 2 of plaint was not denied - stated that it was upon plaintiff to prove the execution of the agreement - application under Order VII, Rule 11 C.P.C. filed by defendant-revisionist - rejected - objection filed by plaintiff-respondent - specifically stating that after affirming of issues oral testimony of PW-1 was recorded and was cross-examined by defendant-revisionist - application filed under Order VI, Rule 17 after 11 years - to delay the matter - barred by proviso to Order VI, Rule 17 as the trial had already commenced - court below rejected the amendment application - Hence, the present revision.(Para - 3,4)

HELD:- If the rent was not admitted to defendant and by mistake in the pleading it was not denied, he had the opportunity to cross-examine the plaintiff witnesses in regard to quantum of rent and maintenance charges, which he failed to do so. No

interference is made out in order impugned rejecting the amendment application of defendant-revisionist filed under Order VI, Rule 17 C.P.C.(Para - 21,22)

Revision dismissed.(E-7)

List of Cases cited:-

1. Ishaq @ Gama Ahmad Vs Smt. Champa Devi, 2016 (117) ALR 742

2. St. of U.P. & ors. Vs Ashok Kumar & ors., 2015 (2) AWC 1549

3. Baldeo Singh & ors. Vs Manohar Singh & anr., (2006) 6 SCC 498 S.

4. Malla Reddy Vs Future Builders Cooperative Housing Society & ors., (2013) 9 SCC 349

5. Salem Advocate Bar Association, T.N. Vs U.O.I., (2005) 6 SCC 344

6. Baldev Singh & ors. Vs Manohar Singh & anr., (2006) 6 SCC 498

7. Estralla Rubber Vs Dass Estate (P) Ltd. ,(2001) 8 SCC 97

8. Ajendraprasadji N. Pandey & anr. Vs Swami Keshavprkeshdasji N. & ors., (2006) 12 SCC 1

9. Kailash Vs Nanhku ,(2005) 4 SCC 480

10. Baldev Singh Vs Manohar Singh ,(2006) 6 SCC 498

11. Vidyabai & ors. Vs Padmalatha & anr., (2009) 2 SCC 409

12. Sushil Kumar Jain Vs Manoj Kumar & anr., (2009) 14 SCC 38

13. Panchdeo Narain Srivastava Vs K. Jyoti Sahay, 1984 Supplementary SCC 594

14. Ram Niranjan Kajaria Vs Sheo Prakash Kajaria & ors., (2015) 10 SCC 203

15. Revajeetu Builders & Developers Vs Narayanaswamy & Sons, (2009) 10 SCC 84

16. Gautam Sarup [Gautam Sarup Vs Leela Jetly, (2008) 7 SCC 85

17. Revajeetu Builders case, (2009) 10 SCC 84, SCC p. 102

18. Nagindas Ramdas Vs Dalpatram Ichharam ,(1974) 1 SCC 242

19. Panchdeo Narain Srivastava[Panchdeo Narain Srivastava Vs Jyoti Sahay, 1984 Supp SCC 594

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Rohan Gupta, learned counsel for the revisionist and Sri Saurabh Srivastava, learned counsel for plaintiff-respondent.

2. This revision under Section 25 of Provincial Small Cause Courts Act, 1887 arises out of order dated 19.10.2021 passed by Additional District and Sessions Judge, Court No. 7, Kanpur Nagar dismissing the amendment application of the defendant-revisionist in S.C.C. Suit No. 132 of 2009 under Order VI, Rule 17 C.P.C.

3. Facts in nutshell, are that plaintiff-respondent filed a suit for arrears of rent and ejectment in the court of District Judge, Kanpur Nagar being Suit No. 132 of 2009. It was averred that plaintiff was the owner and landlord of premises No. 32/17, Express Road, Kanpur Nagar, and basement and ground floor of the said premises was let out to defendant-revisionist at monthly rent of Rs.10,000/-, which included Rs.5,000/- as rent and Rs.5,000/- towards maintenance charges, since 01.08.2005.

4. As default was committed by defendant in payment of rent, the said suit was filed. Defendant-revisionist contested the aforesaid suit by filing written statement on 31.07.2010, wherein in para 3 of written statement the averment made in para 2 of plaint was not denied and was stated that it was upon plaintiff

to prove the execution of the agreement. An application under Order VII, Rule 11 C.P.C. was filed by defendant-revisionist which was rejected on 19.12.2013, thereafter, again an application under Order VII, Rule 11 was filed which was again rejected. The third application filed under Order VII, Rule 11 by defendant-revisionist on 24.08.2021 was not pressed by revisionist on 24.09.2021. However, an amendment application was filed on 30.09.2021 for amending the written statement by inserting Para 12-A and 12-B wherein the plea was sought to be introduced that the rent claimed at Rs.5,000/- per month by landlord included Rs.1,500/- as rent and rest of amount as security charges. An objection was filed by plaintiff-respondent on 04.10.2021 specifically stating that after affirming of issues the oral testimony of PW-1 was recorded and was cross-examined by defendant-revisionist. The application filed under Order VI, Rule 17 after 11 years has been filed to delay the matter, and the same is barred by proviso to Order VI, Rule 17 as the trial had already commenced. The court below after hearing the parties on 19.10.2021 rejected the amendment application. Hence, the present revision.

5. Sri Rohan Gupta, learned counsel for defendant-revisionist submitted that document relied upon by plaintiff-respondent as rent agreement is an unregistered document and the amendment has been sought to clarify the position that rent of Rs.5,000/- included the rent and other charges including the taxes. He next submitted that amendment was necessary for determining the real question in controversy and the court may allow amendment subject to imposition of cost. Reliance has been placed upon decision of co-ordinate Bench of this Court in case of **Ishaq @ Gama Ahmad vs. Smt. Champa Devi, 2016 (117) ALR 742,** Para Nos. 11 and 12, which are extracted hereasunder:-

"11. In the light of the aforesaid principles of law laid down by the Hon'ble Supreme Court and this Court and also looking to the nature of the amendment of the pleadings sought to be made in the written statement, I find that the proposed amendment is legal in nature which does not cause any prejudice to the opposite party land lady. The amendment application cannot be refused only on the ground that the matter is old and there is a direction of this Court to decide the case expeditiously because the courts are expected to do justice between the parties and not to go into the technicalities.

12. In view of the above, the S.C.C. Revision No.117 of 2015 deserved to be allowed and the order dated 19.09.2015 rejecting the amendment application of the revisionist tenant is set aside. Consequently amendment application Kha 61 seeking amendment of additional written statement is allowed. The revisionist tenant is permitted to carry out the correction in the additional written statement within a period of two weeks from the date of this judgment.

6. He has relied upon a decision of this Court in case of **State of U.P. and others vs. Ashok Kumar and others, 2015 (2) AWC 1549,** Para Nos. 39, 40, 41 and 42 which are extracted hereasunder:-

"39. Thus, it is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence

does not raise the same problem as adding, altering or substituting a new cause of action.

40. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case. Thus, by way of amendment alternate/inconsistent plea can be taken in the written statement.

41. So far as argument advanced from the side of the plaintiff-respondent that no necessity has been shown rather there is no pleading that why the amendment has been sought in the written statement is concerned, a plain and literal meaning to provisions of Order VI Rule 17 of CPC, shows that it enables the parties to amend a plaint or written statement and there is no necessity to plead that application for amendment could not be moved in spite of due diligence. Meaning thereby, provisions of Order VI Rule 17 of CPC does not prohibit to amend a plaint or written statement while considering the application for amendment, Courts have to see whether amendment is necessary to decide the real controversy and no prejudice and injustice is caused to other parties. Hence, the same has got no force, rejected.

42. One of the argument advanced in the matter is that by way of amendment, the admission made by the appellant/defendant will completely change the nature of defence taken by the defendant in the written statement. Even assuming that there was admission made by the appellant in his written statement then such admission can be explained by amendment of his written statement even by taking inconsistent pleas or substituting or altering his defence. As it is well settled law that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. Additing a new ground of defence or substituting or altering a defence does not raise the same problem as adding altering, substituting a new cause of action. It is equally well settled that in the case of an amendment of a written statement, the Courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the later and addition of a new ground of defence or substituting or altering a defence or taking on consistent pleas in the written statement can also be allowed. (See ***Baldeo Singh and others v. Manohar Singh and another (2006) 6 SCC 498).***

7. Sri Saurabh Srivastava, learned counsel appearing for plaintiff-respondent submitted that the sole purpose of filing the amendment application after lapse of 11 years was only to delay the proceedings before the court below, as the defendant-revisionist had already on three occasions had filed application under Order VII, Rule 11 C.P.C. which has been rejected. He next submitted that in para 3 of written statement there has been no denial to the averment made in para 2 of plaint wherein it has been specifically stated that after the execution of agreement between the parties the premises in question was let out at monthly rent of Rs.10,000/- which included Rs.5,000/- as rent and remaining Rs.5,000/- as maintenance charges. By the present amendment the revisionist was trying to introduce a totally new case which was never before the court for last 12 years. He relied upon decision of the Apex Court in case of **S. Malla Reddy vs. Future Builders Cooperative Housing Society and others, (2013) 9 SCC 349** Para 27, which is extracted hereasunder:-

"27. Although the appellant-defendants filed the petition for striking out their own pleading i.e. written statement, labelling the petition as under Order 6 Rule 16 CPC, but in substance the application was dealt with as if under Order 6 Rule 17 CPC inasmuch as the trial court discussed the facts of the case and did not permit the defendants to substitute the

written statement whereunder there was an admission of the suit claim of the plaintiff Society. The relevant portion of the order quoted hereinabove reveals that the trial court while rejecting the aforementioned petition held that the appellant-defendants cannot be allowed to substitute their earlier written statement filed in the suit whereunder there was an admission of the claim of the plaintiff Society (the respondent herein). Similarly in the revision filed by the defendants, the High Court considered all the decisions referred by the defendants on the issue as to whether the defendants can withdraw the admission made in the written statement and finally came to the conclusion that the appellant-defendants cannot be allowed to resile from the admission made in the written statement by taking recourse to Order 8 Rule 9 or Order 6 Rule 16 CPC by seeking to file a fresh written statement. In the aforesaid premises, filing of a fresh petition by the defendants under Order 6 Rule 17 CPC after about 13 years when the hearing of the suit had already commenced and some of the witnesses were examined, is wholly misconceived. The High Court in the impugned order has rightly held that filing of subsequent application for the same relief is an abuse of the process of the court. As noticed above, the relief sought for by the defendants in a subsequent petition under Order 6 Rule 17 CPC was elaborately dealt with on the two earlier petitions filed by the appellant-defendants under Order 6 Rule 16 and Order 8 Rule 9 CPC and, therefore, the subsequent petition filed by the defendants labelling the petition under Order 6 Rule 17 CPC is wholly misconceived and was not entertainable.

8. I have heard the rival submissions and perused the material on record.

9. The present proceedings arises out of the order passed by court below rejecting the amendment application. The legislature by amendment w.e.f. 01.07.2002 had inserted proviso to Order VI, Rule 17 which provides that no application for amendment shall be allowed after the trial has commenced, unless the court comes to conclusion that inspite of due diligence, the parties could not have raised the matter before commencement of trial. The said amendment was challenged before the Apex Court in the case of **Salem Advocate Bar Association, T.N. vs. Union of India, (2005) 6 SCC 344**, wherein the Apex Court while upholding the amending Act No. 22 of 2002 held as under:-

"26. Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."

10. Thus, in the suit filed after 01.07.2002, once the trial commences the application for amendment cannot be allowed unless and until the court comes to conclusion that inspite of due diligence the parties could not have raised the matter before commencement of trial.

11. It is not in dispute that suit for arrears of rent and ejectment was filed in the year 2009 and written statement was filed in the year 2010. It is admitted to defendant-revisionist that oral statement of PW-1 was recorded on 17.09.2012. In the cross-examination no such question was

put by defendant-revisionist as regards the rent at Rs.1,500/- and remaining amount as maintenance charges or taxes. Similarly, PW-2 was cross-examined on 17.12.2012 and in the cross-examination no such question was put to PW-2 by defendant-revisionist and it is only after 9 years that by way of an amendment that an application on 30.09.2021 has been moved by defendant-revisionist. Once the defendant-revisionist had cross-examined both PW-1 and PW-2, no question arises to introduce new fact after 9 years when the said plea was available with the defendant-revisionist who is the tenant of the occupation in question. The Apex Court while dealing with the issue of amendment of pleading, especially the amendment of written statement had held that such amendment can be allowed in a written statement but once the trial commences the same is not permitted.

12. In **Baldev Singh and others vs. Manohar Singh and another, (2006) 6 SCC 498,** the Apex Court held as under:-

"9. Keeping this principle in mind, let us now consider the provisions relating to amendment of pleadings. Order 6 Rule 17 of the Code of Civil Procedure deals with amendment of pleadings which provides that the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. From a bare perusal of this provision, it is pellucid that Order 6 Rule 17 of the Code of Civil Procedure consists of two parts. The first part is that the court may at any stage of the proceedings allow either party to amend his pleadings and the second part is that such amendment shall be made for the purpose of determining the real controversies raised between the parties. Therefore, in view of the provisions made under Order 6 Rule 17 CPC it cannot be doubted that wide power and unfettered discretion has been conferred on the court to allow amendment of the pleadings to a party in such manner and on such terms as it appears to the court just and proper. While dealing with the prayer for amendment, it would also be necessary to keep in mind that the court shall allow amendment of pleadings if it finds that delay in disposal of suit can be avoided and that the suit can be disposed of expeditiously. By the Code of Civil Procedure (Amendment) Act, 2002 a proviso has been added to Order 6 Rule 17 which restricts the courts from permitting an amendment to be allowed in the pleadings of either of the parties, if at the time of filing an application for amendment, the trial has already commenced. However, the court may allow amendment if it is satisfied that in spite of due diligence, the party could not have raised the matter before the commencement of trial. So far as proviso to Order 6 Rule 17 of the Code of Civil Procedure is concerned, we shall deal with it later.

13. In view of this decision, it can be said that the plea of limitation can be allowed to be raised as an additional defence by the appellants. Accordingly, we do not find any reason as to why amendment of the written statement introducing an additional plea of limitation could not be allowed. The next question is that if such amendment is allowed, certain admissions made would be allowed to be taken away which is not permissible in law. We have already examined the statements made in the written statement as well as the amendment sought for in the application for amendment of the written statement. After going through the written statement and the application for amendment of the written statement in depth, we do not find any such admission of the appellants which was sought to be withdrawn by way of amending the written statement.

14. As noted hereinearlier, the case set up by the plaintiff-Respondent 1 was that his parents had no money to purchase the suit

property and it was the plaintiff-Respondent 1 who paid the consideration money. In the written statement, this fact was denied and further it was asserted in the written statement that the suit property was in fact purchased by their parents and they had sufficient income of their own. In the application for amendment of written statement it was stated that the plaintiff-Respondent 1 did not have any income to pay the consideration money of the suit property and in fact the parents of the plaintiff-Respondent 1 had sufficient income to pay the sale price. It was only pointed out in the application for amendment that after the death of their parents, the suit property was mutated in the joint names of the plaintiff-Respondent 1 and the defendants in equal shares. Therefore, the question whether certain admissions made in the written statement were sought to be withdrawn is concerned, we find, as noted hereinearlier, there was no admission in the written statement from which it could be said that by filing an application for amendment of the written statement, the appellants had sought to withdraw such admission. It is true that in the original written statement, a statement has been made that it is Defendant-Appellant 1 who is the owner and is in continuous possession of the suit property, but in our view, the powers of the court are wide enough to permit amendment of the written statement by incorporating an alternative plea of ownership in the application for amendment of the written statement. That apart, in our view, the facts stated in the application for amendment were in fact an elaboration of the defence case. Accordingly, we are of the view that the High Court as well as the trial court had erred in rejecting the application for amendment of the written statement on the ground that in the event such amendment was allowed, it would take away some admissions made by the defendant-appellants in their written statement. That apart, in ***Estralla Rubber v. Dass Estate (P) Ltd. [(2001) 8 SCC 97]*** *this Court held that even if there were some admissions in the evidence as well as in the written statement, it was still open to the parties to explain the same by way of filing an application for amendment of the written statement. That apart, mere delay of three years in filing the application for amendment of the written statement could not be a ground for rejection of the same when no serious prejudice is shown to have been caused to the plaintiff-Respondent 1 so as to take away any accrued right.*

17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings."

13. In **Ajendraprasadji N. Pandey and another vs. Swami Keshavprkeshdasji N. and others, (2006) 12 SCC 1,** the Apex Court held as under:-

"59. In the instant case, the appeal was filed in the second round on 9-10-2002 as could be seen from the dates and events

mentioned in the counter-affidavit. Special leave petition in this Court was filed on 7-7-2004. Additional written statement has been filed on 24-11-2005. Delay in filing the additional written statement from 9-10-2002 to 24-11-2005. From 9-10-2002, the matters sought to be introduced by the defendant by way of additional written statement was known to the defendant-appellant. The application in respect of additional written statement does not make an unequivocal averment as to due diligence. The averment only reads as follows:

"Under the circumstances, the facts which were submitted in the said appeal from order before the High Court and the facts which are now being submitted in the present application could not be submitted before this Court in spite of utmost care taken by the defendants."

60. The above averment, in our opinion, does not satisfy the requirement of Order 6 Rule 17 without giving the particulars which would satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have been raised earlier in spite of due diligence. As held by this Court in ***Kailash v. Nanhku [(2005) 4 SCC 480]*** *the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.*

61. We can also usefully refer to the judgment of this Court in ***Baldev Singh v. Manohar Singh [(2006) 6 SCC 498]*** *for the same proposition. A perusal of the proposed amendment would show that it contains numerous averments. So far as the averments in the proposed amendments are concerned, at p. 12 of the order in para 22, the appellants admit that all the issues raised by way of proposed amendment in the written statement were taken before this Court in the appeal from order filed by the present defendants in the civil appeal filed before this Court and again in the special leave petition filed subsequently. As rightly pointed out by learned Senior Counsel, any section should not be so interpreted that part of it becomes otiose and meaningless and very often a proviso itself is read as a substantive provision it has to be given full effect."*

14. In **Vidyabai and others vs. Padmalatha and another, (2009) 2 SCC 409,** the Apex Court categorically held that proviso to Order VI, Rule 17 is couched in a mandatory form, and court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied. Relevant Paras 10, 11 and 19 are extracted hereasunder:-

"10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), Parliament inter alia inserted a proviso to Order 6 Rule 17 of the Code, which reads as under:

"Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

11. From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfil the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to "commencement of proceeding".

19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint."

15. Similarly, dealing with amendment of written statement in **Sushil Kumar Jain vs Manoj Kumar and another, (2009) 14 SCC 38,** the Apex Court held that the principle of amendment of a plaint and a written statement are not necessarily governed by exactly the same principle. In a case of amendment of written statement the courts would be liberal in allowing than that of a plaint as the question of prejudice would be far less but the court held that once the trial has commenced the proviso to Order VI, Rule 17 would be applicable.

16. The Court relied upon the earlier decision of Apex Court in case of **Panchdeo Narain Srivastava vs. K. Jyoti Sahay, 1984 Supplementary SCC 594** wherein it was held that admission made by a party may be withdrawn or may be explained, but the court was clear of the view that the benefit could not be extended in case of commencement of trial.

17. In **Ram Niranjan Kajaria vs. Sheo Prakash Kajaria and others, (2015) 10 SCC 203,** the Apex Court relying upon its earlier judgment held as under:-

*"20. On amendments generally, in the decision reported in **Revajeetu Builders and Developers v. Narayanaswamy and Sons (2009) 10 SCC 84,** after referring to **Gautam Sarup [Gautam Sarup v. Leela Jetly, (2008) 7 SCC 85],** the principles on amendment have been summarised at para 63. It has been held as follows: **(Revajeetu Builders case (2009) 10 SCC 84,** SCC p. 102)*

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

*22. Delay in itself may not be crucial on an application for amendment in a written statement, be it for introduction of a new fact or for explanation or clarification of an admission or for taking an alternate position. It is seen that the issues have been framed in the case before us, only in 2009. The nature and character of the amendment and the other circumstances as in the instant case which we have referred to above, are relevant while considering the delay and its consequence on the application for amendment. But a party cannot be permitted to wholly withdraw the admission in the pleadings, as held by this Court in **Nagindas Ramdas v.***

Dalpatram Ichharam [(1974) 1 SCC 242] . *To quote para 27: (SCC pp. 251-52)*

"27. From a conspectus of the cases cited at the Bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could [Ed.: The word "could" has been emphasised in original.] be prima facie satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself. Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong." (emphasis supplied)

23. We agree with the position in ***Nagindas Ramdas [(1974) 1 SCC 242]*** *and as endorsed in* ***Gautam Sarup [Gautam Sarup v. Leela Jetly, (2008) 7 SCC 85]*** *that a categorical admission made in the pleadings cannot be permitted to be withdrawn by way of an amendment. To that extent, the proposition of law that even an admission can be withdrawn, as held in* ***Panchdeo Narain Srivastava[Panchdeo Narain Srivastava v. Jyoti Sahay, 1984 Supp SCC 594]*** *, does not reflect the correct legal position and it is overruled.*

24. However, the admission can be clarified or explained by way of amendment and the basis of admission can be attacked in substantive proceedings. In this context, we are also mindful of the averment in the application for amendment that:

"11. ... Mahabir Prasad Kajaria died at the age of 24 years on 7-5-1949 when Defendant 5 was only 2 years and Defendant 12 was only 21 years. Till the death of Mahabir and even thereafter, the petitioners had been getting benefits from income of the joint properties. Defendant 5 and his two sisters, namely, Kusum and Bina were brought up and were maintained from the income of the joint family properties. The petitioners after the death of Mahabir, they continued to live in the joint family as members and till now as members of the joint family. In the marriage of the two sisters of Defendant 5 Kusum and Bina (now after marriage Smt Kusum Tulsian and Smt Bina Tulsian) the expenses were wholly borne out from the incomes of the joint family properties. The said facts are well known to all the family members and their relations."

18. Thus, position which comes out from the above decisions of Apex Court are that after validity of Act No. 22 of 2002 was upheld in case of **Salem Advocate Bar Association** (supra), the court has to take note of the fact that once the trial is commenced which includes the framing of charges, statement of witnesses, filing of documentary evidences and hearing of the suit that amendment in the pleadings cannot be ordinarily allowed and only when the courts come to conclusion that despite due diligence the parties could not have raised the matter before commencement of trial that such applications can be allowed. In the present case, it is admitted to both the parties that PW-1 was cross-examined on 17.09.2012 while PW-2 was cross-examined on 17.12.2012 and amendment being sought through the application was available to defendant-revisionist at that time but

no such question was put to plaintiff witnesses 1 and 2. The application filed at the behest of defendant-revisionist after a lapse of 9 years from recording of statement itself is an ample proof that it has been filed to delay the matter.

19. The S.C.C. Suit has been filed in the year 2009 and after 12 years the application for amendment of written statement is being sought.

20. Moreover, Order VIII, Rule 5 mandates that denial should be specific, and every allegation of fact in the plaint if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of defendant shall be taken to be admitted. There is a specific averment in Para 2 of plaint as to quantum of rent and maintenance charges. In Para 3 of written statement there is no denial to the said fact nor the defendant-revisionist has stated that he is not admitting the averment of the plaint. The only statement made is that it is for the plaintiff to prove the allegations made in the said paragraphs, meaning thereby that the averment has been admitted by defendant-revisionist.

21. If the rent was not admitted to defendant and by mistake in the pleading it was not denied, he had the opportunity to cross-examine the plaintiff witnesses in regard to quantum of rent and maintenance charges, which he failed to do so.

22. Considering the facts and circumstances of the case, this Court finds that no interference is made out in the order impugned dated 19.10.2021 rejecting the amendment application of defendant-revisionist filed under Order VI, Rule 17 C.P.C.

23. Revision lacks merit and is hereby **dismissed.**

(2021)12ILR A297
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Application U/S 482/378/407 No. 2834 of 2021

Rahimunnisha & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sadhu Sharan Chaubey, Abha Srivastava, Rajesh Kumar Singh, Salik Kr. Srivastava

Counsel for the Opposite Parties:
G.A., Shiv Pal Singh

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860 - Sections 419, 420, 467, 468, 471-quashing of entire proceeding-accused/Petitioner No. 1 was drawing Old Age Pension from the Bank account concerned, and thereafter working as Safai Karmi by forged documents- Trial court found that Prima facie case had been made out for framing of charge while considering the discharge application on its merit and also the charge-sheet-no illegality or infirmity in the orders impugned.(Para 1 to 30)

B. At this stage, probative value of the materials has to be gone into and the court is not to expected to go deep into the matter and hold that the materials would not warrant a conviction. if the court thinks that the accused might have committed the offence the basis of the materials on record on its probative value, it can frame the charge, though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.(Para 29)

The application is rejected. (E-6)

List of Cases cited:

1. Dilawar Balu kurane Vs St. of Mah. (2002) 2 SCC 135

2. U.O.I. Vs Prafulla Kumar Samal (1979) 3 SCC 5

3. St. of Raj. Vs Ashok Kumar Kashyap (2021) SCC Online SC 314

4. State of T.N. Vs N. Suresh Rajan (2014) 11 SCC 709

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. This petition has been filed with the following main prayer:-

"WHEREFORE, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to pass an order thereby quashing the impugned charge-sheet as well as cognizance/ summoning order including order dated 11.02.2020, passed by learned 2nd Additional Civil Judge (JD) Judicial Magistrate Bahraich in Criminal Case No. 23/2015 arising out of Case Crime No. 666/2013 U/s 419/420/467/468/471. I.P.C P.S. Huzoorpur, District Bahraich, pending in the court of 2nd Additional Civil Judge (JD)/Judicial Magistrate Bahraich and also to quash the order dated 20.02.2021 passed by Learned Revisional Court / 6th Additional Session Judge, Bahraich, (contained as Annexure no 1, 2, 10 &12 of petition) in order to meet the ends of justice."

2. It has been submitted by learned counsel for the petitioners Sri Salil Kumar Srivastava Assisted by Sri S. S. Chubey that the petitioners have been falsely implicated and the offence has not been made out in the evidence that has been collected by the Investigating Officer regarding the Sections under which charge sheet has been submitted to the VIIth Additional Civil Judge(Junior Division) Judicial Magistrate, Behraich in Criminal Case No. 23 of 2015, when the case was initially inquired into by the Investigating Officer, he submitted a final report in the Court but before the Court could pass any order thereon, the Superintendent of Police directed further investigation in the matter without jurisdiction and entrusted the inquiry/investigation to another police officer who took the statement of only the Branch Manager of the Bank concerned and filed a charge sheet in Court of which cognizance was taken by the learned trial court without application of mind.

3. The petitioners approached this Court initially by filing a petition challenging the FIR regarding to Case Crime No. 666 of 2013 under Sections 419, 420, 467, 468, 470, 471, 409, 323, 504, 506 I.P.C. Police Station Huzoorpur Distric Bahraich. This Court passed an order staying the arrest of the petitioners in Writ Petitioner No. 10783(MB) of 2013, till the report is submitted under Section 173 to the Court concerned.

4. Learned counsel for the petitioners submitted that the earlier Investigating Officer had recorded the statement of various witnesses including the complainant Rafique Ahmad as also Fakaroo, Mohd. Sabir, Rajjab and others under Section 161 of the Cr.P.C. and on the basis of evidence collected, he had recorded a categorical finding that no case for which the FIR was lodged can be said to have been made out. The Investigating Officer had also recorded a finding that since all the documents pertaining to the alleged forgery in original are in possession of Economic Offence Wing where the investigation is in progress, as such filing of charge sheet in the absence of documentary evidence is unwarranted. Resultantly, final report was filed by the earlier Investigating Officer.

5. Without taking permission of the Court under Section 173 (3) of the Cr.P.C. further investigation was directed by the Superintendent of Police and then an other Investigation Officer was entrusted with the job.

6. Learned counsel for the petitioner has pointed out paragraph 33 of the petition to say that superior officers of the police by invocation power under Section 173 (3) of the Cr.P.C. could not have directed further investigation and that power is reserved only with the Court and can be exercised pending the order of the Magistrate if an application for further investigation is made to the Magistrate, during consideration of such application, the superior officer of the police is empowered under Section 173 (3) Cr.P.C. to make further investigation, keeping in view the exigency of the situation.

7. Learned counsel for the petitioners submits that such orders could not have been passed by the superior officers of the police and it is being challenged by means of this petition.

8. Learned counsel for the petitioner further submitted that a charge sheet filed by the subsequent Investigating Officer upon which cognizance has been taken is also been challenged on the ground that the Investigating Officer has recorded the statement of only one witness namely, Ghanshyam Tripathi in the capacity of Branch Manager, who had not said anything in respect of forgery and cheating.

9. Learned counsel for the petitioners repeatedly stated that all the documentary evidence with regard to forgery is with the Economic Offences Wing and therefore charge sheet could not have been filed with out documentary evidence. However, learned counsel for the petitioner admits that on subsequent investigation the second Investigation Officer had recorded that no such case in respect of Section 409, 323, 504, 506 IPC were made out. He recorded a finding that offences only under Section 419, 420, 467, 468, 471 IPC are made out.

10. It has been submitted by the learned counsel for the petitioners that they again approached this Court by filing Criminal Misc. Case No. 2564 of 2016 under Section 482 of the Cr.P.C. which was disposed of by this Court by its order dated 30.07.2019 directing the petitioners to move appropriate discharge application through counsel before the court concerned and directed that such discharge application shall be considered within the time prescribed by the Court. The petitioner, thereafter, moved an application under Section 239 for discharge before the Magistrate concerned, which has been rejected by the order dated 11.02.2020 without application of judicial mind and without considering the material available in the case diary.

11. It has been further submitted by the learned counsel for the petitioners that the petitioners preferred a Criminal Revision No. 43 of 2020, namely, Rahimunnisha & another Vs. State of U.P. & another assailing the order passed by the learned Magistrate whereby he had rquired the application for discharge. The revisional court/Sixth Additional Sessions Judge, Behraich also rejected the revision.

12. It has been further submitted that the petitioner no.1 is a Safai Karmi and petitioner no.2 is a retired teacher he is blind and suffering from eyes trouble since 2010 and they have been erroneously and falsely implicated by the opposite party no.2.

13. Learned counsel for the petitioner has placed reliance upon the judgement rendered by the Hon'ble Supreme Court in, ***"Dilawar Balu Kurane vs. State of Maharashtra 2002 (2) SCC 135"*** to say that application of judicial mind is necessary while considering an order which is challenged. Learned counsel for the petitioner has placed reliance upon paragraph 4 of the judgement which in fact has been borrowed by the Hon'ble Supreme Court from its earlier judgement, ***"Union of India vs. Prafulla Kumar Samal 1979 (3) SCC 5".***

14. It has been also argued by the learned counsel for the petitioners that a specific query was made by this Court when the case was taken up as fresh on 02.09.2021 to the learned AGA to seek instructions as to how initially final report was filed, then without intimating the learned Magistrate, further investigation was conducted by the police itself which was violation of Section 173 (3) Cr.P.C.

15. In the end after arguing for more than one hour, it has been submitted by the learned counsel for the petitioners that he has been served a copy of the counter affidavit filed by the opposite party no. 2 and he may be given time to file a rejoinder affidavit to the same. This submission was made at a time when a detailed hearing had already taken place and this Court was convinced that it was not a case under Section 173 (3) of the Cr.P.C. as it had come out from the record itself i.e. from the charge sheet submitted by the second Investigating Officer that a report regarding no case being made out was initially submitted by the first Investigating Officer to the Circle Officer concerned of the Police Station Huzoorpur. The Circle Officer had directed further investigation and entrusted the investigation to another Sub-Inspector. This fact has come out from the charge sheet itself that no final report/ finding was ever submitted to the learned trial court.

16. This Court has perused Section 173 of the Cr.P.C. on which the reliance has been placed by the learned counsel for the petitioners. Section 73 in its entirety is being quoted herein below:-

"173. ***Report of police officer on completion of investigation.***

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, weather with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(ii) The officer shall also communicate, In such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation,

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order- for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate alongwith the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements- recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject- matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub- sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2)."

17. It is evident from a perusal of Section 173 of the Cr.P.C. that is only when a report is submitted to the Magistrate concerned, and superior officer of the police finds that some further investigation is necessary, pending the orders of the Magistrate on the final report submitted, such superior officer can direct the Officer Incharge of the police station to make further investigation.

18. It is not the case of the petitioners that the police report was ever submitted before the Magistrate concerned, only the finding was recorded by the Investigating Officer in the case diary that since documentary evidence that was proposed to be relied upon was with the Economic Offences Wing, without original documents being there on record, he could not come to any conclusion regarding forgery being committed by the petitioners. The Circle Officer on submission of such report had decided that the matter required further investigation and a second Investigating Officer was appointed. The second Investigating Officer thereafter submitted a charge sheet in court.

19. It is relevant to note, in this case that after charge sheet was submitted to the learned trial court, the petitioners approached this Court challenging the charge sheet as well as cognizance taken thereon, and the entire criminal proceedings initiated on the basis of FIR. The Court rejected the contention raised by the learned counsel for the petitioners in its judgement and order dated 30.07.2019, which has been filed as annexure-09 to the petition.

20. Once this Court has rejected the challenge to the charge sheet, such a challenge could not be entertained afresh, even though learned counsel for the petitioners has argued upon the merit on the charge sheet before this Court again while arguing this petition. This Court is only concerned with the merits of the order passed on discharge application under Section 227 of the Cr.P.C. and also the order passed by the Sixth Additional Sessions Judge, Behraich rejecting the revision of the petitioners.

21. This Court has perused the order dated 11.02.2020 passed by the learned Magistrate on the discharge application moved by the petitioners. Learned Magistrate in the first two paragraphs of his order dated 11.02.2020 had noted that the petitioners in their discharge application have stated that the age of the petitioner no.1, namely, Rahimunnisha had been

shown to be more than 60 years, on the basis of entry in the parivar register, on the basis of which she was being given old age pension and that the earlier Investigating Officer could not find evidence, and therefore submitted a final report, but further investigation was directed and the second Investigating Officer, thereafter, filed charge sheet without any evidence being available against the petitioner.

22. Learned trial court, thereafter, recorded the submission of the Public Prosecutor that the application for discharge was misconceived and should be rejected. Learned trial court has recorded its finding thereafter, saying that from a perusal of the paper book, it was evident that an application under Section 156 (3) Cr.P.C. was filed by one Rafique Ahmad, on which the trial court had directed Police Station Huzoorpur to register FIR and to investigate. After investigation charge sheet was submitted under Section 419, 420, 467, 468, 471 IPC. The applicants had argued that none of these sections were made out for the alleged offence, if any committed by them. The trial court, thereafter, observed that petition under Section 482 Cr.P.C., namely, Petition No. 2564 of 2016 had been filed by Rahimunnisha and Another where the High Court had rejected the contention in its order dated 30.07.2019 directing the petitioner to approach the learned trial court by moving discharge application which was to be decided within time as prescribed by the Court in its order. The learned trial court thereafter, observed that it is a settled law that for considering the discharge application only the facts as mentioned in the papers submitted by the prosecution had to be looked into. The sufficiency of the evidence could not be taken into account but only the prima facie case has to be shown to be made out by the prosecution.

23. Learned trial court, thereafter, observed that evidence cannot be analyzed at the stage of considering the discharge application. The case diary and the materials submitted alongwith the charge sheet had already been considered and cognizance taken by the court. Prima facie a case under Section 419, 420, 467, 468, 471 IPC was made out from the charge sheet. Learned trial Court, thereafter, rejecting the discharge application by its order dated 11.02.2020. The petitioners, thereafter, filed the Revision No. 43 of 2020.

24. This Court has considered the order passed by the learned Additional District and Sessions Judge dated 20.02.2021. The Revisional Court has first noted the arguments made by the counsel for the revisionist and also analyzed the papers on record, wherein the complaint/application under Section 156 (3) Cr.P.C. had stated that the petitioners were husband and wife, and petitioner no.1 was shown in the parivar register of the year 1995-1996, as having been born in 1940, and therefore, more than 60 years of age, and on the basis of such overwriting a medical certificate of a Doctor was filed, on the basis of which the petitioner no.1 was getting Old Age Pension for several years. The Shrawasti Gramin Bank Branch at Huzoorpur had shown in its Ledger on page dated 23.12.2005, at serial no. 138, the name of Rahimunnisha and Account No. 2446 wherein Rahimunnisha continued to draw Old Age Pension w.e.f. 2005, onward. Thereafter, the accused Rahimunnisha managed to get a different entry of Date of Birth mentioned in the Parivar Register as 1974 and showed herself to be 40 years of age on 01.07.2007, and took up service as Safai Karmi. The accused Rahimunnisha in fact had been drawing pension showing her age to be more than 60 years for several years before she showed herself to be 40 years of age and started working as Safai Karmi.

25. Certain allegations had been made in the application under Section 156 Cr.P.C. relating to the applicant being beaten up by the duo, husband and wife, and some money being

taken out of his purse at one point of time, and being annoyed of which he had filed the application under Section 156 (3) Cr.P.C. before the learned trial Court. Learned revisional court, thereafter, noted the arguments raised by the learned counsel for the petitioners regarding the earlier Investigating Officer, namely, Mr. Ram Chand Singh not finding any evidence against the accused and the superior police officers rejecting the final report on their own and directing further investigation giving it to a second Investigating Officer, namely, Mr. Ram Murat Yadav. Mr. Ram Murat Yadav contacted the Gramin Bank Branch at Huzurpur and the Manager Ghanshyam Tripathi gave evidence regarding pension being deposited in the account of petitioner no.1 and after such deposit the same being withdrawn by Rahimunnisha.

26. The Revisional Court referred to the writ petition filed for quashing of FIR and the order passed thereon and also the petition filed under Section 482 of the Cr.P.C. and the observations made by the Court regarding the right of the accused to file appropriate discharge application. The Revisional Court considered the fact that there was evidence on record of the petitioner no.1 drawing Old Age Pension from the Bank account concerned, and thereafter working as Safai Karmi. The Revisional Court, thereafter, observed that under Section 239 Cr.P.C., the duty of the trial court is that of considering the discharge application, if any, moved by the accused and passing appropriate orders thereon, under Section 240 Cr.P.C. The trial court after hearing the accused and coming to the conclusion that prima facie case had been made out for framing of charge had thereafter framed charges against such accused. Learned trial court had considered the discharge application on its merit and also the charge sheet and had come to the conclusion that prima facie case had been made out against the petitioner.

27. The revisional court also referred to the settled law with regard to the duty of the trial court and the scope of exercise of its power while considering a discharge application. The revisional court also considered the arguments raised by the learned counsel for the petitioners that the original documents relating to irregularity in distribution of Old Age Pension were with the Economic Offences Wing, and therefore, the charge sheet could not have been filed on the basis of photo copies of such documents, and observed that it is only at the time of considering of evidence on detailed trial that original documents would be necessary and they can then be called for by the learned trial court concerned.

28. This Court has considered the submissions made by the learned counsel for the petitioners with regard to the judgement rendered by the Hon'ble Supreme Court in the case of ***Dilawar Balu Kurane (Supra),*** no doubt, the Hon'ble Supreme Court has observed in paragraph 12 as follows:-

"Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot

act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial [See Union of India versus Prafulla Kumar Samal & Another (1979 3 SCC 5)]"

29. However the entire law on the subject has been considered and retreated, thereafter, in the judgement render by the Hon'ble Supreme Court ***State of Rajasthan Vs. Ashok Kumar Kashyap, 2021 SCC Online SC 314*** Where the Supreme Court has observed as follows:-

"24. In the recent decision of this Court in the case of M.R. Hiremath (supra), one of us (Justice D.Y. Chandrachud) speaking for the Bench has observed and held in paragraph 25 as under:

25. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 CrPC. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In State of T.N. v. N. Suresh Rajan [State of T.N. v. N. Suresh Rajan, (2014) 11 SCC 709, adverting to the earlier decisions on the subject, this Court held: (SCC pp. 721-22, para 29)

"29.....At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.

25. We shall now apply the principles enunciated above to the present case in order to find out whether in the facts and circumstances of the case, the High Court was justified in discharging the accused for the offence under Section 7 of the PC Act.

26. Having considered the reasoning given by the High Court and the grounds which are weighed with the High Court while discharging the accused, we are of the opinion that the High Court has exceeded in its jurisdiction in exercise of the revisional Jurisdiction and has acted beyond the scope of Section 227/239 Cr.P.C. While discharging the accused, the High Court has gone into the merits of the case and has considered whether on the basis of the material on record, the accused is likely to be convicted or not.-----As rightly observed and held by the learned Special Judge at the stage of framing of the charge, it has to be seen whether or not a prima facie case is made out and the defence of the accused is not to be considered.------ As observed hereinabove, the High Court was required to consider whether a prima facie case has been made out or not and whether the accused is required to be further tried or not. At the stage of framing of the charge and/or considering the discharge application, the mini trial is not permissible."

30. Accordingly, this Court does not find any infirmity in the orders impugned. This petition stands ***rejected.***

(2021)12ILR A305
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.12.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482/378/407 No. 4301 of 2021

Ashish Shukla @ Kallu @ Ashok Kumar & Anr. ...Applicants

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Indresh Kumar Mishra, S.C. Misra

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure,1973-Section 482 - Indian Penal Code, 1860-Sections 147, 304, 506-quashing of chargesheet-incidence in question took place in Delhi-victim admitted to the hospital at Delhi and after being discharged from the hospital he reached at his native village situated at Hardoi-there was substantial delay, which is unexplained, of about ten days-on account of failure on the part of informant the actual truth could not comeforth-these facts have not been verified by the Magistrate before taking congnizance of the Charge-Sheet so the factum of due care and precaution on the part of Magistrate was missing in this case-this cognizance may not be said to be taken in good faith, therefore, the protection of Section 460 Cr.P.C. may not be extended to such cognizance order-Since no cause of action accrued at Hardoi, the concerned Magistrate had no jurisdiction to deal with the matter.(Para 1 to 29)

The application is allowed. (E-6)

List of Cases cited:

Abraham Ajith & ors. Vs Insp. of Police, Chennai & anr. CRLA No.904 of 2004 {SLP (Crl.) No. 4573 of 2003 }

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Indresh Kumar Mishra, learned counsel for the petitioners and Sri Ran Vijay Singh, learned Additional Government Advocate for the State.

2. By means of this petition filed under Section 482 Cr.P.C., the petitioners have prayed for quashing the Charge-sheet No.128 of 2020 dated 17.03.2020 arising out of Case Crime No.647 of 2018, under Sections 147, 304 & 506 I.P.C. relating to Police Station-Kotwali City Hardoi, as well as the summoning order and also the entire proceeding of Criminal Case No.18362 of 2020 (State vs. Ashish Shukla @ Kallu & others) pending in the Court of the learned Chief Judicial Magistrate, District-Hardoi.

3. On the first date of admission, a pure legal question was argued to the effect that when the appropriate alleged overt act has been committed at Delhi, as to how the investigation can be carried out at Hardoi and pursuant to such investigation as to how the charge-sheet can be filed at Hardoi. Since the charge-sheet was filed at Hardoi, therefore, the cognizance was taken by the learned court below at Hardoi.

4. So learned counsel for the petitioners has submitted that the entire proceedings, investigation and the cognizance order in the present case is nullity in the eyes of law, therefore, the same may be quashed. For this reason, no notice was issued to the private opposite party i.e. opposite party No.2.

5. Since the aforesaid legal question is being dealt with, therefore, notice to opposite party No.2 is hereby dispensed with as no prejudice is being caused him by this order.

6. The brief facts of the present case are that one First Information Report (in short

F.I.R.) was lodged bearing Case Crime No./0647 of 2018, under Sections 147, 304 & 506 I.P.C., at Police Station-Kotwali City, District-Hardoi for the incidence dated 15.09.2018 which admittedly took place at Delhi.

7. On account of prosecution story narrated in the F.I.R., the present petitioners and three other persons have assaulted/ beaten the brother of the informant mercilessly at Delhi, resultant thereof, his brother sustained serious injuries at Delhi. Thereafter, the victim got admitted in the Hospital at Delhi on the same day i.e. 15.09.2018 and after being recovered at Delhi, he came to his home at District-Hardoi and informed the informant about the date of incidence which took place on 15.09.2018 at Delhi and in the meantime he (victim) again felt ill and he was got admitted in the Hospital at Hardoi where he expired on 26.09.2018.

8. Learned counsel for the petitioners has drawn attention of this Court towards the postmortem report, which is contained as Annexure No.3 to this petition, such postmortem was conducted at Hardoi and the opinion of Doctor does not suggest as to what is the cause of death of victim inasmuch as the incidence of assault had taken place at Delhi on 15.09.2018. Thereafter, the victim came to Hardoi on 25.09.2018 and died on 26.09.2018. Therefore, Sri Mishra has submitted with vehemence that the place where cause of action has accrued is Delhi, therefore, if the family members of the victim were aggrieved, they should be lodged the F.I.R. at Delhi immediately after 15.09.2018. Further, there is no allegation regarding assault or beating up at Hardoi on or after 15.09.2018, therefore, the impugned F.I.R. should have not been lodged at Hardoi and investigation should have not been conducted at Hardoi. Not only the above, the charge-sheet should have not been filed before the concerning court at Hardoi and the learned court of Magistrate should have not taken cognizance of such charge-sheet where cause of action has accrued at Delhi.

9. In support of his aforesaid submissions, Sri Mishra has placed reliance upon the dictum of Apex Court in re: ***Y. Abraham Ajith and others vs. Inspector of Police, Chennai and another rendered in Criminal Appeal No.904 of 2004 arising out of SLP (Crl.) No.4573 of 2003)*** referring paragraphs-7 to 16, which are being reproduced here-in-below:-

"7. In response, learned counsel for respondent no.2-complainant submitted that the offences were continuing in terms of Section 178 (c) of the Code, and therefore The Court had the jurisdiction to deal with the matter.

8. Section 177 of the Code deals with the ordinary place of inquiry and trial, and reads as follows:

"Section 177 : ORDINARY PLACE OF INQUIRY AND TRIAL:

Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed."

9. Section 177 to 186 deal with venue and place of trial. Section 177 reiterates the well-established common law rule referred to in Halsbury's Laws of England (Vol. IX para 83) that the proper and ordinary venue for the trial of a crime is the area of jurisdiction in which, on the evidence, the facts occur and which alleged to constitute the crime. There are several exceptions to this general rule and some of them are, so far as the present case is concerned, indicated in Section 178 of the Code which read as follows:

"Section 178 PLACE OF INQUIRY OR TRIAL

(a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas, it may be inquired

into or tried by a Court having jurisdiction over any of such local areas."

10."All crime is local, the jurisdiction over the crime belongs to the country where the crime is committed", as observed by Blackstone. A significant word used in Section 177 of the Code is "ordinarily". Use of the word indicates that the provision is a general one and must be read subject to the special provisions contained in the Code. As observed by the Court in Purshottamdas Dalmia v. State of West Bengal (AIR 1961 SC 1589), L.N. Mukherjee V. State of Madras (AIR 1961 SC 1601),Banwarilal Jhunjhunwalla and Ors. v. Union of India and Anr. (AIR 1963 SC 1620) and Mohan Baitha and Ors. v. State of Bihar and Anr. (2001 (4) SCC 350), exception implied by the word "ordinarily" need not be limited to those specially provided for by the law and exceptions may be provided by law on consideration or may be implied from the provisions of law permitting joint trial of offences by the same Court. No such exception is applicable to the case at hand.

11. As observed by this Court in State of Bihar v. Deokaran Nenshi and Anr. (AIR 1973 SC 908), continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all, that it is one of those offences which arises out of the failure to obey or comply with a rule or its requirement and which involves a penalty, liability continues till compliance, that on every occasion such disobedience or non-compliance occurs or recurs, there is the offence committed.

12. A similar plea relating to continuance of the offence was examined by this Court in Sujata Mukherjee (Smt.) v. Prashant Kumar Mukherjee (1997 (5) SCC 30). There the allegations related to commission of alleged offences punishable under Section 498-A and 323 IPC. On the factual background, it was noted that though the dowry demands were made earlier the husband of the complainant went to the place where complainant was residing and had assaulted her. This Court held in that factual background that clause (c) of Section 178 was attracted. But in the present case the factual position is different and the complainant herself left the house of the husband on 15.4.1997 on account of alleged dowry demands by the husband and his relations. There is thereafter not even a whisper of allegations about any demand of dowry or commission of any act constituting an offence much less at Chennai. That being so, the logic of Section 178 (c) of the Code relating to continuance of the offences cannot be applied.

13.The crucial question is whether any part of the cause of action arose within the jurisdiction of the concerned Court. In terms of Section 177 of the Code it is the place where the offence was committed. In essence it is the cause of action for initiation of the proceedings against the accused.

14.While in civil cases, normally the expression "cause of action" is used, in criminal cases as stated in Section 177 of the Code, reference is to the local jurisdiction where the offence is committed. These variations in etymological expression do not really make the position different. The expression "cause of action" is therefore not a stranger to criminal cases.

15.It is settled law that cause of action consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise.

16.The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions

for the maintenance of the proceeding including not only the alleged infraction, but also the infraction coupled with the right itself. Compendiously the expression means every fact, which it would be necessary for the complainant to prove, if traversed, in order to support his right or grievance to the judgment of the Court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove such fact, comprises in "cause of action"."

10. Per contra, Sri Ran Vijay Singh, learned Additional Government Advocate has submitted that no doubt the occurrence in question has been committed at Delhi on 15.09.2018 but so as to one allegation regarding threatening of dire consequences is concerned, it is after 15.09.2018 at Hardoi. Therefore, for the section i.e. Section 506 I.P.C. the F.I.R. can be lodged at Hardoi. He has also submitted that since some allegations have been made at Delhi and some allegations are at Hardoi, then as per Section 178 Cr.P.C. the F.I.R. can be lodged at Hardoi and therefore, the charge-sheet can be filed at Hardoi and cognizance can be taken by the competent court of law at Hardoi.

11. Having heard learned counsel for the parties and having perused the material available on record what I find is that the place of occurrence is at Delhi and the date of incidence is also relevant to say is 15.09.2018 and admittedly no F.I.R. was lodged immediately after 15.09.2018 at Delhi. The victim came to Hardoi on 25.09.2018 and thereafter except the allegation that the accused persons have threatened for dire consequences, no other allegations have been levelled against the present petitioners and other persons.

12. At this stage, Section 460 Cr.P.C. is being considered which provides that if any Magistrate not empowered by law to do any of the following things, amongst others clause (c) provides to take cognizance of an offence under clause (a) or clause (b) of sub-Section 1 of Section 190 Cr.P.C. erroneously in good faith, his proceedings shall not be set aside merely on the ground of not being so empowered.

13. In the present case, learned counsel for the petitioners has submitted that the Magistrate was not empowered to take cognizance of offence, which was committed at Delhi but investigated at Hardoi and the charge-sheet has been filed at Hardoi.

14. As per the aforesaid Section 460 Cr.PC, the proceedings shall not be set aside if such erroneous cognizance has been taken in good faith. Section 52 of I.P.C. defines the term "good faith". It says that nothing is said to be done or believed in "good faith" which is done or believed without care and attention.

15. In the present case, such error of the Magistrate may not be considered to be done in good faith inasmuch as the allegations of F.I.R. are of Delhi and there was substantial delay, which is unexplained, of about ten days for not reporting at Delhi immediately after committing an offence in question at Delhi and these facts have not been verified by the Magistrate before taking cognizance of the Charge-sheet so the factum of due care and precaution on the part of the Magistrate was missing in this case. Hence, the aforesaid error done by the Magistrate has not been done in good faith then such proceedings may liable to be quashed on this ground alone.

16. Now, Section 462 Cr.P.C. is being considered which categorically provides that if the proceedings of the criminal court or any finding, or order thereof took place in a wrong Session Division, District, Sub-Division or other local area, shall not be set aside for such reason alone unless it appears that such error has in fact occasioned the failure of justice.

17. In the present case, the incidence in question took place at a particular place of Delhi on 15.09.2018, thereafter, the victim was admitted at Pt. Madan Mohan Malviya Hospital, Malviya Nagar, New Delhi for getting treatment on the same day i.e. 15.09.2018 and after being discharged from the hospital he reached at his native village situated at district-Hardoi on 25.09.2018.

18. As per version of the F.I.R., the victim was discharged from hospital after being recovered and there is no allegation of any assault or attack at Hardoi against the petitioners. No F.I.R. under Sections 147 and 304 I.P.C. could have been lodged against the petitioners at Hardoi. Even the postmortem, which was done at Hardoi, is not very clear about the period of injury so sustained by the victim. Had the F.I.R. been lodged at Delhi immediately after 15.09.2018, the police concerned at Delhi must have investigated such serious allegations by examining the relevant persons and material by approaching the hospital where the victim had taken for his treatment after 15.09.2018. Therefore, it appears that on account of lapse on the part of the informant the proper investigation of the issue in question, which could have been conducted at Delhi, could not be made.

19. Notably, on account of failure on the part of the complainant/ informant the actual truth could not comeforth and for the unexplained reason as to why the F.I.R. was not lodged at Delhi and also as to why the substantial delay has been done in lodging the F.I.R., it would be a failure of justice. Therefore, in view of the peculiar facts of the instant case, for the aforesaid reasons, this Court is considering it as a failure of justice, therefore, the proceedings pending before the court at Hardoi are liable to be set aside.

20. It would not be out of place to mention here that if the opposite party No.2 is issued notice, he cannot change his allegations of F.I.R., e.g. date of incidence, place of incidence, no explanation for not lodging the F.I.R. at Delhi immediately after 15.09.2018, the admission that the victim was discharged from Pt. Madan Mohan Malviya Hospital, Malviya Nagar, New Delhi after being recovered, unexplained delay of more than ten days in lodging F.I.R. and no overt act has been committed by the petitioners against the victim at Hardoi between 25.09.2018 to 26.09.2018. In other words, after putting appearance before this Court, he would not be able to improve his case. However, he may take appropriate remedy before appropriate authority as per law inasmuch as in view of the trite law no one can be left remedy less.

21. As per the scheme of Cr.P.C., Section 177 clearly mandates that every offence shall ordinarily be incurred into and tried by the court, within whose local jurisdiction it was committed. In the present case, the offence in question, if any, has been committed at Delhi.

22. Section 178 Cr.P.C. provides further that if it is uncertain about place of offence which could have been committed in several local areas the inquiry or trial may be conducted by the court having jurisdiction in such local areas. In the present case, on the basis of allegations of F.I.R., it appears that offence in question, if any, has been committed only at Delhi.

23. The law is trite that the Magistrate can take cognizance of offence not the offender and while taking cognizance his prima-facie satisfaction is sufficient as he should not to explained reasons elaborately at that point of time but he will have to peruse the material available with the charge-sheet. If he is not satisfied considering the material available on record to take cognizance, he may pass such appropriate order.

24. In the case in hand, before taking cognizance of the charge-sheet the Magistrate

concerned should have applied its mind by asking the Investigating Officer as to what offence has been committed at Hardoi and also as to why the F.I.R. was not lodged at Delhi and as to what is explanation of delay of more than ten days in lodging the F.I.R. Had this exercise been carried out by the Magistrate at Hardoi while taking cognizance, any appropriate order would have been passed in stead of taking cognizance. This cognizance may not be said to be taken in good faith, therefore, the protection of Section 460 Cr.P.C. may not be extended to such cognizance order. Besides, the mere allegations of F.I.R. itself creates some confusion as discussed above, therefore, if the proceedings are permitted to be continued at Hardoi, it would cause failure of justice, hence, such proceedings may not be saved by virtue of Section 462 Cr.P.C.

25. The Apex Court in re: ***Y. Abraham Ajith and others (supra)*** has categorically held that cause of action consists of bundle of facts and expression "cause of action" has acquired a judicially settled meaning, which means the circumstances forming the infraction of the right or the immediate occasion for the action.

26. In the aforesaid judgment, the Apex Court has considered the term "cause of action" from Halsbury Laws of England (Fourth Edition), which says that "cause of action" is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another aspect.

27. Therefore, in the present case, the cause of action has accrued at Delhi where no F.I.R. was lodged and for the cause of action which accrued at Delhi the investigation has been done at Hardoi, charge-sheet has been filed at Hardoi and the cognizance has been taken by the learned court below concerned at Hardoi, which is not permissible in the eyes of law.

28. In view of the above, I hereby ***allow*** the present petition.

29. Since no cause of action has accrued at Hardoi, therefore, the concerned Magistrate at Hardoi had no jurisdiction to deal with the matter. Accordingly, the proceedings of the aforesaid criminal case are quashed. The informant/ complainant would be at liberty to take appropriate steps against the accused persons, strictly in accordance with law, if he so chooses to do so.

30. No order as to costs.

(2021)12ILR A310
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.11.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482/378/407 No. 4481 of 2021

Ram Surat Verma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Anshuman, Akash Dikshit

Counsel for the Opposite Parties:
G.A., Prem Prakash Singh

A. Criminal Law -Code of Criminal Procedure, 1973-Section 482 -Indian Penal Code, 1860-Section 420-quashing of-impugned order rejecting the discharge application and dismissal order of the revision –applicant requested to the court below to direct proper enquiry/investigation in respect of handicapped certificate, which was subject-

matter of the issue, to verify as to whether such certificate is forged or genuine-learned court below rejected the discharge application in undue haste without verifying the same-observation is perverse because 'at any previous stage of the case' includes any stage meaning thereby even before any evidence is recorded u/s 244 Cr.P.C., the dischasrge application u/s 245(2) Cr.P.C. may be considered.(Para 1 to 21)

B. It is well settled that the trial court while considering the discharge application is not to act as a mere post office. The court has to sift through the evidence in order to find out whether there are sufficient grounds to try the suspect. The court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case and so on.(Para 12)

The application is allowed. (E-6)

List of Cases cited:

1. Adalat Prasad Vs Rooplal Jindal & ors. (2004) 7 SCC 338

2. Ajoy Kumar Ghose Vs St. of Jharkhand & anr. (2009) 14 SCC 115

3. Sanjay Kumar Rai Vs St. of U.P. & anr. CRLA No. 472 of 2021

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Akash Dikshit, learned counsel for the petitioner, Sri Aniruddh Kumar Singh, learned AGA-I for the State and Sri Ajmal Khan, learned counsel for opposite party no.2.

2. By means of this petition filed under Section 482 Cr.P.C., the petitioner has prayed for quashing the impugned order dated 24.12.2019 (Annexure No.1) passed by the learned Civil Judge (S.D.)/ A.C.J.M., Ambedkar Nagar rejecting the discharge application moved in Complaint Case No.5661 of 2018, under Section 420 IPC, Police Station Ahirauli, District Ambedkar Nagar and the order dated 25.10.2021 passed by the revisional court i.e. Sessions Judge, Ambedkar Nagar dismissing the revision of the petitioner.

3. On the request of learned counsel for the parties, the present matter is being decided finally at the admission stage.

4. While assailing the impugned order dated 24.12.2019 passed by the Civil Judge (S.D.)/ A.C.J.M., Ambedkar Nagar, learned counsel for the petitioner has submitted that the learned court below has rejected the application for discharge of the petitioner on the point that since the evidence under Section 244 Cr.P.C. is yet to come and the accused/ petitioner has not appeared and obtained bail, therefore, such application for discharge is rejected. Learned counsel for the petitioner has further submitted that in the aforesaid judgment, reference of the judgment of the Apex Court in re; **Adalat Prasad vs. Rooplal Jindal & Others, (2004) 7 SCC 338,** has been given by the learned Magistrate Court observing that once the Magistrate takes cognizance in any matter/ issue, he cannot recall or review such order. The impugned order further says that the learned Magistrate Court has already taken cognizance on 23.3.2019 summoning the petitioner to try the issue under Section 420 IPC and the revisional court while rejecting the revision of the petitioner has upheld the order of the Magistrate dated 24.12.2019.

5. Learned counsel for the petitioner has submitted that when the aforesaid rejection of discharge was assailed before the revisional court, learned revisional court vide order dated 25.10.2021 has rejected the revision of the petitioner upholding the order dated 24.12.2019 passed by the court of Magistrate.

6. Sri Akash Dikshit, learned counsel for the petitioner has submitted with vehemence that

by means of discharge application, the petitioner had not prayed that the summoning order be recalled or reviewed, therefore, the dictum of the Hon'ble Apex Court in re; **Adalat Prasad** (supra) would not be attracted in the present case.

7. At this stage, learned counsel for the petitioner has drawn attention of this Court towards Section 245 Cr.P.C., which is being reproduced herein below:-

"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.*

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

8. Learned counsel for the petitioner has drawn attention of this Court towards Sub Section (2) of Section 245 Cr.P.C., which categorically provides that nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate. So as to strengthen the aforesaid submission, Sri Dikshit has drawn attention of this Court towards the decision of the Apex Court in re; **Ajoy Kumar Ghose vs. State of Jharkhand and another, (2009) 14 SCC 115,** referring paras 25, 36 & 37 thereof. For the convenience those paragraphs are being reproduced herein below:-

"25. The situation under Section 245(2) CrPC is, however, different. There, under sub-section (2), the Magistrate has the power of discharging the accused at any previous stage of the case i.e. even before such evidence is led. However, for discharging an accused under Section 245(2) CrPC, the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none. The Magistrate can take this decision before the accused appears or is brought before the court or the evidence is led under Section 244 CrPC. The words appearing in Section 245(2) CrPC "at any previous stage of the case", clearly bring out this position.

36. The Magistrate has the power to discharge the accused under Section 245(2) CrPC at any previous stage i.e. before the evidence is recorded under Section 244(1) CrPC, which seems to be the established law, particularly in view of the decision in Cricket Assn. of Bengal v. State of W.B. [(1971) 3 SCC 239 : 1971 SCC (Cri) 446] , as also the subsequent decision of the Bombay High Court in Luis de Piedade Lobo v. Mahadev Vishwanath Parulekar [1984 Cri LJ 513 (Bom)] . The same decision was followed by Kerala High Court in Manmohan Malhotra v. P.M. Abdul Salam [1994 Cri LJ 1555 (Ker)] and Hon'ble Justice K.T. Thomas, as the learned Judge then was, accepted the proposition that the Magistrate has the power under Section 245(2) CrPC to discharge the accused at any previous stage. The Hon'ble Judge relied on a decision of the Madras High Court in Mohd. Sheriff Sahib v. Abdul Karim Sahib [AIR 1928 Mad 129 (1)] , as also the judgment of the Himachal Pradesh High Court in Gopal Chauhan v. Satya [1979 Cri LJ 446 (HP)].

37. We are convinced that under Section 245(2) CrPC the Magistrate can discharge the accused at any previous stage i.e. even before any evidence is recorded under Section 244(1) CrPC. In that view, the accused could have made the application. It is obvious that the application has been rejected by the Magistrate. So far, there is no difficulty."

9. The Apex Court has clearly held in the aforesaid judgment that under Section 245 (2) Cr.P.C. the Magistrate can discharge the accused at any previous stage i.e. even before any evidence is recorded under Section 244 (1) Cr.P.C.

10. Therefore, Sri Dikshit has submitted that the observation of learned Magistrate Court vide impugned order dated 24.12.2019 is unwarranted and uncalled for. Further the order dated 25.10.2021 passed by the revisional court upholding the order dated 24.12.2019 is also perverse and uncalled for.

11. Sri Dikshit has further drawn attention of this Court towards Annexure No.12 to the petition, which is an application dated 6.11.2019 filed by the petitioner before the court of Magistrate when his discharge application was pending wherein he had categorically requested from the learned court below to direct for proper enquiry/ investigation in respect of handicapped certificate, which is subject matter of the issue, to verify as to whether such handicapped certificate is forged or genuine. Sri Dikshit has submitted that since this application was filed on 6.11.2019, therefore, before rejecting the discharge application of the petitioner vide order dated 24.12.2019, any appropriate order on such application dated 6.11.2019 could have been passed by the Magistrate so as to set the controversy at rest but no such order has been passed before rejecting the discharge application of the petitioner.

12. He has also drawn attention of this Court towards a recent judgment of the Apex Court dated 7.5.2021 in re; **Sanjay Kumar Rai vs. State of Uttar Pradesh & Anr., Criminal Appeal No.472 of 2021,** referring para-16 thereof, which is being reproduced herein below:-

"16. Further, it is well settled that the trial court while considering the discharge application is not to act as a mere post office. The Court has to sift through the evidence in order to find out whether there are sufficient grounds to try the suspect. The court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case and so on. [Union of India v. Prafulla Kumar Samal, (1979) 3 SCC 4]. Likewise, the Court has sufficient discretion to order further investigation in appropriate cases, if need be."

13. Sri Dikshit has categorically submitted that it has been the view of the constitutional court that the trial court while considering the discharge application is not to act as a mere post office. The court has to sift through the evidence in order to find out whether there are sufficient grounds to try the suspect. The court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case and so on.

14. *Per contra*, Sri Ajmal Khan, learned counsel for opposite party no.2 has submitted that there is no infirmity or illegality in the order dated 24.12.2019 passed by the learned Magistrate Court inasmuch as in the complaint case, there is difference between the stage upto Sections 200 to 204 and 244 Cr.P.C. Further, as per him, unless the evidence under Section 244 Cr.P.C. is recorded, the discharge application in the complaint case should have not been considered otherwise it would frustrate the entire purpose of taking cognizance and summoning the prospective accused. He has also submitted that if without recording the statement under Section 244 Cr.P.C., the discharge application is allowed, the accusation on accused person would not come before the learned trial court and in that case, not only the complainant but the prosecution shall suffer, therefore, this petition may be dismissed.

15. Learned AGA has also submitted that so far as the judgment of the Apex Court in re; **Adalat Prasad** (supra) is concerned, there may not be any dispute on the observation and

proposition of law of the Apex Court but it would be upto the court to see as to whether the judgment in re; **Adalat Prasad** (supra) may be applicable at the stage which has been discussed by the Magistrate while rejecting the discharge application vide order dated 24.12.2019 inasmuch as this Court while invoking its power under Section 482 Cr.P.C. has got vast power, rather inherent power, to cure abuse of the process of the law, if any.

16. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion and also in agreement with the judgment of the Apex Court in re; **Ajoy Kumar Ghose** (supra) and **Sanjay Kumar Rai** (supra) to the effect that the trial court has to sift through the evidence in order to find out whether there are sufficient grounds to try the suspect. The court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case. In the present case, since the present petitioner had himself filed an application on 6.11.2019 before the learned Magistrate with the request that appropriate direction to investigate/ enquire the handicapped certificate in question, which is subject matter, be issued so as to verify as to whether such certificate was forged or genuine, therefore, it was incumbent upon the Magistrate before passing any final order on discharge application to direct for investigation to verify the genuineness of the handicapped certificate so that the issue in question may likely be set at rest. Learned court of Magistrate should not show undue haste in deciding the discharge application without verifying the genuineness of the handicapped certificate. I am also of the view that the discharge application should not be disposed of in a cursory manner inasmuch as if such application is decided in a cursory manner, then it may likely to cause prejudice, not only to the side of the applicant or complainant but also to the prosecution. Therefore, before disposing of the discharge application, all possible efforts, due care and precaution should have been taken by the learned court below to ensure that the prospective accused or suspect is not scot free. At the same time, if the prima facie material available with the learned court below is sufficient to pass order of discharge, there should not be any hesitation for the learned court below to pass such order. In any case, the subjective satisfaction of the learned court below on the basis of material available on record should be paramount.

17. So far as the observation of the learned court below regarding Section 244 Cr.P.C. is concerned, I find that such observation is perverse inasmuch as the law is trite that the term *'at any previous stage of the case'* includes any stage meaning thereby even before any evidence is recorded under Section 244 Cr.P.C., the discharge application under Section 245 (2) Cr.P.C. may be considered and disposed of.

18. Therefore, in the light of the facts and circumstances and the case laws so discussed above, I hereby set aside/ quash the order dated 24.12.2019 (Annexure No.1) passed by the learned Civil Judge (S.D.)/ A.C.J.M., Ambedkar Nagar and the order dated 25.10.2021 passed by the Sessions Judge, Ambedkar Nagar (Annexure No.14).

19. However, the matter is relegated back to the learned court of Magistrate to pass a fresh order on discharge application strictly in accordance with law and considering all relevant materials available and ensure that proper justice is made in favour of the parties, be it the petitioner, the private opposite party or the prosecution. Such order shall be passed within a period of two months from the date of receipt of certified copy of this order, by affording an opportunity of hearing to the parties concerned, if it is so required under the law.

20. Liberty is given to the petitioner to produce certified copy of this order before the

court of Magistrate through counsel and the discharge application through counsel shall be decided in terms of earlier order dated 1.11.2019.

21. Accordingly, the petition is **allowed.**

22. No order as to costs.

(2021)12ILR A315
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.11.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Application U/S 482/378/407 No. 4612 of 2021

Sarvesh Kumar Tiwari ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Dinesh Kumar Singh (D.K.S, Umesh Singh

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - quashing of-non-bailable warrant-petitioner earlier challenged the chargesheet in which he got the stay of proceedings-during the pendency of the petition, trial court issued non-bailable warrants-accused were directed to place the current status regarding the stay order granted by the High Court-from the perusal of ordersheet, trial court had given repeated opportunities to the accused but the accused remained absent-A last opportunity was also given which was not availed-learned trial court had no means to ensure presence of the accused before it-Hence, the trial court committed no factual and legal infirmity while passing order. (Para 1 to 20)

The application is rejected. (E-6)

List of Cases cited:

1. Inder Mohan Goswami & anr Vs St. of Uttranchal & ors. (2007) 12 SCC 1

2. Asian Resurfacing of Road Agency Pvt. Ltd. & anr. Vs C.B.I .(2018) 16 SCC 299

3. Fazalullah Khan Vs M. Akbar Contranctor (d) by LRs & ors. (2019) 8 ADJ 615 SC

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard learned counsel for the petitioner and learned AGA for the State.

2. This petition has been filed with the following main prayer:-

"Wherefore, it is most respectfully prayed that this hon'ble Court may kindly be pleased to set-aside the impugned order dated 16.09.2021 and 28.10.2021 passed by IIIrd Additional District and Sessions Judge, Ambedkar Nagar in S.T. No. 186/2011 (State Versus Sarvesh Kumar Tiware), with all consequential benefits contained as Annexure No.1 and 2 respectively to the present petition."

3. It has been submitted by learned counsel for the petitioner that earlier a Criminal Misc. Case No. 15 of 2016 under Section 482 Cr.P.C. (Sarvesh Kumar Tiware vs. State of U.P. and Others) was filed by the petitioner challenging the charge sheet in which this Court had been pleased to stay the proceedings in the Sessions Trial no. 186 of 2011 (State Vs. Sarvesh Kumar Tiware) by its order dated 17.08.2021, which is still operative and inforce. During the pendency of the petition and the interim order therein, the trial court had issued non-bailable warrants against the petitioner on 16.09.2021 giving rise to afresh cause of action to file the present petition under Section 482 Cr.P.C.

4. Learned AGA for the State has raised the preliminary objection regarding the

maintainability of the petition as according to him the petitioner's case no. 5131 of 2016 is still pending before this Court and a second petition by the same petitioner with regard to the same Sessions Trial only challenging the non-bailable warrant issued by the learned trial court is not maintainable.

5. Learned counsel for the petitioner has pointed out the order sheet annexed as annexure-09 to the petition and he says that he has never been issued any summon, warrant earlier and a wrong observation has been made by the learned trial court in its order dated 16.09.2021 that he has been granted several opportunities to place a current status of the petition under Section 482 of the Cr.P.C., bearing Petition No. 5131 of 2016.

6. The counsel for the petitioner has stated that the non-bailable warrant has been issued against the petitioner without application of mind to the observations made by the Hon'ble Supreme Court in the ***"Inder Mohan Goswami and Another vs. State of Uttranchal and Others (2007) 12 SCC 1",*** where the Court had observed in paragraph nos. 50 to 53 that non-bailable warrants would be issued to bring a person to Court only when summons and bailable warrants would be unlikely to have the desired result. If the Court is of the opinion that the summons will suffice in getting the appearance of the accused in the Court, the summons or bailable warrants should be preferred.

7. This Court has carefully perused the order sheet a typed copy of which has been filed at annexure-09 to the petition. It appears that on 24.01.2020 when the case was called out, the accused were directed to place the current status regarding the stay order granted by the High Court by the next fixed. The matter was fixed to be taken on 25.02.2020.

8. On 25.02.2020, again, the accused were directed to place a current status regarding the stay order granted by the High Court and the matter was fixed for 25.03.2020. The case was again taken up on 25.03.2020 where noting the absence of the accused, the court had ordered the accused to present the status of stay in the proceedings before the High Court by the next date of listing as a last opportunity. The case was fixed on 03.08.2021, when again the accused remain absent and the learned trial court observed that because of the petition remaining pending in the High Court, the proceedings had remained stayed and the accused was directed to place the current status of the stay order granted earlier by the next date. The matter was fixed again for hearing on 20.08.2021. On 20.08.2021, there was a public holiday declared due to Moharam. The case was taken up on 21.08.2021, when accused remained absent. Again the Court directed the accused to place the current status to of the proceedings by the next date. The matter was fixed for 08.09.2021. On 08.09.2021, again, the accused remained absent. The Court had again given time to the accused to place the current status with regard to the pendency of proceedings before the High Court and the stay order and fixed the matter for 16.09.2021. It was on 16.09.2021 that the learned trial court has passed the order impugned, observing that repeated opportunities were being given to the accused which were not availed by him.

9. In the case of ***"Inder Mohan Goswami and Another vs. State of Uttranchal and Others (2007) 12 SCC 1"***, the Hon'ble Supreme Court had observed in paragraph nos. 53 and 54 that non-bailable warrants would be issued to bring a person to Court only when summons and bailable warrants would be unlikely to have the desired result. This could be even when the court thought it reasonable that the accused will not voluntarily appear in court or the police authorities are unable to find the person to serve him with a summon or it is considered that the person could harm someone if not placed into custody immediately.

10. This Court having perused the pleadings on record, is of the considered opinion that the petitioner had approached this Court earlier in the petition No. 5131 of 2016 under Section 482 of the Cr.P.C. challenging the charge sheet, where this Court had passed the following order on 17.08.2016, which is quoted herein below:-

"Heard.

Issue notice to the opposite parties, returnable on 4.10.2016. Notice to indicate that the petition may be decided finally at the admission stage itself.

The learned Additional Government Advocate waives service of notice on behalf of the opposite party no.1.

Stand over to 4.10.2016.

In the meantime, further proceedings against the petitioner shall be stayed. "

11. It appears that the petitioner failed to appear before the learned trial court despite observations made by the Hon'ble Supreme Court in the Case of ***"Asian Resurfacing of Road Agency Private Limited and Another vs. Central Bureau of Investigation, 2018 (16) SCC 299"*** where the Hon'ble Supreme Court had observed in paragraph 34, which is quoted herein below:-

"If stay is granted, matter should be taken on day-to-day basis and concluded within two-three months. Where the matter remains pending for longer period, the order of stay will stand vacated on expiry of six months, unless extension is granted by a speaking order showing extraordinary situation where continuing stay was to be preferred to the final disposal of trial by the trial court."

12. The Court had further observed as under:-

"In view of above, situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account If stay, civil and criminal proceedings are held up. At times, proceedings are adjourned sine die on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up. In an attempt to remedy this,situation, we consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized. The trial Court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced."

13. Learned trial court on the basis of the observations made by the Hon'ble Supreme Court in case of ***Asian Resurfacing of Road Agency Private Limited (Supra)*** had initially passed an order on 30.03.2017 noting that the accused was not appearing in the case, and there was no application by his counsel for exempting his personal appearance, the trial court has thereafter given several chances for the petitioner to indicate to the Court the current status of his petition No. 5131 of 2016 under Section 482 Cr.P.C. regarding which the dates have been mentioned by the learned trial court in its order dated 16.09.2021. Having observed the fact that the accused was not appearing despite the several chances being given and even the last opportunity to communicate the current status of

his petition being given to him. The Court has referred to the observations made by the Hon'ble Supreme Court in the case of ***Asian Resurfacing of Road Agency Private Limited (Supra)*** and issued non-bailable warrant against him directing the matter to be placed before it thereafter.

14. It has been argued by the learned counsel for the petitioner that on 28.10.2021, the petitioner had filed an application paper no. 11(b) through his counsel saying that in the case of **Fazalullah Khan vs. M. Akbar Contractor (d) By LRs and Others 2019 (8) ADJ 615 (SC),** the Hon'ble Supreme Court had observed that where the case remained pending in the High Court the Stay would not stand automatically vacated. However, the learned trial court rejected the application by misreading the observations made by the Hon'ble Supreme Court in the case of ***Fazalullah Khan (Supra)***.

15. This Court has gone through the order dated 28.10.2021 and also the judgement rendered by the Hon'ble Supreme Court in the case of ***Fazalullah Khan (Supra)***. In the case of ***Fazalullah Khan (Supra)***, the Court had observed that where an appeal remains pending before the higher Court and there was a stay granted by the higher Court of the impugned order, such stay would not stand automatically vacated in terms of the law laid down in the case of ***Asian Resurfacing of Road Agency Private Limited (Supra).***

16. Admittedly, the petitioner has not appealed against any order of the lower court, and the lower court order has not been stayed during pendency of the appeal. The petitioner had challenged the charge sheet before this Court in petition no. 5131 of 2016 and the Court had granted a stay order as quoted herein above. Such an order would certainly come within the purview of the observations made by the Hon'ble Supreme Court in the case of ***Asian Resurfacing of Road Agency Private Limited (Supra).***

17. As far as possible, if the Court is of the opinion that the summon will suffice in securing the appearance of the accused in the Court, the summons or the bailable warrants should be preferred.

18. But, it is apparent from the order sheet of learned trial court that repeated opportunities were given to the accused but the accused remained absent. A last opportunity was also given to the accused which was not availed. Learned trial court had no means to ensure presence of the accused before it. Hence the order was passed which has been challenged in this petition.

19. This Court, therefore, finds no factual and legal infirmity and no good ground to show interference either in the other dated 16.09.2021 or in the order dated 28.10.2021.

20. Accordingly, the petition is ***rejected as misconceived.***

(2021)12ILR A318
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.12.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482/378/407 No. 4807 of 2021

Neeraj Singh & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Vinod Kumar Pandey

Counsel for the Opposite Parties:
G.A., S.K. Yadav Warsi

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482, 319 - Indian Penal Code, 1860-Sections 302, 323, 504, 506-quashing of –summoning order-prosecution witnesses, while recording their statements before the court, named the present petitioners-petitioners took plea of alibi that they were hospitalised-In Bijendra Singh case, Apex court was of the view that the plea of alibi should have been considered but in the present case prima facie satisfaction of the court concerned while issuing summon is so strong derived from the material available on record including the incriminating material and statement of witnesses-the summon issued u/s 319 Cr.P.C. may not be treated at par with the summons issued while taking cognizance on the chargesheet-even at that stage, the discharge cannot be moved-However, after appearing before the court at the time of framing of charge, the person summoned may take all pleas regarding his non-involvement in the issue in question.(Para 1 to 15)

B. The evidence of an injured witness has greater evidential value and unless compelling reasons exists, their statements are not be discarded lightly. While exercising the power u/s 319 Cr.P.C. the court has not to wait till the cross-examination and on the basis of the examination-in-chief of a witness if a case is made out, a person can be summoned to face the trial u/s 319 Cr.P.C.(Para 11)

The application is disposed off. (E-6)

List of Cases cited:

1. Brijendra Singh & ors Vs St. of Raj. (2017) 100 ACC 601

2. Manjeet Singh Vs St. of Har. & ors. CRLA No.875 of 2021

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Vinod Kumar Pandey, learned counsel for the petitioners, Sri Ran Vijay Singh, learned AGA for the State and Sri Santosh Kumar Yadav "Warsi", learned counsel for opposite party no.2.

2. Sri Warsi has filed counter affidavit, the same is taken on record.

3. By means of this petition, the petitioners have assailed the order dated 22.10.2021 passed by the Additional Sessions Judge, Court No.4, Sultanpur on the application under Section 319 Cr.P.C. in Sessions Trial No.116 of 2015, State Vs. Sachin and others, arising out of Case Crime No.307 of 2014, under Sections 302, 323, 504 & 506 IPC, Police Station Motigarpur, District Sultanpur by means of which the petitioners have been summoned in the aforesaid case.

4. Learned counsel for the petitioners has contended that the present petitioners were not charge sheeted but the learned trial court concerned while appreciating the statements of PW-1, Sudhakar Tiwari and PW-2-Durgesh Tiwari, the injured, who have indicated the involvement of the present petitioners in the incident in question, summoned the petitioners under Section 319 Cr.P.C. Learned counsel for the petitioners has drawn attention of this Court towards Annexures No.7 & 8 to the petition, which are medical prescription/ report of Atul Medical Care Centre situated at Saidkhanpur Road, Kotwa Sarak, Barabanki wherein it has been indicated that both the petitioners were admitted in the Hospital w.e.f. 21.10.2014; 09.40 PM to 25.10.2014; 01.40 PM. Therefore, he has submitted that when the present petitioners were admitted in one private hospital, how can they be remain present at the place of incident on 23.10.2014. Not only the above, Doctor concerned i.e. Dr. Y. R. Singh has recorded his statement (Annexure No.10) and verified and reiterated the same thing, which has been indicated in the medical certificate.

5. Therefore, on the basis of aforesaid facts and circumstances, learned counsel for the petitioners has submitted that this is a case where the present petitioners have been wrongly summoned under Section 319 Cr.P.C. He has

also submitted that even in the statement recorded under Section 161 Cr.P.C. of both the aforesaid prosecution witnesses, they have not suggested that the present petitioners were present. However, while recording their statements before the court, they have named the present petitioners. So, the learned court below has committed manifest error of law and fact both in summoning the petitioners under Section 319 Cr.P.C. inasmuch as before issuing summon under the aforesaid section, plea of alibi of the present petitioners should have been considered. So as to strengthen the aforesaid argument, learned counsel for the petitioners has drawn attention of this Court towards a decision of the Apex Court in re; **Brijendra Singh and others vs. State of Rajasthan, [2017 (100) ACC 601]**, referring paras 14 & 15 thereof. For the convenience, paras 14 & 15 are being reproduced herein below:-

"14. When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 km. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 CrPC to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that the appellants plea of alibi was correct.

15. This record was before the Trial Court. Notwithstanding the same, the trial court went by the depositions of the complainant and some other persons in their examination-in-chief, with no other material to support their so-called verbal/ocular version. Thus, the "evidence" recorded during trial was nothing more than the statements which were already there under Section 161 CrPC recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where a plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty-bound to look into the same while forming prima facie opinion and to see as to whether much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the revision petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing the agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

6. He has also submitted that following the aforesaid proposition of law, this Court has granted interim order in some of identical cases.

7. Learned AGA has opposed the prayer of this petition by submitting that the summon issued under Section 319 Cr.P.C. may not be treated at par with the summons issued while taking cognizance on the charge sheet. While

issuing summons under Section 319 Cr.P.C., learned court below has got strong prima facie satisfaction to summon the person concerned. Even at that stage, the discharge cannot be moved. However, after appearing before the learned court below pursuant to the aforesaid summon and at the time of framing of charges, the person summoned may take all pleas regarding his non-involvement in the issue in question.

8. Sri Warsi has also adopted the aforesaid submission of Sri Ran Vijay Singh, learned AGA.

9. Having heard learned counsel for the parties and having perused the material available on record, I am also of the considered opinion that prima facie satisfaction of the court concerned while issuing summons under Section 319 Cr.P.C. is so strong. Under Section 319 Cr.P.C., this is the power of the court to proceed against other persons appearing to be guilty of the offences and satisfaction to this effect is derived from the material available on record including the incriminating material and statement of the witnesses.

10. Even there is no statutory prescription to provide any prior opportunity of hearing to the persons under Section 319 Cr.P.C. before passing summoning order under Section 319 Cr.P.C.

11. In the case so cited by the learned counsel for the petitioners i.e. **Brijendra Singh** (supra), the Hon'ble Apex Court has noticed the statements so recorded under Section 161 Cr.P.C. of various persons and on the basis of such statements recorded under Section 161 Cr.P.C., the Apex Court was of the view that the plea of alibi should have been considered before issuing summons under Section 319 Cr.P.C. But, in the present case, the learned court below has issued summon under Section 319 Cr.P.C. on the basis of statements of prosecution witnesses and one of such witnesses is injured witness, therefore, the facts and circumstances considered by the Apex Court in re; **Brijendra Singh** (supra) would not be applicable in the present case. The law is trite on the point that the facts and circumstances of individual case may not be cited in another case, if the facts and circumstances of both the cases are not identical and similar. The Apex Court vide judgment and order dated 24.8.2021 in re; **Manjeet Singh vs. State of Haryana & Ors., Criminal Appeal No.875 of 2021**, in para-14.1 has observed as under:-

"14.1 Now thereafter when in the examination-in-chief the appellant herein - victim - injured eye witness has specifically named the private respondents herein with specific role attributed to them, the Learned trial Court as well as the High Court ought to have summoned the private respondents herein to face the trial. At this stage it is required to be noted that so far as the appellant herein is concerned he is an injured eye-witness. As observed by this Court in the cases of State of MP v. Mansingh (2003) 10 SCC 414 (para 9); Abdul Sayeed v. State of MP (2010) 10 SCC 259; State of Uttar Pradesh v. Naresh (2011) 4 SCC 324, the evidence of an injured eye witness has greater evidential value and unless compelling reasons exist, their statements are not to be discarded lightly. As observed hereinabove while exercising the powers under Section 319 CrPC the Court has not to wait till the cross-examination and on the basis of the examination-in-chief of a witness if a case is made out, a person can be summoned to face the trial under Section 319 CrPC."

12. Having considered the aforesaid facts and circumstances and case laws so referred above, I do not find any infirmity or illegality in

the order dated 22.10.2021 passed by the Additional Sessions Judge, Court No.4, Sultanpur in Sessions Trial No.116 of 2015.

13. Therefore, liberty is given to the present petitioners to appear before the court concerned pursuant to the summoning order dated 22.10.2021 within three weeks and file appropriate application of bail and if such application is filed, the same may be considered and disposed of with expedition, preferably on the same day.

14. It is needless to say that the present petitioners would submit their defence and bonafide before the learned court below at the appropriate stage and such bonafide shall be dealt with and considered by the learned court below properly.

15. The petition is **consigned to record.**

(2021)12ILR A322
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Application U/S 482/378/407 No. 5066 of 2021

Arvind Shukla ...Applicant

Versus

U.O.I. & Anr. ...Opposite Parties

Counsel for the Applicant:
Vijay Kumar Bajapai

Counsel for the Opposite Parties:
Anurag Kumar Singh

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 120B, 420 & 13(2) r/w 13(1)(d) PC Act, 1988-quashing of entire proceedings-petitioner took a housing loan of which a no dues certificate had been issued by the Bank to the petitioner-petitioner was issued notice regarding irregularities committed in sanctioning housing loans-trial court took cognizance and summoned the petitioner alongwith other co-accused-Later police personnel visited his house and apprised regarding the pendency of the case and non-bailable warrant-non-bailable warrant only issued by the trial court because the petitioner did not appear before the trial court on the date fixed-petitioner directed to appear before the learned trial court for interim bail.(Para 1 to 12)

B. The court shall on appearance of an accused in non-bailable offence who has neither been arrested by the investigating agency during investigation nor produced in custody as envisaged in section 170 Cr.P.C. call upon the accused to move a bail application if the accused does not move it on his own release him on bail as the circumstances of his having not be arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. if a person has been at large and free for several years and has not been even arrested during investigation, to send him to jail by refusing bail suddenly, merely because charge-sheet has been filed is against the basic principles governing grant or refusal of bail.(Para 8)

The application is disposed off. (E-6)

List of Cases cited:

1. Amanpreet Singh Vs C.B.I. thru Director CRLA No. 929 of 2021

2. Siddharth Vs St. of U.P. CRLA NO. 838 of 2021

3. Court on its own Motion Vs C.B.I. (2004) 72 DRJ 629 Para 26

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

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

(2) This petition has been filed by the petitioner for the following main prayer:-

"For the facts and reasons stated in the accompanying petition supported by Affidavit, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash the entire proceedings arising out of FIR No: RC No.0062005A0018/05, dated 30.06.2005U/S 120B,420, IPC & 13(2) r/w 13(1)(d) PC Act 1988 P.S. CBI/ACB Lucknow including the charge-sheet dated 12.12.2007 filed U/S 120B/420/468 and 471 IPC & 13(2) r/w 13(1)(d) PC Act 1988 P.S. CBI/ACB Lucknow including the cognizance/ summoning order dated 17.09.2020 and Non-Bailable Warrant dated 26.11.2021 passed in Criminal Misc, Case No. 530 of 2020, CBI, ACB, Lucknow Vs. S.N. Lal & Others pending before the Court of Additional District & Sessions Judge PC Act / Special Judge C.B.I. Lucknow, so far as it relates to the petitioner."

(3) It has been submitted by the learned counsel for the petitioner that the petitioner had taken a Housing loan on 30.01.2004 which was repaid by him in various installments and a certificate dated 21.06.2018 was issued to him by the Bank that the Housing loan account has been closed on 21.06.2018. A No Dues Certificate had been issued by the Bank to the petitioner, a copy of which has been filed as Annexure-5 to the petition. It has been submitted that on 27.06.2005 the opposite party no.2 wrote a letter to the Superintendent of Police, CBI Anti Corruption Branch, Lucknow for lodging the FIR against Shri S.N. Lal the then Branch Manager, SBI, Mumfordganj, Allahabad, alleging various irregularities committed by him in sanctioning the Housing loan to various borrowers. The petitioner was issued notice on 22.01.2007 directing him to appear in the office and explain his case. The petitioner appeared on 08.02.2007 and thereafter nothing was heard by him of the matter. The petitioner assured that no case against the petitioner being made out, he had been exonerated by the Investigating Agency. The Charge-sheet was however submitted by the CBI on 12.12.2007 implicating the petitioner also alongwith other accused. CBI Court cancelled the Charge-sheet on 05.06.2008. Against the order passed by the learned Special Judge/Anti Corruption Wing, Lucknow, The CBI filed a Criminal Revision No.498/2008 (D) and got the matter remanded back to the learned Trial court to proceed afresh after taking cognizance.

(4) In pursuance of the order passed by this Court on 14.11.2019 the learned Trial Court by its order dated 17.09.2020 took cognizance and summoned the petitioner alongwith other co-accused. The petitioner was never served any summons with regard to the pendency of Criminal Miscellaneous Case No.530/2020 pending in the Court of Additional District & Sessions Judge, PC Act/Special Judge, C.B.I., Lucknow. For the first time, on 16.11.2021 the police personnel visited his house and apprised his wife regarding the pendency of the aforesaid case. After inquiry the petitioner came to know that the learned Trial court had issued non-bailable warrant against him on 26.11.2021.

(5) Hence this petition has been filed challenging the summoning order dated 17.09.2020 and the order issuing non-bailable warrant dated 26.11.2021.

(6) I have heard the learned counsel for the petitioner and counsel for the CBI who says that the summoning order has been issued by the learned Trial Court after this Court had remanded the matter to it on 14.11.2019 and therefore, no interference should be shown in the summoning order by this Court at this stage.

(7) With regard to non-bailable warrant, it has been submitted fairly by the learned counsel for the CBI that it appears that it has been issued to the petitioner only because he did not appear after summoning order for which he says that he had no knowledge earlier.

(8) Learned counsel for the petitioner has placed reliance upon the judgment rendered by the Hon'ble the Supreme Court in **Amanpreet Singh Vs. CBI through Director passed in Criminal Appeal No.929/2021 decided on 02.09.2021 reported in 2021 SCC Online 941**, where in similar circumstances the Supreme Court has shown interference relying upon the observations made by its in **Siddharth Vs. State of U.P.** passed in Criminal Appeal No.838/2021, reported in 2021 SCC Online 615. The Supreme Court has referred to observation made by the Delhi High Court in **"Court on its own Motion Vs. CBI" reported in (2004) 72 DRJ 629, in Paragraph-26** which has been affirmed by the Court in its order in Paragraph-9. Directions were issued for the Criminal Court in Paragraph-26 of the Delhi High Court judgment which was quoted with approval by the Supreme Court in Paragraph-9 of the report. Such directions are quoted hereinbelow:-

"26. Arrest of a person for less serious or such kinds of offence or offences those can be investigated without arrest by the police cannot be brooked by any civilized society.

Directions for Criminal Courts:

(1) Whenever officer-in-charge of police station or Investigating Agency like CBI files a charge-sheet without arresting the accused during investigation and does not produce the accused in custody as referred in Section 170, Cr.P.C. the Magistrate or the Court empowered to take cognizance or try the accused shall accept the charge-sheet forthwith and proceed according to the procedure laid down in Section 173, Cr.P.C. and exercise the options available to it as discussed in this judgment. In such a case the Magistrate or Court shall invariably issue a process of summons and not warrant of arrest.

(ii) In case the Court or Magistrate exercises the discretion of issuing warrant of arrest at any stage including the stage while taking cognizance of the charge sheet, he or it shall have to record the reasons in writing as contemplated under Section 87, Cr.P.C. that the accused has either been absconding or shall. not obey the summons or has refused to appear despite proof of due service of summons upon him.

(iii) Rejection of an application for exemption from personal appearance on any date of hearing or even at first instance does not amount to non-appearance despite service of summons or absconding or failure to obey summons and the Court in such a case shall not issue warrant of arrest and may either give direction to the accused to appear or issue process of summons.

(iv) That the Court shall on appearance of an accused in a bailable offence release him forthwith on his furnishing a personal bond with or without sureties as per the mandatory provisions of Section 436, Cr.P.C.

(v) The Court shall on appearance of an accused in non-bailable offence who has neither been arrested by the police/Investigating Agency during investigation nor produced in custody as envisaged in Section 170, Cr.P.C. call upon the accused to move a bail application if the accused does not move it on his own and release him on bail as the circumstance of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail, Reason is simple. If a person has been at large and free for several years and has not been even arrested during investigation, to send him to jail by refusing bail suddenly, merely because charge-sheet has been filed is against the basic principles governing grant or refusal of bail."

(9) This Court has carefully gone through the judgment rendered by the Hon'ble Supreme Court in **Amanpreet Singh Vs. CBI (Supra),** the Supreme Court has made observation in Paragraphs-10 and 11 affirming the order of the

Delhi High Court and directing that the appellant therein be not arrested. The Paragraphs-10 and 11 of the judgment are being quoted hereinbelow:-

"10. A reading of the aforesaid shows that it is the guiding principle for a Magistrate while exercising powers under Section 170, Cr.P.C. which had been set out. The Magistrate of the Court empowered to take cognizance or try the accused has to accept the charge sheet forthwith and proceed in accordance with the procedure laid down under Section 173, Cr.P.C. It has been rightly observed that in such a case the Magistrate or the Court is required to invariably issue a process of summons and not warrant of arrest. In case he seeks to exercise the discretion of issuing warrants of arrest, he is required to record the reasons as contemplated under Section 87, Cr.P.C. that the accused has either been absconding or shall not obey the summons or has refused to appear despite proof of due service of summons upon him. In fact the observations in Sub-para (ii) above by the High Court are in the nature of caution.

11. In so far as the present case is concerned and the general principles under Section 170 Cr.P.C., the most apposite observations are in sub-para (v) of the High Court judgment in the context of an accused in a non-bailable offence whose custody was not required during the period of investigation. In such a scenario, it is appropriate that the accused is released on bail as the circumstances of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. The rationale has been succinctly set out that if a person has been enlarged and free for many years and has not even been arrested during Investigation, to suddenly direct his arrest and to be incarcerated merely because charge sheet has been filed would be contrary to the governing principles for grant of bail. We could not agree more with this."

The Supreme Court had thereafter directed the learned Trial Court to grant bail to the appellant on the next date on terms and conditions to its satisfaction.

(10) It has been submitted on the basis of such judgment rendered by Hon'ble Supreme Court in Amanpreet Singh that the petitioner has remained completely unaware of the proceedings before the High Court till 16.11.2021, and he was not arrested by the Investigating Agency earlier and only because non-bailable warrant has been issued by the learned Trial Court, he should not now be arrested and sent to jail.

(11) Having considered the arguments raised by the learned counsel for the petitioner and the learned counsel appearing for the CBI, this Court finds that the observation in Amanpreet Singh related to a case where Amanpreet Singh had been given the liberty to continue to appear before the learned Trial Court through virtual mode in the prevailing circumstances of Covid-19 Pandemic, and he had continued to appear thereafter. In the case of the petitioner non-bailable warrant has only been issued by the learned Trial Court because the petitioner has not appeared before the learned Trial Court on the date fixed.

(12) This petition is finally **disposed of** with a direction to the petitioner to appear before the learned Trial Court through counsel and apply for interim bail which shall be considered by the learned Trial Court and appropriate orders be passed thereon. His regular bail application shall also be considered expeditiously thereafter.

(2021)12ILR A326
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2021

BEFORE

THE HON'BLE SANJAY KUMAR PACHORI, J.

Application U/S 482 No. 19009 of 2021

Pawan Kumar ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Syed Mohammad Abbas Abdy

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

A. Criminal Law -Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 420, 467, 468, 471-quashing of entire proceedings-applicant mutated the land of the first informants in his favour on the basis of forged sale deed-when the first informants came to know about fake registration of the sale deed, the first information report was lodged-dispute raised was a purely civil dispute-applicant filed a suit against first informants with regard to the property in question for permanent injunction-the same was granted-the Investigating officer filed chargesheet despite the fact that the matter with regard to the same property, is pending for consideration before the civil court-Magistrate did not apply his judicial mind at the time of taking cognizance in an arbitrary manner on printed proforma-therefore, the impugned order liable to be set aside-the matter is remitted to the Chief Judicial Magistrate to pass fresh cognizance order in accordance with law after applying judicial mind.(Para 1 to 25)

B. It is a position of law that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must take notice of the accusations and apply his mind to the allegations made in the police report. However, a Magistrate is not required to pass a detailed reasoned order at the time of taking cognizance on the chargesheet. But it does not mean that an order of taking cognizance can be passed just by filling up the blanks on a printed proforma. A judicial order cannot be allowed to be passed in such a manner. (Para 9 to 23)

The application is disposed off. (E-6)

List of Cases cited:

1. Ankit Vs St. of U.P. & anr (2010) 1 JIC 432.

2. Fakhurddin Ahmad Vs St. of Uttaranchal (2008) 17 SCC 157

3. Darshan Singh Ram Kishan Vs St. of Mah. (1971) AIR SC 2372

4. Devarapally Lakshminarayana Reddy & ors.. Vs V. Narayana Reddy & ors. (1976) AIR SC 1672

5. St. of W.B. & anr. Vs Mohd. Khalid & ors. (1995) 1 SCC 684

6. Fakhurddin Ahmad Vs St. of Uttaranchal (2008) 17 SCC 157,

7. Ajit Kumar Palit Vs St. of W.B. (1963) AIR SC 765, P.770 para 19

8. Emperor Vs Sourindra Mohan Chuckerbutty (1910) ILR 37 Cal 412 P. 416

9. Chief Enforcement Officer Vs Videocon International Ltd.(2008) 2 SCC 492

10. Prasad Shrikant Purohit Vs St. of Mah. & anr. (2015) 7 SCC 440

11. Gopal Marwari Vs Emperor (1943) AIR P. 245

12. R.R. Chari Vs St. of U.P.(1951) AIR SC 207

13. Megh Nath Gupta & anr. Vs St. of U.P. & anr. (2008) 62 ACC 826,

14. Deputy Chief Controller Import & Export Vs Roshan Lal Agarwal (2003) 4 SCC 139

15. UP Pollution Control Board Vs Mohan Meakins(2000) 3 SCC 745

16. Kanti Bhadra Vs St. of W.B.(2000) 1 SCC 722

17. Jagdish Ram Vs St. of Raj. & anr.(2004) 4 SCC 432

18. St. of Guj. Vs Afroz Mohammed Hasanfatta (2019) AIR SC 2499

19. Saurabh Dewana Vs St. of U.P. (2010) 2 JIC 3 AII

20. Abdul Rasheed & ors. Vs St. of U.P. & anr. MANU/UP/3138/2010:2010(3) JIC 761(AII)

21. Qavi Ahmad Vs St. of U.P. & ors. MANU/UP/4806/2011

22. Naval Dey Bharti Vs St. of U.P. & ors. MANU/UP/1831/2019

23. Dushyant Kumar Vs St. of U.P. & ors. MANU/UP/0431/2020

24. Ashu Rawat Vs St. of U.P. & ors. Appl. u/s 482 No. 1388 of 2020

25. Ram Kumar Singh & ors. Vs St. of U.P. & ors. MANU/UP/1891/2020

26. Vishnu Kuma Gupta & ors. Vs St. of U.P & ors. MANU/UP/1925/2020

27. Ali Ashraf Quardri & ors. Vs St. of U.P. & ors. MANU/UP/2048/2020

28. Anuj Gupta Vs St. of U.P & ors. MANU/UP/0204/2021

29. Babu & ors. Vs St. of U.P & ors. MANU/UP/1394/2021

30. Rinki Rastogi & ors. Vs St. of U.P & ors. MANU/UP/0840/2021

31. Surendra Kumar & ors. Vs St. of U.P. & ors. MANU/UP/0935/2021

32. Sunil Tyagi Vs St. of U.P. & ors. MANU/UP/1059/2021

33. Dharmraj & ors. Vs St. of U.P. & ors. MANU/UP/1054/2021

34. Pankaj Jaiswal Vs St. of U.P. & ors. MANU/UP/1079/2021

35. Rubina Khan Vs St. of U.P. & ors. MANU/UP/1075/2021

36. Sanjay Vs St. of U.P. & ors. MANU/UP/1080/2021

37. Suresh Babu Vs St. of U.P. & ors. MANU/UP/1164/2021

38. Abhay Pratap Singh Vs St. of U.P. & ors. MANU/UP/1217/2021

39. Israil & ors. Vs St. of U.P. & ors. MANU/UP/2060/2021

40. Saleem Vs St. of U.P. & ors. MANU/UP/1457/2021

41. Phoolwanti Devi & ors. Vs St. of U.P. & ors. MANU/UP/1540/2021

42. Sunil Kumar Singh Vs St. of U.P & ors. MANU/UP/1639/2021

43. Pramod Kumar & ors. Vs St. of U.P. & ors. MANU/UP/1640/2021

(Delivered by Hon'ble Sanjay Kumar Pachori, J.)

1. Heard Syed Mohammad Abbas Abdy, learned counsel for the applicant, Shri Manoj Kumar Dwivedi, learned A.G.A. for the State and perused the material on record.

2. The instant application under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "Cr.P.C.") has been filed for quashing the entire proceedings of impugned charge-sheet dated 16.1.2019 as well as cognizance order dated 18.3.2019 in Criminal Case No. 2527 of 2019 (State v. Pawan Kumar) arising out of Case Crime No. 0339 of 2018, under Sections 420, 467, 468, 471 of Indian Penal Code (in short "IPC"), registered at Police Station Kotwali Shahar, District Bulandshahr, pending before the Court of Chief Judicial Magistrate, Bulandshahr.

BRIEF FACTS OF THE CASE:

Brief facts, as unfolded from the record as under:

3. The First Information Report dated 29.3.2018 under Sections 420, 467, 468, 471, I.P.C. at Police Station Kotwali Shahr, Bulandshahr, has been lodged by the opposite parties no. 2 and 3 against the applicant and unknown employees of Tehsil, Dadri, stating that the father of the first informants/opposite party nos. 2 & 3 was the owner and recorded tenure holder of agriculture land of Khata No. 986, Gata No. 1578/4 area 0.4680 hectare. After the death of their father they became owner of the aforesaid land on the basis of registered will and are in possession of the said agriculture land, their names have been mutated in the record of rights. The applicant prepared a forged fabricated sale deed dated 30.5.1974/19.6.1974 in the name of his father Ram Chandra from the first informants' father Raghuver Dayal relating to the land of area 1818 sq. yards of Gata No. 1578/4. The applicant replaced the aforesaid sale deed by another sale deed which had been executed by Teekam Singh in favour of Smt. Satyawati Devi wife of Shive Kumar on 30.5.1974 and registered on 19.6.1974 as document no. 1813 Bahi no. 1 Zild no. 994-997 page no. 279/87-88 with the help of the employees of concerned department. The applicant tried to mutate the land of the first informants in his favour on the basis of a forged sale deed. When the first informants came to know about the fake registration of the sale deed, the first information report was lodged.

SUBMISSIONS BEFORE THE COURT:

4. Learned counsel for the applicant assailed that the impugned order is being passed without applying judicial mind in taking cognizance on printed proforma wherein, dates have been filled up by the court employee and initial signature has been made by the Magistrate concerned. The learned counsel has submitted that the dispute raised by the first informant is purely a civil dispute. The applicant filed a suit against the first informants on 30.9.2014 with regard to the property in question for permanent injunction. The court of Civil Judge (Junior Division) Court No. 2, Bulandshahar granted interim injunction vide order dated 30.9.2014. Thereafter, the first informants appeared in the court below in Suit No. 217 of 2014 and prayed to restrain the applicant from alienating the property in question. The Investigating Officer without proper investigation filed charge sheet in the present case despite the fact that the matter with regard to the same property, on the basis of sale deed dated 19.6.1974 is pending consideration before the Civil Court in suit No. 217 of 2014 in which issues have been framed on 12.1.2019.

5. It has been further submitted that the charge sheet has been filed by the investigating officer in a mechanical manner without considering the evidence on record and the Magistrate did not apply his judicial mind at the time of taking cognizance and passed the impugned order dated 18.3.2019 in an arbitrary manner without applying judicial mind on printed proforma by filling up the dates. Therefore, the impugned charge-sheet, the cognizance order and further proceedings pursuant thereto is an abuse of the process of the court and is liable to be quashed. He relied upon the decision of this Court in **Ankit Vs. State of U.P. and another, JIC 2010 (1) 432.**

6. Learned A.G.A. has vehemently opposed the arguments made by the learned counsel for the applicant and submitted that as per allegations made in the FIR and the evidence collected during the investigation, it makes out a prima facie cognizable offence against the applicant, but it is admitted that the order

impugned has been passed by the concerned Magistrate on the printed proforma.

7. Certified copy of the impugned order dated 18.9.2019 filed as Annexure SA -3 of the Supplementary affidavit. By the order dated 18.9.2019, learned Magistrate took cognizance in the matter against the applicant. At this stage it is relevant to extract the aforesaid order as under:

"आज दिनांक ..... को उक्त अपराध संख्या में विवेचक ने आरोप पत्र मय केस डायरी प्रेषित किया है। सम्पूर्ण केस डायरी का विधिनुसार परिसीलन किया गया अपराध का प्रसंज्ञान लिया गया आधार पर्याप्त है। दर्ज रजिस्टर हो। नकले दी जाये, एवं अभियुक्त गणों को समन द्वारा दिनांक ..... के लिए तलब किया जाये।"

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बुलन्दशहर

Hence, foremost question arises for consideration is whether the impugned cognizance order dated 18.9.2019 has been passed by the concerned Magistrate after applying judicial mind?

The next incidental question is as to what is meant by the expression "taking cognizance of an offence" by a Magistrate within the contemplation of Section 190 of the Code?

8. To examine the validity of the impugned order, it would be convenient to refer the relevant statutory provisions as well as the case laws relating to the subject.

9. The power of the court to take cognizance of the offence is laid in Section 190 of the Code, which reads as under:

"190. Cognizance of offences by Magistrate.-*(1) Subject to the provisions of this Chapter any Magistrate of the first class, and any Magistrate of second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-*

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon informations received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

10. Thus, it is trite that the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion in this behalf, irrespective of the view expressed by the investigating officer in police report and decide whether an offence has been made out or not. This is because the purpose of police report under Section 173(2) of the Code, which will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom is primarily to enable the Magistrate to satisfy himself whether on the basis of police report and material referred therein, a case for cognizance is made out or not. **(Vide: Fakhurddin Ahmad v. State of Uttaranchal1)**

11. In **Darshan Singh Ram Kishan v. State of Maharashtra, AIR 1971 SC 2372,** while considering Section 190 of the Code of 1908, the Apex Court observed that "taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the

Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer."

12. While considering the expression "taking cognizance" of an offence by a Magistrate within the contemplation of Section 190 of the Code, in **Devarapally Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors. AIR 1976 SC 1672, (3 Judge)** the Supreme Court has observed as under: (AIR p. 1677 para 14)

"14. This raises the incidental question: What is meant by "taking cognizance of an offence" by the Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in clauses (a), (b) and (c) of Section 190 (1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purpose of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning to Section 190 (1) (a). If, instead of proceeding under Chapter XV, he, has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156 (3), he cannot be said to have taken cognizance of any offence."

13. In **State of W. B. & Anr. v. Mohd. Khalid & Ors., (1995) 1 SCC 684,** the Supreme Court after taking note of the fact that the expression had not been defined in the Code, observed as under: (SCC p. 696 para 43-44)

"43.....Section 190 of the Code talks of cognizance of offences by Magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.

44. Cognizance is defined in Wharton's Law Lexicon 14th Edn., at page 209. It reads:

"Cognizance (Judicial), knowledge upon which a judge is bound to act without having it proved in evidence: as the public statutes of the realm, the ancient history of the realm, the order and course of proceedings in Parliament, the privileges of the House of Commons, the existence of war with a foreign State, the several seals of the King, the Supreme Court and its jurisdiction, and many other things. A Judge is not bound to take cognizance of current events, however notorious, nor of the law of other countries."....

14. In **Fakharuddin Ahmad v. State of Uttaranchal (2008) 17 SCC 157,** the Supreme Court, considering the scope of expression

"cognizance" it was observed after referring the judgments of cases **Ajit Kumar Palit v. State of W.B.2, Emperor v. Sourindra Mohan Chuckerbutty3, Chief Enforcement Officer v. Videocon International Ltd.4** as under: (SCC p. 162- 63 para 16-17)

"16. From the aforenoted judicial pronouncements, it is clear that being an expression of indefinite import, it is neither practicable nor desirable to precisely define as to what is meant by "taking cognizance". Whether the Magistrate has or has not taken cognizance of the offence will depend upon the circumstances of the particular case, including the mode in which the case is sought to be instituted and the nature of the preliminary action.

17. Nevertheless, it is well settled that before the Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender."

15. In **Prasad Shrikant Purohit v. State of Maharashtra & Anr. (2015) 7 SCC 440,** the Supreme Court has observed as under: (SCC p. 480-81 para 68)

"68. Mr. Lalit, learned counsel in the course of his submissions relied upon Ajit Kumar Palit v. State of W.B.5. In the said decision with reference to the expression "cognizance" a three-Judge Bench of this Court has explained what is really meant by the said expression in the following words in para 19 (AIR p. 770)

"19. ...The word 'cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means become aware of and when used with reference to a court or Judge, to take notice of judicially. It was stated in Gopal Marwari v. Emperor6, by the learned Judges of the Patna High Court in a passage quoted with approval by this Court in R. R. Chari v. State of U. P.7 (SCR at P. 320: AIR at p. 210) that the word 'cognizance' was used in the Code to indicate the point when the Magistrate or Judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the same sense. As observed in Sourindra Mohan Chuckerbutty v. Emperor8 (ILR at p. 416 SCC online Cal)

"...taking cognizance does not involve any formal action, or indeed action of any kind; but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence.'

Where the statute prescribes the materials on which alone the judicial mind shall operate before any steps is taken, obviously the statutory requirement must be fulfilled."

In the above-extracted portion the reference made to the earlier judgment in R. R. Chari's case reported in R.R.Chari9 (AIR at p. 210, para 8) that the word 'cognizance' was used in the Code to indicate the point when the Magistrate or Judge takes judicial notice of an offence throws sufficient light to state that at that very moment when a Magistrate takes judicial notice of an offence, the requirement of cognizance of such offence will get fulfilled. Therefore, the said decision also fully supports our conclusion on the question of taking cognizance by the competent court."

16. Upon keeping in mind the position of law, it is settled that taking cognizance is a well-

known but undefined concept in criminal jurisprudence. The Code of Criminal Procedure does not define the word "cognizance". The dictionary meaning of the word "cognizance" is 'judicial hearing of a matter'. Taking cognizance of offence by Magistrate under the Criminal Procedure Code is laid down under Section 190 (1) of the Code. Under that provision a Magistrate may take cognizance of any offence in three different ways, namely, (i) upon receiving a complaint of facts which constitute such offence; (ii) upon a report in writing of such facts made by any police officer; and (iii) upon information received from any person other than a police officer or upon his own knowledge or suspicion, that such offence has been committed. The only restriction contained in Section 190 is that the power to take cognizance is subject to the provisions of this Chapter.

17. This Court in the case of **Megh Nath Gupta & Anr. v. State of U.P. & Anr., 2008 (62) ACC 826**, after referring the cases of **Deputy Chief Controller Import and Export v. Roshan Lal Agarwal10, UP Pollution Control Board v. Mohan Meakins11, Kanti Bhadra v. State of West Bengal12**, it has been observed that no speaking order is needed when a court merely takes cognizance or issue summons, although reasons may be required when a complaint is being dismissed and therefore, the attack to the order taking cognizance on the charge sheet passed by the CJM on 28.2.2005 on this ground must be summarily repulsed as devoid of any substance.

18. In the case of **Ankit Vs. State of U.P. and another,** 13, this Court has observed in para no. 9 that paper No. 31 is the certified copy of the impugned order, which has been initiated by Sri Talevar Singh, the then judicial magistrate-III, Saharanpur. This order has been prepared by filling up the blank on the printed proforma. The blanks in the printed proforma appear to have been filled up by some employee of the Court and the learned magistrate has only put his short signature (initial) above the seal of the Court containing his name. All the details of the case including the name, section, P.S., district, case number and address of the applicant have been filled up by some employee of the Court on the printed proforma. Therefore, this type of the order shows non-application of judicial mind on the part of the learned magistrate passing the same.

19. Similar view has been taken in **Jagdish Ram v. State of Rajasthan & Anr.14, The State of Gujarat v. Afroz Mohammed Hasanfatta, AIR 2019 SC 2499.** In **Afroz Mohd.** (supra) the Supreme Court further observed that in a case based upon the police report, the Magistrate is not required to record any reason at the stage of issuing the summons to the accused. In case, if the charge-sheet is barred by law or where there is lack of jurisdiction or when the charge-sheet is rejected or not taken on file, then the Magistrate is required to record his reason for rejection of the charge-sheet and for not taking on the file.

20. In the case of **Saurabh Dewana v. State of U.P., 2010 (2) JIC 3 (All)**, this Court has held that the cognizance on the printed proforma is not a legal cognizance.

21. In the case of **Abdul Rasheed & others v. State of U.P. & another, MANU/UP/3138/2010: 2010 (3) JIC 761 (All),** this Court observed that judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. This reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms. Therefore, this practice must be stopped forthwith.

22. This Court repeatedly directed that the conduct of the judicial officers concerned in passing

cognizance/summoning orders on printed proforma by filling up the blanks without an application of judicial mind is objectionable and deserves to be deprecated and set aside the said orders and matters are remanded back to the concerned court to take fresh cognizance. (Vide: **Andul Rasheed & Ors. v. State of U.P.15, Qavi Ahmad v. State of U.P. & Ors.16, Naval Dey Bharti v. State of U.P. & Ors.17, Dushyant Kumar v. State of U.P. & Ors.18, Ashu Rawat v. State of U.P. & Ors.19, Ram Kumar Singh & Ors. v. State of U.P. & Ors.20, Vishnu Kumar Gupta & Ors. v. State of U.P. & Ors.21, Ali Ashraf Quardri & Ors. v. State of U.P. & Ors.22, Anuj Gupta v. State of U.P. & Ors.23, Babu & Ors. v. State of U.P. & Ors.24, Rinki Rastogi & Ors. v. State of U.P. & Ors.25, Surendra Kumar and Ors. v. State of U.P. & Ors.26, Sunil Tyagi v. State of U.P. & Ors.27, Dharmraj & Ors. v. State of U.P. & Ors.28, Pankaj Jaiswal v. State of U.P. & Ors.29, Rubina Khan v. State of U.P. & Ors.30, Sanjay v. State of U.P. & Ors.31, Suresh Babu v. State of U.P. & Ors.32, Abhay Pratap Singh v. State of U.P. & Ors.33, Israil and Ors. v. State of U.P. & Ors.34, Saleem v. State of U.P. & Ors.35, Phoolwanti Devi & Ors. v. State of U.P. & Ors.36, Sunil Kumar Singh v. State of U.P. and Ors.37, Pramod Kumar & Ors. v. State of U.P. & Ors.38)**

23. It is a position of law that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must take notice of the accusations and apply his mind to the allegations made in the police report. However, a Magistrate is not required to pass a detailed reasoned order at the time of taking cognizance on the charge sheet. But it does not mean that an order of taking cognizance can be passed just by filling up the blanks on a printed proforma. A judicial order cannot be allowed to be passed in a such manner.

24. After considering the facts and keeping in mind the position of law, which have been discussed above, I am satisfied that there is no indication on the application of mind by the learned Magistrate in taking cognizance. The Magistrate passed the impugned order dated 18.9.2019 in a mechanical manner on a printed proforma without applying the judicial mind. Therefore, the impugned order is liable to be set aside. The matter is remitted to the Chief Judicial Magistrate to pass fresh cognizance order in accordance with law after applying judicial mind within two weeks after the production of the certified copy of the judgment.

25. Before parting with the judgment, I am of the view that considering the nature of the issue which arose in the instant case, it would be just and appropriate to direct all the District Judges, and Chief Judicial Magistrates/Chief Metropolitan Magistrates to ensure that the Judicial Magistrates/Judge shall not pass the cognizance order on printed proforma while taking cognizance under Section 190 of the Code.

26. A copy of the instant judgment shall be transmitted by the Registry of this Court to all the District Judges within one week for circulation to all the judicial officers. The office is further directed to enter the judgment in compliance Register maintained for the purpose of the Court.

27. With the aforesaid observations, the present application U/S 482, Cr.P.C. stands **disposed off.**

(2021)12ILR A333
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.10.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 8935 of 2021

M/s PepsiCo India Holdings Pvt. Ltd.
...Petitioner
Versus
Employees Provident Fund Appellate Tribunal/CGIT & Ors. ...Respondents

Counsel for the Petitioner:

Sri Sunil Kumar Tripathi, Sri Devesh Tripathi, Sri Sandeep Pandey

Counsel for the Respondents:
C.S.C., Sri Sachindra Upadhyay, Sri Udit Chandra

A. Civil Law – Employees' Provident Funds and Miscellaneous Provisions Act, 1952 – Sections 7-I & 7-O – Filing of Appeal – Pre-condition of depositing the amount – Waiver – Cryptic and non-speaking order – Validity challenged – Held, appellate authority was under an obligation of law to apply its mind to the grounds raised by the petitioner and pass a reasoned order while determining the waiver / reduction of the pre-deposit amount as contemplated under Section 7-O of the Act of 1952 – High Court set aside appellate order declaring it cryptic and non-speaking order and vitiated by non application of mind. (Para 14, 16 and 17)

Writ petition allowed. (E-1)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Shri Sunil Tripathi, learned counsel for the petitioner and Shri Udit Chandra, learned counsel for the respondents.

2. The petitioner is aggrieved by the order dated 11.01.2021 passed by the appellate authority/Employees Provident Fund Appellate Tribunal/CGIT, Shram Bhawan, ATI Campus, Udyog Nagar, Kanpur under Section 7-I of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, admitting the appeal of the petitioner subject to deposit of 50% of the dues.

3. Shri Sunil Tripathi, learned counsel for the petitioner assailing the order dated 11.01.2021 contends that the petitioner is not liable to deposit any amount on filing of the appeal for two reasons. Firstly only conditional liability was fixed by the assessing authority /Assistant Provident Fund Commissioner, Employees Provident Fund Organization, Varanasi. Secondly, the petitioner is not the principal employer. Thirdly, the order dated 11.01.2021 passed by the appellate authority is devoid of reasons.

4. Shri Udit Chandra, learned counsel for the respondents could not dispute the fact that the order 11.01.2021 passed by the appellate authority/Employees Provident Fund Appellate Tribunal, Kanpur is not supported by any reasons. He submits that the petitioner is liable to make the pre-deposit amount in terms of Section 7-I of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

5. Heard learned counsel for the parties.

6. The assessing authority /Assistant Provident Fund Commissioner, Employees Provident Fund Organization, Varanasi, by the order dated 15.01.2020 rendered in proceedings taken out under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 has found non payment of provident fund dues to the eligible employees. The assessing authority /Assistant Provident Fund Commissioner, Employees Provident Fund Organization, Varanasi in the order dated 15.01.2020 found as follows:

"25. Now, therefore, I, Shahid Iqbal, Assistant Provident Fund Commissioner in exercise of powers conferred on me under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, having regard to the facts of the case and considering the submissions made before me/evidence on record produced before me, hereby decide that the Establishment, M/s Nishtha Enterprises (together with M/s Nishtha Agency), Varanasi has failed to deposit Provident Fund dues in respect of its eligible employees amounting to Rs.7,84,194/- (Rs. Seven Lakhs Eighty Four Thousand One Hundred and Ninety Four only) for the period October, 2011 to December, 2015. The details of dues is delineated as under:

Period 10/2011 to 12/2015	Total Wages	A/c I	A/c II	A/c X	A/c XXI	A/c XXIII	Total
Total Dues	3094782	4849452	484952	257795	14525	309	784194
Total Paid	NIL	NIL	NIL	NIL	NIL	NIL	NIL
Outstanding Dues	3094782	4849452	26612	257795	14525	309	784194

26. I further order that the above amount of Rs.7,84,194/- (Rs. Seven Lakhs Eighty Four thousand one hundred and ninety four only) assessed u/s 7A of the Act shall be paid by the Establishment within 15 days of the receipt of this order, failing which steps shall be taken to recover the same in the manner as provided u/s 8B to 8G of the said Act. As Establishment has fulfilled the criterion for coverage under the Act and has already been issued a Code Number for compliance, the Establishment shall be liable to pay the aforesaid assessed dues. In case the Establishment fails to do so, the Principal Employer shall be liable to pay the aforesaid assessed dues."

7. Relevant provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'Act') read with the Tribunal (Procedure) Rules, 1997 (hereinafter referred to as the 'Rules'), which govern and regulate the filing and processing of appeals, are extracted hereunder:

"**Section 2(e) of the Act of 1952** "employer" means-

(I) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under clause (f) of sub-section (1) of section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent."

"**Section 7-I of the Act of 1952. Appeals to Tribunal.-** (1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or sub-section (4) of section 1, or section 3, or sub-section (1) of section 7A, or section 7B [except an order rejecting an application for review referred to in sub-section (5) thereof], or section 7C, or section 14B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed."

"**Section 7-O of the Act of 1952. Deposit of amount due, on filing appeal.-** No appeal by the employer shall be entertained by a Tribunal unless he has deposited with it seventy-five per cent of the amount due from him as determined by an officer referred to in section 7A:

Provided that the Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section."

"**Rule 7 of the Rules of 1997. Fee, time for filing appeal, deposit of amount due on filing appeal.-** (1) Every appeal filed with the Registrar shall be accompanied by a fee of two thousand rupees to be remitted in the form of crossed demand draft on a nationalised bank in favour of the Registrar of the Tribunal and payable at the main branch of that Bank at the station where the seat of the said Tribunal is situated."

(2) Any person aggrieved by a notification issued by the Central Government or an order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification/order, prefer an appeal to the Tribunal:

Provided that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days :

Provided further that no appeal by the employer shall be entertained by a Tribunal unless he has [deposited with the Tribunal a Demand Draft payable in the Fund and bearing] 75 per cent of the amount due from him as determined under Section 7-A :

Provided also that the Tribunal may for reasons to be recorded in writing, waive or reduce the amount to be deposited under Section 7-O."

8. The Employees' Provident Funds Scheme, 1952 also has a bearing on the controversy, inasmuch as, it contemplates responsibility of the principal employer to pay the employer's contribution and also on behalf of the employees employed by or through a contractor. The provision is extracted hereunder:

"**Para 30 of the Scheme of 1952. Payment of contribution.-(1)** The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).

(2) In respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employee (in this Scheme referred to as the member's contribution) and shall pay to the principal employer the amount of member's contribution so deducted together with an equal amount of contribution (in this Scheme referred to as the employer's contribution) and also administrative charges.

(3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges.

[Explanation-For the purposes of this paragraph the expression administrative charges" means such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concession admissible thereon) for the time being payable to the employees other than an excluded employee, and in respect of which provident fund contributions are payable, as the Central Government may, in consultation with the Central Board and having regard to the resources, of the fund for meeting its normal administrative expenses, fix.]"

9. The provision for pre-deposit amount is a mandatory pre-requisite for entertaining the appeal. However, the appellate authority/Employees Provident Fund Appellate Tribunal/CGIT, Nagar, Kanpur has been vested with powers under Section 7-O of the Act of 1952 read with Rule 7 of the Rules of 1997 to waive or reduce the amount.

10. In the impugned order dated 11.01.2021, the appellate authority/Employees Provident Fund Appellate Tribunal/CGIT, Nagar, Kanpur admitted the appeal subject to deposit of 50% of the dues.

11. The provisions of Section 7-O of the Act of 1952 read with Rule 7 of the Rules of 1997 shall apply whenever an appeal is preferred by the employer. In fact as seen earlier the pre-

deposit amount is a necessary pre-condition for entertaining the appeal.

12. The nature of directions issued upon an appellant by the assessing authority/Assistant Provident Fund Commissioner, Employees Provident Fund Organization, Varanasi in the first instance does not exclude the employer / appellant from the embrace of Section 7-O of the Act of 1952 requiring pre-deposit while filing the appeal.

The assessing authority has found that the petitioner is a principal employer. The said finding is in issue before the appellate authority/Employees Provident Fund Appellate Tribunal, Kanpur and the petitioner has raised a ground to that effect in the appeal. The defence of an employer/appellant in appeal does not cease the applicability of the statutory requirement of making the pre-deposit while filing the appeal.

13. Needless to add, the appellant may raise such grounds while making an application for reduction or waiver of the pre-deposit amount. Such application shall be considered on merits. There is one clarification. A full waiver granted by the appellate authority in the facts of a case merely reduces the pre-deposit amount to zero but the appellant remains within the ambit of Section 7-O of the Act of 1952. The first two submissions of behalf of the petitioner are decided in above terms.

14. There is merit in the third submission of Shri Sunil Tripathi, learned counsel for the petitioner that the order passed by the appellate authority is a cryptic one and is non speaking. The petitioner had submitted an application containing grounds for waiving the pre-deposit amount.

15. Under the proviso to Section 7-O of the Act of 1952, the Tribunal may waive or reduce the pre-deposit amount for reasons to be recorded in writing.

16. The appellate authority/Employees Provident Fund Appellate Tribunal/CGIT, Nagar, Kanpur was under an obligation of law to apply its mind to the grounds raised by the petitioner and pass a reasoned order while determining the waiver / reduction of the pre-deposit amount as contemplated under Section 7-O of the Act of 1952.

17. A perusal of the order dated 11.01.2021 passed by the appellate authority/Employees Provident Fund Appellate Tribunal/CGIT, Nagar, Kanpur shows that the appellate authority neglected to consider the grounds raised for waiver of the pre-deposit amount and failed to return any finding thereon. The order of the appellate authority is bereft of reasons. The order dated 11.01.2021 passed by the appellate authority is vitiated by non application of mind.

18. In the wake of preceding discussion, this Court finds that while passing the order dated 11.01.2021, the appellate authority has failed to discharge its obligations under Section 7-O of the Act of 1952. The order dated 11.01.2021 passed by the appellate authority/Employees Provident Fund Appellate Tribunal/CGIT, Nagar, Kanpur is liable to be set aside and is set aside.

19. The matter is remitted to the appellate authority/Employees Provident Fund Appellate Tribunal/CGIT, Nagar, Kanpur with the following directions:

I. The appellate authority/Employees Provident Fund Appellate Tribunal/CGIT, Nagar, Kanpur, shall decide the application for waiver of pre-deposit amount made by the petitioner upon independent application of mind and consistent with the observations made in this judgement and as per law.

II. The exercise shall be completed within a period of two months from the date of

receipt of copy of this order downloaded from the official website of the High Court of Judicature at Allahabad along with fresh copy of representation. 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.

III. The petitioner shall be given an opportunity of hearing before any order is passed on the application for waiver made by the petitioner.

20. The writ petition is allowed to the extent indicated above.

(2021)12ILR A338
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2019

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ C No. 68553 of 2015

Ram Nath @ Ram Nath Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shiv Shankar Pd Gupta, Sri Sunil Kumar Dubey

Counsel for the Respondents:
C.S.C., Sri Bal Mukund Singh, Sri Sunil Kumar Chaudhari, Sri Anil Bhushan

A. Civil Law – Fair price shop – Cancellation – GO dated 17.08.2002 – Condition no. 10-Gha – License obtained by the petitioner concealing the criminal case pending against him – Effect – Held, the petitioner having not disclosed the pendency of the criminal case in which he was already facing charge sheet, the petitioner conveniently and deliberately concealed this fact and this conduct of his amounts to a fraud – The petitioner would not be entitled to any benefit coming out of the same. His fair price shop license has rightly been cancelled. (Para 17 and 18)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Smt. Raj Kumari Singh Vs St. of U.P. & ors.; 2011 (3) ALJ 140

2. Misc. Single No. 8033 of 2013; Bajrangi Tiwari Vs St. of U.P. & ors. decided on 05.03.2018

3. Shrishti Dhawan Vs Shaw Bros; (1992) 1 SCC 534 : AIR 1992 SC 1555

4. Meghmala Vs G. Narasimha Reddy; (2010) 8 SCC 383

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

1. Heard learned counsels for the parties.

2. By means of present writ petition, the petitioner has challenged the order dated 11.08.2014, whereby, the allotment of fair price shop of the petitioner has been cancelled as well as the order dated 27.11.2015 passed by the appellate rejecting the appeal.

3. Briefly stated facts of the case are that the petitioner is a resident of village Gaura, Block Meh Nagar, District Azamgarh applied for grant of fair price shop pursuant to the advertisement issued on 10.08.2013. The condition as contained in the advertisement regarding the eligibility issued by the Sub-Divisional Magistrate in the advertisement dated 10.08.2013 were five in nature; (i) a candidate must have the available money of Rs. 40,000/- so that pursuant to the allotment he could lift the commodities; (ii) must be of general good reputation; (iii) must be educated enough to maintain the daily business transactions; (iv) must be of 21 years of age and there must not be any other shop allotted to any other member of his family; and (v) must be permanent resident of the village.

4. Pursuant to the above advertisement, the petitioner applied and was one amongst the 18 applicants; the petitioner was selected and was allotted fair price shop with an agreement entered between the State authorities and the petitioner under the order dated 27.10.2013 passed by the Sub-Divisional Magistrate. It appears that one Vinay Kumar Singh along with 4th respondent filed a writ petition before this Court bearing Writ - C No. 62185 of 2013 questioning the allotment of the fair price shop to the petitioner inter alia on the ground that there was a criminal case registered against the petitioner as Case Crime No. 748 of 2007, under Sections 147, 148, 149, 341, 353, 204, 504, 506, 188 IPC and section 7 of the Criminal Law Amendment Act at P.S. Meh Nagar, Azamgarh and which fact according to those petitioners present petitioner who was 8th respondent in the said case had conveniently concealed. According to those complainants as per the Government Order dated 17.08.2002 which provided for eligibility criterian had provided that a candidate should not have a criminal case registered against him and / or should not be a convicted person in any criminal case. The Division Bench took notice of the argument of the counsels for the parties, particularly the argument advanced by the counsel of the present petitioner who was 8th respondent in the said case, that there were many men in the name of Ram Nath in the village and therefore, it could not be said that the case had been registered against him or that he was involved in the said criminal case. The writ petition was finally disposed of vide order dated 06.05.2014 directing the Sub-Divisional Magistrate, Meh Nagar, Azamgarh to decide the disputed question of facts regarding registration of FIR and as to whether the documents were duly filed by 8th respondent in the said case, for the purposes of allotment and were available on record on the date of selection or not and it was further provided that the Sub-Divisional Magistrate shall afford proper opportunity of hearing to the parties. The relevant portion of the judgment/ order of this Court dated 06.05.2018 is reproduced hereunder:

"The submission of Sri Anil Bhushan against the impugned order is mainly on two grounds. He states that the last date for filing the relevant documents under the advertisement issued in Rashtriya Sahara newspaper was 16.08.2013, however, while referring to the list prepared by the Committee appointed for such consideration filed as Annexure-4 to the writ petition dated 16.08.2013 clearly indicates that the Respondent No.8, Ram Nath Yadav had not filed his income certificate, caste certificate, domicile certificate, character certificate and earnest money. He states that in the absence of the necessary requirement as contemplated under the advertisement the shop could not have been allotted to the Respondent No.8, Ram Nath Yadav.

The second submission is that Ram Nath Yadav is facing a criminal charges and therefore in light of the Government Order dated 17.08.2002 filed as Annexure No.8 to the writ petition, the Respondent No.8 against whom criminal proceedings are pending was not eligible. He submits that neither of these two conditions were considered by the Committee appointed for second fair price shop in the village and hence the impugned order is not in accordance with law.

Sri Ashish Agrawal, learned counsel for the Respondent No.8 has disputed the submission and submits that the time of submitting the relevant certificates was extended inasmuch as the same facility was extended to the petitioner himself and therefore the petitioner cannot now assail the impugned order on that ground. Insofar as the criminal proceedings against the Respondent No.8 are concerned Sri Ashish Agrawal denies the same on the ground that in the F.I.R. the name of Ram Nath is there and there are several persons by the name of Ram Nath in the village and

therefore it is not the Respondent No.8, Ram Nath Yadav son of Udai Yadav who is the person mentioned in the F.I.R.

We have considered the submission of learned counsel for the parties and perused the record. Highly disputed question of fact has been raised in the writ petition by the petitioner as also the contesting-Respondent No.8. Whether the time for filing the documents before the Committee were extended after 16.08.2013 is a fact which can be determined only from a perusal of the record of the proceedings which are not available before us in this writ petition.

Secondly, whether the Respondent No.8, Ram Nath Yadav is the person mentioned in the said F.I.R. so as to be disqualified under the Government Order is also a question of consideration after sufficient evidence has been brought before the Authority and considered by it. Such evidence being not available on the record we cannot adjudicate such highly disputed question of fact. Therefore, this writ petition is finally disposed of by providing that the petitioner as also the Respondent No.8, Ram Nath Yadav may approach the Sub Divisional Magistrate, Mehnagar raising their respective grievance against the impugned order dated 22.10.2013 within a period of four weeks from today alongwith a certified copy of this order and in case the same is done the Respondent No.5, Sub Divisional Magistrate, Mehnagar, District Azamgarh should afford opportunity of hearing to the petitioner as also the Respondents No.8 & 9 and having done so decide the said objections in accordance with law within one month thereafter.The impugned order will be subject to such decision taken by the Sub Divisional Magistrate, Mehnagar, District Azamgarh.

It is made clear that we have not expressed our opinion on the merits of the submission made by learned counsel for the parties against the impugned order dated 22.10.2013 and that has to be considered by the Sub Divisional Magistrate, Mehnagar, District Azamgarh in accordance with law.

The writ petition is accordingly disposed of.

No order is passed as to costs."

(Emphasis added)

5. The Sub-Divisional Magistrate, in compliance of the order of this Court, directed the petitioner to file his objection to the complaint made along with order of the High Court dated 15.05.2014 (annexure No. 7 to the writ petition), the petitioner submitted reply on 11.06.2014. The Sub Divisional Magistrate ultimately after perusal of the record and the objections, found that the petitioner had in fact concealed the material fact regarding registration of criminal case and, therefore, he violated condition no. 10-Gha of the Government Order dated 17.08.2002 and so the fair price shop license was cancelled vide order dated 11.08.2014. The petitioner preferred appeal, which met the same facts.

6. The argument of learned counsel for the petitioner is two fold: (a) the petitioner did not conceal any material fact because the information that he was required to furnish pursuant to the advertisement dated 10.08.2013, had been duly furnished by him and nothing had come in the impugned order that he did not furnish opinion as per the advertisement; and (b) that the fair price shop license of the petitioner could not be cancelled merely because of registration of criminal case in the light of the judgment of the Division Bench of this Court in the case of **Smt. Raj Kumari Singh v. State of U.P. and others 2011 (3) ALJ 140**; has placed heavy reliance to paras 5 and 8 of the said judgment and also the Full Bench judgment of this Court in **Misc. Single No. 8033 of 2013, Bajrangi Tiwari v. State of U.P. and others** (decided on 05.03.2018), wherein it has been held that fair price shop of a licensee could not be cancelled resorting to the procedure

prescribed under the Government Order of the year 2002 as the subsequent Government Order has come on 29.07.2014 and any action should be taken under the said Government Order only.

7. The Full Bench decision according to learned counsel for the petitioner reiterates on both the questions referred before the said Full Bench whether lodging of criminal case would result in cancellation of fair price shop license and also whether the fair price shop license could have been cancelled in the light of para 10 of the Government Order dated 07.08.2002 and the Full Bench have negatived both the questions referred. Thus, the argument is that the fair price shop license of the petitioner has been wholly illegally cancelled for utter disregard of the rules and the authorities have acted in clear error of law in the light of Division Bench and Full Bench judgments of this Court (supra).

8. *Per contra*, learned counsel for the respondents is that the factually the position in the present case is different because it is a case where license has been obtained by concealing material facts and therefore, the judgments cited would not be applicable in the present case. He has further argued that the fraud vitiates every solemn proceedings and no right can flow from fraud. While advancing the argument on the said premise, learned counsel for the respondents reiterates that for the purposes of allotment of fair price shop license, it is the rule that will govern the procedure and not the advertisement. He submits that advertisement lays down only five conditions but ultimately the authority while evaluating an application has to examine as to whether the application is in line with the rules or not. He argues that no one can be permitted to take the plea of ignorance of law. He further argues that before the Division Bench the argument was advanced that there were many men in the name of Ram Nath and petitioner would not be the one named in the first information report, whereas, on the date of argument being advanced on behalf of the petitioner before the Division Bench i.e. 06.05.2014, the charge sheet had already been submitted in the said criminal case and the petitioner was very much aware of the said fact. Therefore, according to him it was a case of deliberate attempt to mislead the court as well. According to him, over all conduct of the petitioner in the present case has been of hide and seek and the plea of innocence deserves to be rejected.

9. Having heard learned counsels for the parties and having perused the records, I find that the basic question that arises for consideration is whether a fair price shop license could have been granted to the petitioner while he submitted the application concealing the fact that there was a criminal case registered against him. The Government Order of the year 2002 lays down the selection procedure and in the said Government Order, one of the conditions vide Clause 10-D(Gha) is that there should not be any criminal case registered and/ or one should not be convicted. The relevant condition 10 of the Government Order is reproduced hereunder:

"10. ग्राणीण क्षेत्र में राशन की दुकानों का चयन निम्नलिखित अनिवार्य अर्हताओं एवं शर्तो को दृष्टिगत रखते हुए किया जायेगाः-

(क) अभ्यर्थी के खाते में कम से कम 40 हजार रूपया उपलब्ध हो ताकि वह अपनी दुकान को आवंटित एक माह की सामग्री का एक बार में उठान करने के लिए आर्थिक रूप से सक्षम हो।

(ख) सामान्य ख्याति अच्छी हो।

(ग) शिक्षित हो ताकि वह दुकान का हिसाब किताब सही रूप से रख सकें।

(घ) अभ्यर्थी के विरूद्ध कोई आपराधिक मामले पंजीकृत न हो और न ही वह किसी आपराधिक मामले में दण्डित किया गया हो।

(ड़) अभ्यर्थी की आयु 21 वर्ष से अधिक हो और परिवार में किसी अन्य सदस्य के नाम कोई दुकान आवंटित न हो।

(च) दुकानदार स्थानीय निवासी हो।

(छ) अभ्यर्थी द्वारा 1000/- रूपये की अर्नेसट मनी का बैक ड्राफ्ट जिलापूर्ति अधिकारी के पक्ष में जमा किया जायेगा। उपरोक्त अर्नेस्ट मनी दुकानों के आवंटन की स्थिति में प्रतिभूति राशि में समायोजित कर ली जायेगी।

(ज) दुकानों की नियुक्त की स्थिति में अभ्यर्थी को 5000/- रूपये की प्रतिभूति जमा करनी होगी तथा 100/- रूपये का नानजूडिशियल स्टाम्प पेपर लगाना होगा। यह प्रतिभूति केवल नये नियुक्ति होने वाले दुकान के अभ्यर्थियो से ली जायेगी। जिनकी दुकान पूर्व से ही नियुक्त है और संचालित है उनसे नये दर पर प्रतिभूति नहीं जमा करवायी जायेगी।

(झ) यदि दुकानदार अच्छी ख्याती का हो तो उसकी मृत्यु के उपरान्त दुकान का आवंटन उसके आश्रित को करने पर विचार किया जा सकता है। आश्रित का तात्पर्य पत्नी, पुत्र तथा अविवाहित पुत्र से है।"

10. The petitioner in the writ petition does not dispute that the charge sheet in the said criminal case in which he was named, was submitted as far after back as on 11.02.2008 i.e. almost more than 5 years before the advertisement and the fact also that the summoning order was issued against him on 02.04.2008. Petitioner has brought on record the order dated 30.03.2017 by means of supplementary affidavit passed by the Additional Chief Judicial Magistrate, Court No. 12, Azamgarh by which in the said criminal case against all the accused persons including the petitioner, have been acquitted.

11. Thus, the registration of the criminal case was well within the knowledge of the petitioner on the date of advertisement and now he cannot take the plea that he was not aware of the said criminal case. Even in the reply to the complaint made in pursuance to the order of this Court in Writ - C No. 62185 of 2013, the petitioner has nowhere stated that he was not aware about the criminal case at the time he had made an application for allotment of fair price shop. So the plea, therefore, taken even before the Division Bench on 06.05.2014 on his behalf was nothing but an attempt to mislead the Court on facts.

12. The question now is whether the Division Bench in the case of **Smt. Raj Kumari Singh (supra)** is attracted in the present case or not. In the said case, the factual position was different; the fair price shop dealer was already enjoying the license when the first information report came to be lodged under Section 3/7 of Essential Commodities Act on 01.09.2009 and it is on the basis of said FIR, the fair price shop license in the said case was cancelled. It is in that above factual background that the Court held that mere lodging of FIR would not result in an automatic conviction of the fair price shop dealer and therefore, it would not be justified in law to cancel the fair price shop license on that ground. Para 5 and 8 of the said judgment are quoted herein under:

"5. Nothing has been brought to our attention that the said judgment has been overruled. Even otherwise, we are of the opinion that the said conclusion cannot be faulted for the reason that mere filing of a F.I.R. cannot result in holding a fair price shop owner guilty of the offences charged. If there be a conviction, then it is possible to proceed, based on the conviction and not otherwise. In case if the F.I.R. is lodged, it is still open to the respondents to proceed by leading independent evidence and statements of the persons recorded.

8. Even otherwise we may point out that a reading of the order dated 10.8.2010 discloses total non application of mind. The said order purports to cancel the license merely on the ground of lodging of an F.I.R. and that suspension is going on for a long time thereby causing inconvenience in distribution of essential commodities to the card holders. The

said reasons cannot be justified in law to cancel the dealership."

13. From the bare perusal of the law discussed by their Lordships in the said case, it is nowhere held dealing with the aspect of the matter that whether a fair price shop license if obtained concealing the material fact of a pending criminal case would also not be liable to cancellation, and therefore, in the considered opinion of the Court, the legal position as has emerged in the said judgment is not attracted in the present case and the judgment is of no help to the petitioner.

14. Coming to the Full Bench judgment of this Court in the case of **Bajrangi Tiwari *(supra)*,** facts of the case are noticing that even in the said case while the Full Bench was seized with the two questions framed therein a fair price shop dealer was already enjoying the fair price shop license since long when on 03.05.2011 some villagers made a complaint with regard to irregularities in distribution of essential commodities from his fair price shop and on the said basis some inquiry was conducted and report was submitted on14.06.2011 and license was suspended. Ultimately, it was cancelled on the ground tht the petitioner was involved in some case in Case Crime No. 267 of 2011 under various sections of IPC including section 3(2)5 SC/ST Act and therefore, the question arose before the Full Bench whether in such circumstances where a person enjoying fair price shop license since long and FIR came to be registered subsequently in the year 2011, the Prescribed Authority was justified in cancelling the fair price shop license taking recourse to the provsiions of Section 10-D of the Government Order. The two questions framed by the Full Bench are reproduced hereunder:

"1. Whether the fair price shop licence can be cancelled merely on lodging of a criminal case against the licencee?; and

2. Whether, while passing any such order the Government Order dated 17.8.2002, particularly para - 10 of said Government Order would be applicable/ considered or not?"

15. The Full Bench discussed the law at length and considered the two Government Orders dated 17.08.2002 and 29.07.2014 and came to record that the procedure for cancellation of fair price shop license has to be followed only in the light of Government Order dated 29.07.2014 and not 17.08.2002.

16. Having gone through the judgment of Full Bench, I find that the proposition laid down by the Full Bench is absolutely correct and in tune with the provisions of two Government Orders. The first deals with the eligibility criterian and grant of license whereas, the second one deals with the procedure to be followed for cancellation of such license. The Full Bench answered both the questions in negative: once the fair price shop license has been given, the same cannot be cancelled taking recourse to the provisions of section 10-D that a criminal case is registered against the licensee; and that mere lodging of the criminal case would not result in automatic cancellation. The wide proposition of law as has been discussed and laid down by the Full Bench of this Court only leads to one conclusion that in case if the fair price shop license is already being enjoyed by a licensee, such a license should be cancelled only by resorting the procedure prescribed under the Government Order of 2014, but here the question is different. The Full Bench has not held that the Government Order dated 17.08.2002 was bad or was absolutely inapplicable. The two Government Orders deal with different situation: one is for the purposes of eligibility criterian and allotment; and the other is for cancellation. Here I am dealing with the case where allotment has been obtained by concealing the material fact as one of the conditions under the Government Order for the purposes of allotment was that one should not have criminal case registered against him. The

word 'and' should be read as 'or' appearing under Section 10-D of the Government Order and therefore, the condition is that if a crimianl case is registered against a person, he would be disqualified and/ or a person if convicted in a criminal case, the said person would also be equally disqualified.

17. Here is a case where concealment or non disclosure for that matter of the criminal case against the petitioner has been made in his application. The advertisement would abide by the ultimate rules that are framed and the Full Bench having not held that for the puproses of allotment the procedure under the Government Order of 2002 would not be followed, I am of the considered opinion that the Government Order in the present case is fully attracted. The petitioner having not disclosed the pendency of the criminal case in which he was already facing charge sheet, the petitioner conveniently and deliberately concealed this fact and this conduct of his amounts to a fraud and therefore, in view of the Apex Court judgment in the case of **Shrishti Dhawan v. Shaw Bros. (1992) 1 SCC 534 : AIR 1992 SC 1555**, wherein it has been held that fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It has been defined as an act of trickery or deceit, every order obtained by fraud or benefit taken under fraud cannot confer any right or create any decision. However, in the case of **Meghmala v. G. Narasimha Reddy (2010) 8 SCC 383** the Apex Court, in paragraph nos. 32 to 36 has observed thus:

"32. The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (See District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram & Anr. Vs. M. Tripura Sundari Devi (1990) 3 SCC 655; Union of India & Ors. Vs. M. Bhaskaran (1995) Suppl. 4 SCC 100; Vice Chairman, Kendriya Vidyalaya Sangathan & Anr. Vs. Girdharilal Yadav (2004) 6 SCC 325; State of Maharashtra v. Ravi Prakash Babulalsing Parmar (2007) 1 SCC 80; Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company AIR 2007 SC 2798; and Mohammed Ibrahim & Ors. Vs. State of Bihar & Anr. (2009) 8 SCC 751).

33. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. (Vide Dr. Vimla Vs. Delhi Administration AIR 1963 SC 1572; Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd. (1996) 5 SCC 550; State of Andhra Pradesh Vs. T. Suryachandra Rao AIR 2005 SC 3110; K.D. Sharma Vs. Steel Authority of India Ltd. & Ors. (2008) 12 SCC 481; and Regional Manager, Central Bank of India Vs. Madhulika Guruprasad Dahir & Ors. (2008) 13 SCC 170).

34. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide S.P. Changalvaraya Naidu (supra); Gowrishankar & Anr. Vs. Joshi Amba Shankar

Family Trust & Ors. AIR 1996 SC 2202; Ram Chandra Singh Vs. Savitri Devi & Ors. (2003) 8 SCC 319; Roshan Deen Vs. Preeti Lal AIR 2002 SC 33; Ram Preeti Yadav Vs. U.P. Board of High School & Intermediate Education AIR 2003 SC 4628; and Ashok Leyland Ltd. Vs. State of Tamil Nadu & Anr. AIR 2004 SC 2836).

35. In kinch Vs. Walcott (1929) AC 482:1929 AII ER Rep 720 (PC) it has been held that

"....mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained y perjury."

Thus, detection/discovery of constructive fraud at a much belated stage may not be sufficient to set aside the judgment procured by perjury.

36. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est."

18. Thus, in view of the above legal position and the factual position emerging in the present case, the petitioner having obtained the fair price shop license by concealing material fact, has virtually played fraud and would not be entitled to any benefit coming out of the same. The petitioner's fair price shop license has rightly been cancelled. The plea of the petitioner that he was ignorant of rules would not be acceptable as the legal position, as has rightly been argued by learned counsel for the resopndent, is that nobody can take the plea of ignorance of law or the rules.

19. The further plea of the petitioner that a case was registered by the State and the State found it to be not appropriate and had proceeded to lift the same, would not change the situation either. The fact remains that the petitioner had obtained the license of the fair price shop and on the said date the charge sheet was pending against him and it would be sufficient enough to hold that the fair price shop license had been obtained by such means which would not have the approval of law.

20. However, this Court at the same time holds that since the crimianl case against the petitioner has been lifted by the State prosecution and the Chief Judicial Magistrate has discharged him under its order dated 12.03.2017 in criminal case arising out of case crime no. 748 of 2007, it is hereby provided that in future the said crimianl case will not come in the way of petitioner in applying for fair price shop license, if any advertisement is issued and the applications are invited.

21. Subject to the aforesaid observations, the writ petition fails and is accordingly **dismissed.**

(2021)12ILR A345
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2021

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Arbitration & Concill. Appl. U/S 11(4) No. 92 of 2021

M/s P.N. Garg, Engg. & Contractors, Jhansi & Anr. ...Applicants

Versus

Chief Engineer, Bhopal Zone, Sultania Infantry Lines, Bhopal & Ors. ...Opp. Parties.

Counsel for the Applicants:
Ms. Aarushi Khare

Counsel for the Opp. Parties:
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(A) Civil Law - The Arbitration and Conciliation Act, 1961 - Sections 11,14,15, 32 & 34 - Appointment of an independent Arbitrator - Contract - Award - power under Section 34 (4) of the Act can be exercised so long the arbitral award is not set aside - No power has been invested in the Court to remand the matter to the arbitral tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section (4) of Section 34 of the Act - consequent to disposal of the main proceedings under Section 34 of the Act by the Court, it would become functus officio - power to modify, vary or remit the award does not exist under Section 34 of the Act.(Para -12,13)

Parties entered into a contract - dispute under clause 70 of general conditions - provides for arbitration - final award - challenged before District Judge - application under Section 34 of the Act - setting aside award - Court allowed application - set aside the award - remitted matter back to Arbitrator - to reconsider all issues raised before the Court - to pass afresh award.(Para -3,4)

HELD:-Order passed by the Court on 16.09.2019 under Section 34 of the Act remitting the matter back to the Arbitrator to reconsider all the issues would be beyond the statutory mandate conferred on the Court and is thus without jurisdiction. No failure on part of the opposite parties to act or discharge a function which would entitle the applicants to invoke the powers conferred by sub-sections (4), (5) and (6) of Section 11 of the Act, and which would render the present application maintainable. (Para - 14,21)

Application dismissed. (E-7)

List of Cases cited:-

1. McDermott International Inc. Vs Burn Standard Company Ltd. & ors.,(2006) 11 SCC 181

2. Kinnari Mullick & anr. Vs Ghanshyam Das Damani, (2018) 11 SCC 328

3. Project Director, National Highways Vs M. Hakeem & anr., 2021 SCC Online SC 473

4. Puri Construction P. Ltd. Vs Larsen & Tubro Ltd., 2015 SCC Online Del. 9126

5. S.K. & Associates Vs IFFCO & ors., (2019) SCC Online All 5390

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

1. Heard Ms. Aarushi Khare, learned counsel for the applicants and perused the record.

2. This application has been filed praying for appointment of an independent Arbitrator under Section 11 of the Arbitration and Conciliation Act, 19961. The opposite parties are as follows:- (I) Chief Engineer, Bhopal Zone, Sultania Infantry Lines, Bhopal-462001, (II) Engineer-in-Chief, Branch Army Head Quarter, New Delhi, (III) Commander Works Engineer, Military Engineer Services, Jhansi, and, (IV) Garrison Engineer, Military Engineer Services, Jhansi-284001, U.P.

3. The applicants and the opposite parties entered into a contract under a Contract Agreement No.CEJZ/JHA-05. Since a dispute arose between the parties, under clause 70 of the general conditions of the aforesaid agreement which provides for arbitration, the competent authority-opposite party no.2 appointed one Mr. Baljit Singh as the sole Arbitrator under the terms of the arbitration agreement, who made the final award on 25.02.2010.

4. The aforesaid award was challenged before the District Judge, Jhansi by means of an application under Section 34 of the Act (Arbitration Misc. Case No.20/2010) for setting aside the award. By an order dated 16.09.2019, the Court allowed the application, set aside the award dated 25.02.2010, and remitted the matter back to the Arbitrator to reconsider all the issues raised before the Court in light of the terms of the contract as well as the issue regarding extension of period for completion of work of IIIrd Phase and to pass the award afresh.

5. However, thereafter, the Arbitrator Mr. Baljit Singh resigned and withdrew from the aforesaid arbitration proceedings citing his ineligibility to continue as Arbitrator as he had retired, and only a serving officer could be an Arbitrator as per the agreement.

6. It is contended by the learned counsel for the applicants that despite repeated reminders to the opposite parties, no substitute Arbitrator is being appointed by them and, therefore, this application has been filed.

7. When the matter was listed on 23.09.2021, the learned counsel for the applicants sought adjournment to address the Court on the issue of maintainability of the application. Learned counsel has thus made her submissions on the issue of maintainability.

8. A query was made by the Court to the learned counsel for the applicants that whether the Court exercising jurisdiction under Section 34 of the Act, had power to remand the matter to the Arbitrator after setting aside the arbitral award dated 25.02.2010, and if not, whether the present application would be maintainable. The learned counsel for the applicants referred to Sections 14 and 15 of the Act, and contended that since the matter has been remanded, and since the Arbitrator withdrew from his office, his mandate stood terminated, and, therefore, under Section 15(2) of the Act, a substitute Arbitrator is required to be appointed. It is, therefore, contended that under the facts of the case, since the award has been set aside, an Arbitrator would anyway be required to be appointed and therefore, the present application would be maintainable. Learned counsel has referred to the judgement of the Supreme Court in **McDermott International Inc. v. Burn Standard Company Ltd. and others**2.

9. On perusal of the order passed by the court below on 16.09.2019 on the application filed by the applicants under Section 34 of the Act, it is evident that the award passed by the Arbitrator on 25.02.2010 was set aside and the matter was remitted back to the Arbitrator to reconsider all the issues raised before the court in light of the terms of the contract as well as the issue regarding extension of period for completion of work of Phase-III and to pass the award afresh. The relevant extract of the order of the Court below is quoted :-

"12. A perusal of Impugned award reveals that the Arbitrator has rejected the claim of applicant/firm for want of extension of period for completion of work for III phase, while the applicant/firm has vehemently submitted that extension of time was recommended by Chief Engineer, Jabalpur, who was the competent authority under the contract to extend the period for completion of any work, which itself amounts to extension of period. Admittedly, the applicant/firm has completed the work of III phase as per the agreement. The dispute is only with regard to extension of period for completion of work of III phase. When the applicant/firm has completed the work of III phase without any interruption from the side of opposite parties, though without extension of period as alleged by the opposite parties, but it would draw adverse presumption against the opposite parties that they were conceded to the request of applicant/firm for extension of period, otherwise they would have stopped the work of III phase.

The Arbitrator, while passing the impugned award, has not given a detailed finding on this fact; rather rejected the claim of the applicant/firm for want of extension of period for completion of work. Further, the Arbitrator has also not taken into consideration the terms of contract for deduction of sales tax @ 4% instead of 1% from the final bill. He also failed in consider the applicability of VAT, which was allegedly enforced after completion of work on 27.09.1993. The Arbitrator has

committed gross error of law in rejecting the claim of the applicant without considering these legal issues in the light of terms of contract. Hence, there appears some substance in the argument of learned counsel for the applicant/firm that matter requires reconsideration in the light of terms of contract.

Thus, in view of the above discussion, it is proved that award suffers from illegality and infirmity, as it has been passed without considering the points being raised by applicant/firm at the time of hearing before Arbitrator. Hence, the impugned award requires reconsideration in terms of the contract.

ORDER

Application 3B for setting aside the award dated 25.02.2010 is allowed with no order as to cost. The award dated 25.02.2010 is hereby set aside. The matter is remitted back to the Arbitrator to reconsider all the issues being raised before this Court in the light of terms of contract as well as the issue regarding extension of period for completion of work of III phase and to pass the award afresh, as early as possible. Let the record of Arbitrator, if any, be sent back along with a copy of this judgment forthwith."

10. Thus the Court below, while affirming that an award by the arbitrator cannot be modified, set aside the award, and proceeded to hold that the matter requires reconsideration in light of the terms of the contract, and remitted the case to the arbitrator.

11. A three Judge Bench of the Supreme Court in the case of **Kinnari Mullick and Another vs. Ghanshyam Das Damani**3 has held that no power has been invested by Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section (4) of Section 34 of the Act. It was further held that the limited discretion available to the Court under Section 34(4) of the Act can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. The relevant paragraphs of the judgment of **Kinnari Mullick and Another (supra)** are quoted below:-

"6. Being dissatisfied with the interim award dated 27-8-2010 and final award dated 18-6-2013 passed by the Arbitral Tribunal, the appellants filed an application under Section 34 of the Act, for setting aside of the said awards. The learned Single Judge was pleased to allow the said application on the finding that the impugned award did not disclose any reason in support thereof. The impugned award was accordingly set aside and the parties were left to pursue their remedies in accordance with law. The relevant portion of the decision of the learned Single Judge reads thus: (Kinnari case, SCC OnLine Cal para 9)

"9. Since the present award is completely lacking in reasons and is littered with the unacceptable expressions like "I feel that the claim is justified", "I find no basis" and the like which cannot be supplement for reasons that the statute demands, AP No. 1074 of 2013 is allowed by setting aside the award dated 18-6-2013. The parties are left free to pursue their remedies in accordance with law."

7. Against the aforementioned decision, the respondent preferred an appeal before the Division Bench of the High Court of Calcutta. The appellants also filed a cross-objection in respect of the adverse findings recorded by the learned Single Judge against them. The cross-objection bearing APO No. 223 of 2014 and APOT No. 318 of 2014 were heard and decided together by the Division Bench vide the impugned judgment dated 13-8-2014. The Division Bench affirmed the findings and conclusion recorded by the learned Single Judge that the award did not contain any reason whatsoever and thus rejected the appeal

preferred by the respondent, in the following words: (Ghanshyam Das case, SCC OnLine Cal)

"We have considered the rival contentions. Section 31 is clear that it would require the Tribunal to assign reason. The award would suffer from such lacunae. We would not be in a position to agree with Mr Sharma when he would contend, it was reasoned, but reasons might have been insufficient.

The learned Judge observed:

"The award does not indicate a line or sentence of reasons and notwithstanding the petitioners herein, having pulled out of the reference and not urging their counter-statement or any defence to the claim, it was still incumbent on the arbitrator to indicate the grounds on which the respondents were entitled to succeed.'

We fully endorse what his Lordship would say as quoted (supra). Hence, the appeal fails on such count."

(emphasis in original)

8. While considering the cross-objection filed by the appellants, the Division Bench negatived the ground urged before it about the inappropriate and illegal constitution of the Arbitral Tribunal. As a result, the cross-objection filed by the appellants was also rejected. Having decided as above, the Division Bench suo motu decided to relegate the parties before the Arbitral Tribunal by sending the award back with a direction to assign reasons in support of its award. It will be useful to reproduce the observations of the Division Bench in this regard. The same reads thus: (Ghanshyam Das case, SCC OnLine Cal)

"On the cross-objection we would, however, agree with Mr Sharma when he would draw our attention to Section 13. The learned Judge, in our view, rightly rejected the contention of the respondents. The challenge procedure as spelt out in Section 13 would refer to constitution of the Tribunal as well. Section 4 would clearly provide, if a party knowing his right does not take any step that would debar him to object at a later stage as if he shall be deemed to have waived his right to object.

... Section 34 would empower the Court to remit the award to the arbitrator, at a stage when the award was under challenge, to eliminate the ground for setting aside of the arbitral award. Applying such provision we send the award back to the arbitrator with a direction, he must assign reason to support his award. However, we wish to give the arbitrator a free hand. If he feels, further hearing to be given to the parties, he may do so and upon hearing, he may publish his award in accordance with law adhering to the norms and procedures laid down under the said 1996 Act without being influenced by the award that the learned Judge already set aside.

The appeal is dismissed without any order as to costs."

(emphasis supplied)

.....

13. We have heard the learned counsel for the parties. At the outset, we may note that if the plea taken by the appellants in relation to the concluding part of the impugned judgment--of sending the award back to the Arbitral Tribunal for recording reasons--was to be accepted, we may not be required to dilate on any other argument. Inasmuch as the learned Single Judge allowed the application under Section 34 of the Act for setting aside of the award preferred by the appellants; and the Division Bench has already affirmed the conclusion recorded by the learned Single Judge while dismissing the appeal preferred by the respondent. Thus, the award has been set aside on that count. The respondent has not challenged that part of the impugned judgment and has allowed it to become final.

14. In this backdrop, the question which arises is: whether the highlighted portion in the operative part of the impugned judgment of the Division Bench can be sustained in law? For that, we may advert to Section 34(4) of the

Act which is the repository of power invested in the Court. The same reads thus:

"34. (4) On receipt of an application under sub-section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award."

15. On a bare reading of this provision, it is amply clear that the Court can defer the hearing of the application filed under Section 34 for setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming the arbitral proceedings or to take such other action as in the opinion of the Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. The quintessence for exercising power under this provision is that the arbitral award has not been set aside. Further, the challenge to the said award has been set up under Section 34 about the deficiencies in the arbitral award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award. No power has been invested by Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section (4) of Section 34. This legal position has been expounded inMcDermott International Inc. In para 8 of the said decision, the Court observed thus: (Bhaskar Industrial case, SCC OnLine Kar)

"8. ... Parliament has not conferred any power of remand to the Court to remit the matter to the Arbitral Tribunal except to adjourn the proceedings as provided under sub-section (4) of Section 34 of the Act. The object of sub-section (4) of Section 34 of the Act is to give an opportunity to the Arbitral Tribunal to resume the arbitral proceedings or to enable it to take such other action which will eliminate the grounds for setting aside the arbitral award."

(emphasis supplied)

16. In any case, the limited discretion available to the Court under Section 34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it suo motu. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an application under Section 34(4) of the Act. For, consequent to disposal of the main proceedings under Section 34 of the Act by the Court, it would become functus officio. In other words, the limited remedy available under Section 34(4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court.

17. In the present case, the learned Single Judge had set aside the award vide judgment dated 7-3-2014. Indeed, the respondent carried the matter in appeal before the Division Bench. Even if we were to assume for the sake of argument, without expressing any opinion either way on the correctness of this assumption, that the appeal was in continuum of the application under Section 34 for setting aside of the award and therefore, the Division Bench could be requested by the party to the arbitral proceedings to exercise its discretion under Section 34(4) of the Act, the fact remains that no formal written application was filed by the respondent before the Division Bench for that purpose. In other words, the respondent did not make such a request before the learned Single Judge in the first instance and also failed to do so before the Division Bench rejected the appeal of the respondent."

12. In the aforesaid judgement of the Supreme Court in **Kinnari Mullick (supr**a) it has been held that the Court can defer the

hearing of the application filed under Section 34 of the Act for setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming the arbitral proceedings or to take such other action as in the opinion of the Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. The power under Section 34 (4) of the Act can be exercised so long the arbitral award is not set aside. No power has been invested in the Court to remand the matter to the arbitral tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section (4) of Section 34 of the Act. It was further held that consequent to disposal of the main proceedings under Section 34 of the Act by the Court, it would become functus officio. The judgement in the matter of **McDermott International Inc.(supra)**, which has been relied upon by the Supreme Court in the case of Kinnari Mullick (supra), is of no assistance to the applicants.

13. It is pertinent to mention here that the Supreme Court, in the case of **Project Director, National Highways v. M. Hakeem & another**4 (para. 28), has relied upon a judgement of the Delhi High Court in Puri **Construction P. Ltd. v. Larsen and Tubro Ltd.**5 in which it was held that the power to modify, vary or remit the award does not exist under Section 34 of the Act.

14. Therefore, the order passed by the Court on 16.09.2019 under Section 34 of the Act remitting the matter back to the Arbitrator to reconsider all the issues would be beyond the statutory mandate conferred on the Court and is thus without jurisdiction.

15. In view of the facts of the present case, after making the final arbitral award, given the provisions of sub-Section (1) of Section 32 and subject to sub-Section (3) of Section 32 of the Act, the mandate of the arbitral tribunal stood terminated with the termination of the arbitral proceedings. Thereafter, the Arbitrator became functus officio, and, therefore, remitting the matter back to him by the Court to reconsider all the issues is not permissible.

16. The last letter written by the applicant to the opposite parties on 22.03.2021, which is enclosed as Annexure-7 to the present application, demands the appointment of a substitute sole Arbitrator. In the present case, just because after remission of the case to the arbitral tribunal the Arbitrator has resigned and withdrawn from that case, does not result in termination of his mandate as envisaged in Sections 14 and 15 of the Act. It is pertinent to mention here that under the facts and circumstances of the present case, since the arbitrator has been rendered *functus officio*, there exists no occasion to invoke the provisions of Sections 14 and 15 of the Act for appointing a substitute arbitrator. Sections 14 and 15 of the Act provide for appointment of a substitute arbitrator where the specified conditions cause the mandate of an arbitrator to terminate. The provisions are as follows:-

"**14. Failure or impossibility to act**.--(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if -

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

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

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

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of

the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. Termination of mandate and substitution of arbitrator.--(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate--

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

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

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

17. Thus, the conditions prescribed in these Sections 14 and 15 are distinguishable and very different from the sole condition prescribed in sub-section (1) of Section 32 of the Act which mandates termination of the arbitral proceedings by the final arbitral award of the arbitral tribunal. Sections 14 and 15 of the Act provide for termination of the mandate of the arbitrator and for substitution of the arbitrator. Clearly, the mandate of an arbitrator stems forth from an arbitration agreement under Section 7 of the Act and his appointment under Section 11 of the Act. Sections 14 and 15 of the Act would only be applicable where the arbitral proceedings are pending. In the present case, under sub-section (1) of Section 32 of the Act, the arbitral proceedings stood terminated by the final arbitral award, and, in view of sub-section (3) of Section 32 of the Act, the mandate of the arbitral tribunal stood terminated with with the termination of the arbitral proceedings. Under the circumstances, seeking appointment of a substitute Arbitrator in respect of the dispute between the parties pursuant to the aforesaid order of the Court below dated 16.09.2019, is misconceived.

18. With regard to the maintainability of an application before the High Court under the relevant provisions of Section 11 of the Act, a coordinate bench of this Court, in the case of **S.K. and Associates v. IFFCO & others**6, (paragraph 25), has held that the sine qua non for invocation of the powers conferred by Section 11 of the Act is a failure of a party to the agreement to act or discharge a function, and that, in the absence of these primordial conditions being satisfied, the Chief Justice or his nominee Judge would not be entitled to exercise jurisdiction.

19. Clause 70 of the agreement, which provides for arbitration, reads as follows:-

"70. Arbitration. - All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineering Officer to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the

Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof."

20. From the record of this application, it appears that :

(a) A letter dated 11.09.2020 was sent by Mr. Baljit Singh, the arbitrator, to both the parties stating that as per the directions of the Court dated 16.09.2019 for reconsideration of all the issues and to pass the award afresh, he had called upon both the parties by his letter dated 09.11.2019 to submit the matter for his reconsideration, and both the parties had been making various submissions till March 2020. It was stated that due to the Covid-19 pandemic it may not be possible to hold oral hearing, as requested by the parties, in the near future till the pandemic situation becomes normal. That he would superannuate from Government service on 30.09.2020 and therefore, he would not be eligible to continue as sole arbitrator. Therefore the arbitrator resigned and withdrew from the matter.

(b) Thereafter, by a letter dated 12.10.2020, the Garrison Engineer sent the case files of the matter received from the Arbitrator, to the Government counsel for filing them in the Court, with a copy of the letter being endorsed to the applicants for information.

(c) By a letter dated 15.10.2020, the applicants, with reference to the letter dated 11.09.2020 of Mr. Baljit Singh (former arbitrator), requested the Chief Engineer to communicate the name appointing another officer as sole arbitrator to enable them to represent their case before him to adjudicate on the disputes afresh arising out of the agreement. It was further requested to hand over the relevant files/ document returned by the former arbitrator to the officer who would be appointed as an arbitrator to enable him to process the case further.

(d) By means of a letter of 26.10.2020, the Chief Engineer wrote to the applicant that the former arbitrator had forwarded all the files and documents to file in the Court for further direction in the matter, and, since the matter is sub-judice, as such further action would be taken as per the directions of the Court.

(e) Thereafter, by means of a letter of 22.03.2021 (Annexure no.7 to the affidavit) addressed to the Chief Engineer, the applicant referred to a letter dated 23.11.2020 sent by him for substituting the arbitrator under Section 14 (b) of the Act as the mandate of the earlier arbitrator was terminated due to his superannuation. It was stated that in the event of the failure of the opposite parties to appoint a substitute sole arbitrator within 30 days, an application would be moved before the High Court under Section 11 (6) of the Act to appoint an independent and impartial arbitrator.

21. There is no averment in the present application that, after setting aside of the award passed by the arbitral tribunal, under the aforesaid provision of clause 70 of the agreement, any written notice has been given to the opposite parties regarding any dispute, to initiate arbitration proceedings de novo. As stated above, the last notice given to the opposite parties by the applicants is the one dated 22.03.2021, which is enclosed as Annexure-7 to the present application, demanding the appointment of a substitute sole Arbitrator. Thus, in view of the facts and circumstance of the present case, there is no failure on part of the opposite parties to act or discharge a function which would entitle the applicants to invoke the

powers conferred by sub-sections (4), (5) and (6) of Section 11 of the Act, and which would render the present application maintainable.

22. Accordingly, this application is **dismissed**. However, the applicants are free to pursue any remedy they may be entitled to in accordance with law.

(2021)12ILR A354
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.12.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Capital Cases No. 7 of 2021
With reference No .6 of 2021 and Crl. Appl. No. 1861 of 2021

Chandan Singh ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Pradeep Kumar Mishra, Sri Vinay Saran (Sr. Adv.)

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Conviction based on single eye witness - The Arms Act, 1959: Section 3/25 - Though there is no bar in basing conviction on the testimony of a single eye-witness but, before doing so the court must carefully scrutinize the evidence to be intrinsically reliable probable and wholly trustworthy. (Para 28)

The Court after analyzing the testimony of the sole witness (PW -12) finds that the she is not trustworthy and her testimony is not of that sterling quality which alone can form the basis of conviction or circumstantially relate appellant Chandan Singh to those murders. (Para 34)

Appeals Rejected. (E-10)

List of Cases cited:

1. Vijay Shankar Vs St. of Ha. (2015) 12 SCC 644

2. Sharad Birdhichand Sards Vs St. of Mah. (1984) 4 SCC 116

3. Bablu Vs St. of Raj. (2006) 13 SCC 116

4. SHivaji Sahabrao Bobade & ANr. Vs St. of Mah. (1973) 2 SCC 793

5. Devi Lal Vs St. of Raj. (2019) 19 SCC 447

6. Anil Pukan Vs Stat of Assam (1993) 3 SCC 282

7. St. of Raj.Vs Bhola Singh AIR 1994 SC 542

8. Bhimpa Chandapa Hosamani & ors. Vs St. of Karn. (2006) 11 SCC 323

9. Jagdish & ors. Vs St. of Har.a (2019) 7 SCC 711

10. Kali Ram Vs St. of H.P. (1973) 2 SCC 808

11. St. of U.P. Vs Ashok kumar & anr. (1979) 3 SCC 1

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

1. (i) As both these appeals and the reference arise out of a common judgment and order dated 31.03.2021 passed by Additional Sessions Judge, Court No.10, Mathura in connected Sessions Trial Nos. 219 of 2019 and 220 of 2019, these two appeals and the reference are being decided/ answered by a common judgment and order.

(ii) In Sessions Trial No. 219 of 2019, arising out of case crime no.456 of 2018, P.S. Raya, District Mathura, five persons, namely, (i) Chandan Singh, (ii) Kali Charan @ Karuwa, both sons of Chittar Singh; (iii) Anil son of Kali Charan, (iv) Gajraj son of Gulab Singh; and (v) Smt. Bhago Devi @ Bhagwati Devi wife of Chandan Singh, were put on trial. Chandan Singh, Kali Charan, Anil and Gajraj were charged for offence punishable under Section 302 read with Section 149 I.P.C.; and Smt. Bhago Devi was charged under Section 302 read with Section 120-B I.P.C. In this Sessions Trial

No.219 of 2019, the accused Chandan Singh, Kali Charan @ Karuwa; Anil and Gajraj have been convicted under Section 302 read with Section 34 I.P.C. and have been punished as follows:-

(iii) Chandan Singh awarded death penalty; whereas, Kali Charan @ Karuwa, Anil and Gajraj were awarded life imprisonment and fine of Rs. 50,000/-. Bhago Devi was however acquitted.

(iv) In Sessions Trial No. 220 of 2019, arising out of case crime no.460 of 2018, P.S. Raya, District Mathura, Chandan Singh alone was tried and convicted under Section 3/25 Arms Act and awarded punishment of three years R.I. with fine of Rs. 10,000/- and a default sentence of three months.

(v) Capital Case Appeal No. 7 of 2021 has been filed by Chandan Singh against the judgment and order dated 31.03.2021 passed by Additional Sessions Judge, Court No. 10, Mathura in Sessions Trial No. 219 of 2019 and Sessions Trial No. 220 of 2019 against his conviction and sentence under Section 302/34 I.P.C. and 3/25 Arms Act. Likewise, as capital punishment has been awarded to Chandan Singh the court below has made a reference for confirmation of death penalty, which is Reference No.6 of 2021 and is connected with the appeal.

(vi) Criminal Appeal No. 1861 of 2021 has been filed by Kali Charan @ Karuwa, Anil and Gajraj against the judgment and order dated 31.03.2021 passed by Additional Sessions Judge, Court No. 10, Mathura in Sessions Trial No. 219 of 2019 against conviction of these appellants under Section 302/34 I.P.C.

INTRODUCTORY FACTS IN CHRONOLOGICAL ORDER

2. (i) On 19.06.2018, at about 6.20 am, the police of P.S. Raya, District Mathura received information through Delta (code name of surveillance unit) that three bodies have been found in a village named Nagla Bharau under PS. Raya, District Mathura. On receipt of this information, the police rushes to the spot, lifts the bodies from three separate places and brings them to the mortuary and carries inquest proceeding. These three bodies were of (a) Sundar Singh son of Chittar Singh (Deceased No. 1 for short D-1); (b) Satya Prakash Singh son of Gudar Singh (Deceased No.2 for short D-2); and (c) Bhawar Singh son of Ramji Lal (Deceased No.3 for short D-3).

(ii) Inquest proceeding of Bhawar Singh commences in the mortuary at about 11.40 am and is completed by 12.50 pm on 19.06.2018 resulting in inquest report (Exb. Ka-34), prepared by Sub-Inspector R.K. Gautam (PW-14). The witnesses to this inquest are Surya Sain (PW-5); Brij Kishore; Ram Khilari; Rajpal Singh; and Mukesh.

(iii) Inquest proceeding of Satya Prakash Singh is also conducted at the mortuary by SSI Daya Narayan Singh (PW-11) and is completed by 12 noon on 19.06.2018 resulting in inquest report (Exb. Ka-24), prepared by Daya Narayan Singh (PW-11) which is witnessed by Budh Singh son of Bhudar Singh (PW-6); Narendra son of Raghuveer Singh; Rahul son of Budh Singh; Surya Sain son of Satya Prakash Singh (PW-5); and Deepak Singh.

(iv) Inquest proceeding of Sundar Singh is also conducted at the mortuary by S.I. R.K. Gautam (PW-14) on 19.06.2018 and is completed by 13.40 pm, resulting in Inquest report (Exb. Ka-35), prepared by R.K. Gautam (PW-14) which is witnessed by Brij Kishore; Rajveer Singh; Mukesh; Ram Khilari; and Surya Sain (PW-5)

(v) All the three bodies were sent for autopsy, which is conducted by Dr. Devendra Mohan (PW-10).

(vi) **Autopsy report (Exb. Ka-7, dated 19.06.2018, Time: 3.45 pm) of deceased Bhawar Singh reveals following external ante-mortem** injuries:

(a) Firearm wound of entry 0.7 cm x 0.7 cm on left side back of chest 2 cm from midline of back (spine) and 7 cm from left scapula, tattooing was present around wound over area 16 cm x 18 cm;

(b) Firearm wound of exit 2 cm x 1 cm on right side chest, 7 cm from right nipple. On probing both one and two wounds are corresponding with each other.

(c) Rigor mortis found present.

Internal examination revealed two liters of free and clotted blood in chest cavity. Right lung found lacerated. Stomach containing 100 ml of watery fluid and small intestine had liquid and gases and large intestine had faecal matter with gases. Estimated time of death was half a day before.

According to the opinion of the Doctor, death was due to shock and hemorrhage as a result of ante-mortem injuries.

(vii) **Autopsy report (Exb. Ka-12, dated 19.06.2018, Time: 2.25 pm) of deceased Satya Prakash Singh reveals following external ante-mortem** injuries:-

(a) Firearm wound of entry 5.0 cm x 2 cm on right side chest, 3 cm away from right nipple and 6 cm from sternum, margin of wound inverted and red spots present around wound over 20 cm x 28 cm area on the right side and front of chest;

(b) Abrasion 6 cm x 4 cm on right (sic) just away from right elbow;

(c) Rigor mortis found present.

Internal Examination revealed third rib fractured; both lungs lacerated and 1.5 litre free and clotted blood in chest cavity; stomach contained 100 ml watery fluid. Small intestine had liquid and gases and large intestine had faecal matter.

It be noted that a metallic bullet was recovered from left side of back of chest just below scapula which was sealed and handed over for forensic examination.

According to the doctor the death was due to shock and haemorrhage due to ante-mortem injuries. The estimated time of death was half a day before.

(viii) **Autopsy report (Exb. Ka-18, dated 19.06.2018, Time: 3.05 pm) of deceased Sunder Singh reveals following external ante-mortem** injuries:-

(a) Firearm wound of entry 3 cm x 1 cm on right side neck, 2 cm away from manubriosternal notch and 12 cm away from right nipple, tattooing present around wound over 4 cm x 6 cm area.

Internal Examination reveals right clavicle fractured, about 1 litre of free and clotted blood in chest cavity, right lung lacerated and left lung pale, stomach containing 100 ml watery fluid, small intestine had liquid and gases and large intestine had faecal matter and gases.

According to the opinion of the doctor death was due to shock and haemorrhage as a result of ante-mortem injury. The estimated time of death was half a day before.

It be noted that one metallic bullet was recovered from the body which was sealed and handed over for forensic examination.

(ix) At 12.30 hours on 19.06.2018, written report (Exb. Ka-1), scribed by Tejveer Singh (PW-1), is lodged by Jitendra Singh son of Raghuveer Singh (PW-2), stating therein that in the intervening night of 18/19.06.2018 his real uncle Satya Prakash Singh (D-2), aged about 70 years, former Gram Pradhan, who was sleeping in his field to protect the standing crop from animals, was killed by some unknown assailant by use of firearm. It was also alleged that he, later, came to know that a retired army man, namely, Bhawar Singh son of Ramji Lal (D-3), aged about 55 years, a resident of his village, who was sleeping at his 'Neohara' (a place where cattle is tied and kept) was also killed by unknown assailant by use of firearm; and, that, he came to know, one Sundar Singh son of Chittar Singh (D-1), aged about 45 years, who was sleeping on the Chabutra in front of his house was also killed by unknown assailant by using firearm. This written report was registered as first information report (FIR) (Exb. Ka-3) bearing Case Crime No. 456 of 2018 against unknown persons.

(x) On registration of the FIR, investigation of the case was taken over by G.P. Singh (PW-13), who visited three different spots where the three bodies were found. He lifted plain earth and blood-stained earth from the spot where body of Satya Prakash (D-2) was found and prepared Fard memo (Exb. Ka-26) on 19.06.2018, which was witnessed by Jitendra Singh (PW-2) and Dinesh Prakash Singh (PW-8). Similarly, he lifted blood-stained and plain earth from the spot where body of Bhawar Singh (D-3) was found and prepared Fard memo (Exb. ka-28) on 19.06.2018 whose witnesses are Sunil Kumar and Jagdish Prasad. He also lifted one bundle Bidi and a piece of blood soaked blanket from the spot where the body of Bhawar Singh was found and prepared Fard memo (Exb. Ka-27), which was also witnessed by Sunil Kumar and Jagdish Prasad.

(xi) Noticeably, no blood was found at the spot from where the body of deceased Sundar Singh (D-1) was lifted.

(xii) On 19.06.2018 itself, PW-13 prepared three site plans of three separate places from where the bodies of D-1, D-2 and D-3 were found and lifted. Exb. Ka-29 is the site plan of the place where the body of the deceased Satya Prakash (D-2) was found. Noticeably, the place where D-2's body was found is surrounded by fields. Exb. Ka-30 is the site plan of the place where the body of Bhawar Singh (D-3) was found. This place is shown to be surrounded with open fields though, towards North-west, under construction house of Smt. Sunahari Devi is shown. Exb Ka-31 is the site plan of the place where the body of deceased Sundar Singh was found. The site plan indicates that body was lying on the Chabutara, adjoining a pakka (metalled) road which lies towards the west, and in front of the shop of Sundar Singh (D-1) lying on east. Across the metalled road towards west were houses of Satyaveer and Sanju and adjacent to the house of Satyaveer and Sanju, across the metalled road towards South, is the house of Rajendra Singh. Importantly, just behind the Chabutra, towards south east there is house and courtyard of deceased Sundar Singh (D-1) with a door opening towards west i.e. metalled road. Towards North there is open field with standing crop of Sundar Singh, Chandan Singh (accused) and Kalicharan (another accused). Likewise, at the back of the house, towards east, there is vacant field of Sundar Singh, Chandan Singh and Kali Charan. Towards south of the Chabutra there is house and courtyard of Sundar Singh.

(xiii) During the course of investigation, the police received an application on 25.06.2018 (Exb. Ka-2) from Surya Sain (PW-5) in which it is stated by Surya Sain, son of deceased Satya Prakash Singh (D-2), that in the night of the incident his uncle Budh Singh (PW-6) was also sleeping outside to protect his crop and he had witnessed the incident but due to fear he did not disclose anything but, now, he has disclosed it to him that the crime has

been committed by Chandan Singh son of Chittar Singh; Anil son of Kali Charan; and Gajraj son of Gulab Singh with the help of persons called from outside and in the entire crime, Kali Charan and Bhago Devi were also involved. It was disclosed in this application that Chandan Singh and Anil were eyeing the share of deceased Sundar Singh (D-1) in the house and were not willing to give Sundar Singh his share therefore, the deceased (Sundar Singh) had made a complaint about this to PW-5's father (Satya Prakash - D-2) and Fauji Bhawar Singh (D-3). It is because of this enmity that Chandan Singh, Gajraj Singh and Anil, with the help of people called from outside, got them killed. After receipt of the aforesaid application, PW-13 proceeded to record statement of Surya Sain (PW-5); Budh Singh (PW-6); Dinesh Singh (PW-8); and Raj Kumar (PW-7). On 27.06.2018, PW-13 arrested accused Chandan Singh, Anil Kumar and Gajraj. On their arrest, they allegedly confessed their guilt and on the pointing out of Chandan Singh, a country made pistol .315 bore, with a stuck empty cartridge, was recovered from a field located towards North of the wall of the house of Chandan Singh which had standing crop. The site plan (Exb. Ka-32) prepared by PW-13 indicated that the distance of the spot from where the pistol was recovered was 35 paces North of the wall of the house of Chandan Singh. The site plan also indicated that the place from where the recovery was made had access to common Kharanja road of village Nagla Bharau.

(xiv) The seizure memo (Exb. Ka-33) of the country made pistol with cartridge was prepared by PW-13 and was not witnessed by any member of the public. The seizure memo indicates that the accused Chandan Singh was taken to the spot and he searched out the weapon from the middle of the crop standing in the field and handed it over to the police. The seizure memo does not indicate that the weapon was buried in the ground. Prior to that, on 24.06.2018, the police had also prepared a memorandum of taking over a photocopy of a complaint letter dated 05.09.2017 purportedly given by deceased Sundar Singh son of Chittar Singh stating therein that on 05.09.2017, at about 7 am, Sundar Singh's brother Kali Charan, Chandan Singh and Smt. Bhago Devi and his nephews had assaulted him and Smt. Bhago Devi had beaten him with slippers. Seizure memo (Exb. Ka -38) was signed by PW-13 and witnesses Sunil Kumar and Jagdish.

(xv) On the basis of seizure memo (Exb. Ka-33), PW-13 - G.P. Singh lodged an FIR (Exb. Ka-5) at PS Raya, District Mathura on 27.06.2018 at 12.28 hours under Section 3/25 Arms Act against Chandan Singh, which gave rise to Case Crime No. 460 of 2018. The police, thereafter, continued to search for the accused Kali Charan and Bhago Devi. Ultimately, Kali Charan and Bhago Devi surrendered in Court on 21.07.2018. The police, thereafter, submitted charge-sheet (Exb. Ka-36), dated 30.08.2018, in Case Crime No. 456 of 2018, on which cognizance was taken on 18.09.2018. Likewise, after investigation of Case Crime No. 460 of 2018, the police submitted charge-sheet (Exb. Ka-41), dated 06.08.2018, on which cognizance was taken on 25.08.2018. In the charge-sheet of Case Crime No. 456 of 2018, 47 prosecution witnesses were enlisted. The name of Malti (PW-12) was conspicuous by its absence. In charge-sheet of Case Crime No. 460 of 2018 there were 14 police witnesses only. On 27.03.2019, the case arising out of Case Crime No.456 of 2018 was committed to the Court of Session. The Sessions Court framed charge of offence punishable under Section 302/149 I.P.C. against Chandan Singh, Kali Charan @ Karuwa, Anil and Gajraj and under Section 302 read with Section 120 B I.P.C. against Smt. Bhago Devi @ Bhagwati Devi. In the connected Sessions Trial No. 220 of 2018,

Chandan Singh was separately charged for offence punishable under Section 3/25 Arms Act. On denial of the charges, the trial commenced.

PROSECUTION EVIDENCE

3. The prosecution examined as many as 15 witnesses. Their deposition, in brief, are as follows:-

(a) **PW-1- Tejveer Singh**. He is the scribe of Exb. Ka-1 i.e. the written report which was registered as FIR (Exb. Ka-3). He proved that he wrote the application on the dictates of Jitendra Singh (PW-2) and others.

(b) **PW-2- Jitendra**. He states that he had submitted the written report (Exb. Ka-1) by dictating it to his nephew (Tejveer Singh - PW-1). He proved the Exb. Ka-1 as being signed by him. He, however, denied paper no. 4A/63, stated to have been signed by him, to disclose that PW-6 (Budh Singh) is an eye-witness of the incident.

In his cross-examination, he stated that three different spots from where bodies of D-1, D-2 and D-3 were recovered were at a distance of about 1 km from each other and that he does not know which of the three deceased was killed first.

(c) **PW-3 - Rajendra Singh**. He stated that neither he witnessed the incident nor he has knowledge as to who has committed the murders and he has also not given any statement to the police. He was declared hostile and was cross-examined by the prosecution.

In his cross-examination, he was confronted with his statement recorded under Section 161 Cr.P.C. On being so confronted, he stated that he has not given any such statement to the police. He denied the suggestion that he has joined hands with the accused and therefore, has turned hostile. He was also cross-examined by the defence wherein he stated that in the night of the incident as well as the preceding day he had not met Satyaveer.

(d) **PW-4 - Satyaveer**. He stated that information regarding the death of Sundar Singh, Bhawar Singh and Satya Prakash was given to him by his family members on phone that all three had been killed by unknown assailants. He has no knowledge about the incident and that at the time of the incident he was working in a factory at Raipur.

This witness was declared hostile and was confronted with his statement recorded under Section 161 Cr.P.C. He stated that since six months before the incident he had been staying out, as to how the investigating officer recorded his statement he is not aware. He denied the suggestion that he has colluded with the accused and is therefore, lying. In his cross-examination, at the instance of the defence, he further stated that in the month of January 2018 he had migrated to Raipur, State of Chattisgarh, where he worked in a Gas Plant and stayed there continuously for eight months and returned in August, 2018. He also stated that in the village there is no other person by his name. He further stated that he has no knowledge of the incident.

(e) **PW-5 - Surya Sain Singh**. He stated that his father (Satya Prakash Singh - D-2) in the intervening night of 18/19.6.2018 was sleeping in his field to protect the standing crop and in the night, he was killed by unknown assailants. On the same night, Bhawar Singh (D-3), who was sleeping at his 'Nehoara', and Sundar Singh (D-1), who was sleeping on his Chabutra in front of his house, were also killed by unknown assailants of which his cousin brother Jitendra (PW-2) made a report at PS Raya. He stated, that in the night of the incident, his uncle Budh Singh (PW-6) was also sleeping in the field and had recognised the

assailants but, due to fear he did not make any disclosures about them. Later, PW-6 informed him that Chandan Singh, Anil, Gajraj and Kali Charan had killed PW-5's father and Bhago Devi @ Bhagwati Devi was also involved. He stated that the accused Chandan Singh bore enmity with PW-5's father because PW-5's father had influenced Chandan Singh's father Chittariya (i.e. Chittar Singh) to execute a Will in favour of Sundar Singh (D-1) and for this reason, Gajraj also bore enmity with PW-5's father. The accused also wanted to evict PW-5's father from Gram Samaj land ad-measuring 13 Bighas. He proved Exb. Ka-2. He also stated that inquest of all the three deceased was carried out at Mathura mortuary and was witnessed by him.

In his cross-examination, he admitted that he neither saw the accused killing the deceased nor he saw them near the place of incident on or about the time of the incident. He also admitted that he had not seen Bhago Devi conspiring for the murder of the deceased persons. He further stated that he has no personal knowledge that his uncle Budh Singh, in the night of the incident, was sleeping near his late father Satya Prakash (D-2). Further, during cross-examination, he stated that his uncle Budh Singh had not told him that he had witnessed the incident. He stated that he was informed by few people that his uncle Budh Singh had witnessed the incident. He stated that on the basis of that information he had given the names of Chandan Singh, Anil, Gajraj and Kali Charan as perpetrators of the crime. He further stated that on the basis of that information he had also named Bhago Devi @ Bhagwati Devi. He reiterated that Budh Singh had not personally informed him that he had witnessed the incident. He also stated that in his presence Sundar Singh (D-1) had not made any complaint to his father (D-2), or to Bhawar Singh (D-3) regarding the conduct of the accused persons.

(f) **PW - 6 - Budh Singh**. He stated that in the night of the incident he had slept in his own house and that his brother Satya Prakash Singh (D-2) was sleeping in the field to protect the standing crop. In the morning, following the night of the incident, he came to know that his brother Satya Prakash (D-2) had been killed by unknown persons. Later, he also came to know that Bhawar Singh (D-3) and Sundar Singh (D-1) were also killed in the night. He admitted his signature on the inquest report of his brother Satya Prakash (D-2). He stated that he has no information as to who killed Satya Prakash (D-2), Bhawar Singh (D-3) and Sundar Singh (D-1). The witness was declared hostile and was cross-examined by the prosecution.

On being confronted with his statement recorded under Section 161 Cr.P.C., the witness stated that he had never given such statement to the investigating officer and he denied the suggestion that he was trying to protect the accused because they are residents of the same village. He also denied the suggestion that he has resiled from truth because of pecuniary gains. The witness told the court that none of the accused have threatened him nor he has been induced to make a false statement; that whatever he has stated is out of freewill.

(g) **PW-7 - Raj Kumar**. He is the son of the deceased Satya Prakash (D-2). He stated that till date he does not know who has killed his father. He denied that any confession was made by the accused Chandan Singh, Gajraj, Anil, Kali Charan before him or before his brother Dinesh Prakash. The prosecution declared the witness hostile.

During the course of cross-examination, he was confronted with his statement under Section 161 Cr.P.C. He stated that he had not given any such statement. He denied the suggestion that because of an out of court settlement he is resiling from the truth. He also denied the suggestion that due to fear of the accused he is not stating the truth.

He was also cross-examined by the defence, in his cross-examination by the defence, he stated that neither on 24.06.2018 nor on 25.06.2018, the accused confessed their guilt either before him or his brother Dinesh Prakash. He also stated that his uncle Budh Singh was sleeping in the house on the night of the incident and Budh Singh never informed him of having witnessed the incident of the murder of PW-7's father. He, however, admitted that Surya Sain had got his signature on the application (Exb. Ka-2) but stated that he had not read that application. He stated that he is not aware as to who killed his father (D-2), Bhawar Singh (D-3) and Sundar Singh (D-1).

(h) **PW-8 - Dinesh Prakash Singh**. He stated that the murder of his uncle Satya Prakash (D-2), Bhawar Singh (D-3) and Sundar Singh (D-1) was committed in the night by unknown persons. Information of the murder was received by him in the morning on 19.06.2018 and, till date, he does not know as to who has committed the murders. He denied that on 24/25.06.2018, in the evening, or thereafter, Gajraj Singh, Chandan Singh, Kali Charan and Anil came and confessed their guilt before him or before anybody else. He was declared hostile by the prosecution.

He has stated in his cross-examination at the instance of the prosecution that he is a Civil Engineer and no statement of his was recorded by the police. When confronted with his statement under Section 161 Cr.P.C., he stated that he has not given any such statement to the police. He denied the suggestion that on account of out of court settlement, he is resiling from the truth. The witness was offered to the defence for cross-examination but the defence did not accept that offer.

(i) **PW-9 - Head Constable Kamlesh Kumar**. He proved the GD entry of the written report giving rise to Case Crime No. 456 of 2018, which was marked Exb. Ka-2. He proved the registration of the FIR (Exb. Ka-3) as also FIR of Case Crime No.460 of 2018.

In his cross-examination, he stated that he was not aware as to how many persons had come to lodge the FIR. He denied the suggestion that the police team picked up accused Chandan Singh from his house on 24.06.2018 to show a false recovery.

(j) **PW-10 - Dr. Devendra Mohan Lal**. He proved the autopsy reports of the three deceased persons, already noted above.

In his cross-examination, he admitted that the entry wound found on the three different bodies could be from different weapons. He could not tell whether all three wounds on three separate bodies could be from .315 bore firearm.

(k) **PW-11- S.I. Dayanarayan**. He proved the inquest report (Exb. Ka-24) of Satya Prakash (D-2).

(l) **PW -12 - Malti Devi**. Before noticing her deposition it be noted that she was not enlisted as a prosecution witness in the charge-sheet. She moved an application 34 Kha, on 16.10.2020, through a private counsel before the trial court stating therein that she is the wife of deceased Sundar Singh (D-1). In that application 34 Kha it was stated that Sundar Singh (D-1) was earlier married to one Kallo from whom he got a divorce; that Sundar Singh (D-1) had no issue either from Kallo Devi or from her (PW-12); that at the time of incident, she was residing there at village Nagla Barau; that, after the incident, when the police had arrived for investigation, she had informed the investigating officer (I.O.) that the accused persons had killed her husband with a view to grab his property; that, prior to the incident, the deceased Sundar Singh (D-1) had given an application in her presence on 05.09.2017 to the police expressing

his apprehension that he may be killed. She also stated that in the bail application of co-accused Gajraj Singh, Dinesh Kumar, in his affidavit, dated 10.01.2019, in paragraph 16, had stated that the accused would not have got the property on killing Sundar Singh because that would go to his wife Malti Devi. In her application, she narrated that after the death of Sundar Singh, she was thrown out of her in-laws house (Sasural) at Nagla Bharau and since then she had been residing with her father in her parental house. She stated that being the widow of Sundar Singh, she is a victim and she is an important witness and therefore her statement be recorded.

On this application 34 kha, on 09.11.2020, the trial court, exercising its power under Section 311 Cr.P.C., directed for recording her statement on 18.11.2020.

Deposition of Malti Devi (PW-12)

Pursuant to the order of the trial court, her statement was recorded. On oath, she stated that deceased Sundar Singh (D-1) was her husband. Sundar Singh was earlier married to one Kallo with whom he had a divorce. Thereafter, Sundar Singh married her (PW-12). He had no issue, either from Kallo or from PW-12. In the night of the incident, her husband was sleeping outside the house, in front of the shop, and she was sleeping inside the house. From inside the room of the house, at about midnight, she heard a gun shot. She came out to notice that Chandan Singh; Kali Charan; Bhago Devi; Gajraj; and Anil were running away with weapons. Thereafter, she kept crying near the body of her husband. In the morning, when the police arrived she disclosed everything to the I.O. She stated that Sundar Singh (D-1) was killed by the accused persons to grab his property. She stated that at the time of the incident she had been residing with her husband Sundar Singh (D-1) in village Bharau. She stated that about nine months before the incident, Sundar Singh had given an application to SSP, Mathura disclosing that he has threat to his life from the accused persons. The said letter was produced as paper no. 4A/72. She recognised the writing and signature of Sundar Singh (D-1) on the said letter, which was marked as Exb. Ka-25. She stated that on the said letter, no action was taken therefore, her husband Sundar Singh (D-1) had told her that he would be placing his grievance before SSP. She stated that on 05.09.2017, her husband was assaulted by the accused persons and she was present there, which must have been between 6-6:30 hours. She stated that after the incident, accused persons had thrown her out of her Sasural. To prove her identity she produced Adhaar card, voter ID card, voter list and domicile certificate.

She was cross-examined on multiple counts: (a) on her relationship with Sundar (D-1); (b) in respect of her presence in the village; (c) in respect of the topography of the house of Sunder Singh (D-1); and (d) in respect of the incident.

In her cross-examination, on her relationship with Sundar Singh (D-1) she stated that she is illiterate and she does not have a marriage card in respect of her marriage with Sundar Singh; that though she has photographs of her marriage but they all lie at her Sasural; that she does not remember the date of her marriage as long time has passed since then; that she does not know in which village Kallo (i.e. previous wife of Sundar Singh) resided; that she was not taken to the doctor even though she did not have a child; that Seetu is her husband's elder brother's son; that she has seen the wife of Seetu; that Seetu's wife is shorter than herself; that Kali Charan has four children; the youngest is daughter Laxmi though, she does not know her age; that Kali Charan is her Jeth; that she does not know the name of Laxmi's eldest child; that the eldest is Anil who is an accused; that Anil's marriage took place 4-5 years ago; that

she was not present at the time of marriage; that she was not present at the time Seetu's marriage; Chandan Singh (her Jeth) has six children; the youngest of them is named Pankaj who must be 17-18 years old; that her Jeth Kali Charan's house is separate and at a distance from the house of Sundar Singh; that the house of Kali Charan is farthest; that she has seen the house of Chandan Singh; that on the sides of Chandan Singh's house there is open field and on one side there is Rinku's plot and on the other side there is a road; that Chandan Singh's house is a Pakka built house and at the time of incident, Chandan Singh's house was painted yellow; that Chandan Singh and Sundar Singh including herself use to reside in one house; that in front of their house, there was house of Bhawar Singh; that she does not remember whether there was 1 or 2 buffaloes in the house at the time of the incident;

In her cross-examination, in respect of the incident, topography of the house and the village she states that she does not remember the date of the murder of Sundar Singh; that Sundar Singh's murder was committed in between 1 and 1:30 am in the night; that she did not have a watch to notice the time; that the night was dark or moonlit she does not remember; **that on hearing the gun shot she knew that murder has been committed;** that at the time of the incident, she was sleeping in a room upstairs; that murder was committed outside the house in front of the shop on the Chabutra; that Sundar Singh wore a cream colour pyjama and kurta; that, at the place of occurrence on one side there was a shop and on all the remaining sides there was high boundary wall; that the height of the boundary wall would be 12 feet; that she was fast asleep and woke up on hearing the gun shot; that, on hearing the gun shot, she came downstairs, opened the gate and reached the spot; that the gate which she had to open was an Iron gate having two parts and window as well; that at the time when her husband was killed there was nobody else; **that she had hugged the body of her husband and had also touched his head and, thereafter, returned to her room; that she actually rushed upstairs to her room to save herself**; that she does not know whether there is any design on the gate; she told the name of the Pradhan of that village as Pratap though, she could not disclose since when he was Pradhan; she stated that she has not voted in the Pradhan's election; that she does not know for how long she remained with the body of her husband; that she did not put any effort to ascertain whether her husband (D-1) was dead or alive; that the distance between the gate of her husband's house and the shop is 10-15 hands; that one hand distance would be the distance from elbow till the nail of the hand; that she does not remember as to what kind of clothes Gajraj was wearing; that Chandan Singh had a firearm/ Katta in his hand; that Chandan Singh does have moustache; that no weapon was seen in the hand of Anil, Gajraj and Kali Charan; that she also saw Bhago Devi running away though, she did not have weapon in her hand; that her earlier statement was false; that she saw Chandan Singh from a distance of 10-12 paces; that one pace is the distance which one step forward covers; that when she would enter the house towards left she would find toilet; that bathroom is close to the toilet; that the walls of the toilet are yellow in colour; that on the date of the incident in the morning, the police had arrived at about 5:30 am.

On 19.11.2020, she was further cross-examined. In her cross-examination, she stated that her mother-in-law's name is Hoshiyari; that she had not gone to police station to lodge report of her husband's murder; that she had informed the police but had not submitted anything in writing about her husband's murder; that when she heard the gun shot she understood that her husband Sundar Singh has been killed because, the accused had been fighting with him on a daily basis; that at the spot there was no blood; that she does not remember the time when the police had taken away the body

of Sundar Singh; that she does not remember whether the police had sealed the body of Sundar Singh or had kept the same in a cloth; that she does not remember as to how many police personnel had come as when the police had come she was inside the house; that police personnel had taken the body of Sundar Singh in an Ambulance; that she has no knowledge whether an FIR was lodged; that after the murder of Sundar Singh, on the next day, her family members (Maike Wale) had come to take her and amongst them were her brother-Ram Kumar, Ashok, her father Ramji Lal and her mother; that in the morning of the next day, i.e. at about 6 am, after her husband had died, her family members had come and she left with them; that her family members may have stayed for 1-2 hours; that distance of her parental house from Nagla Bharau is not known to her; that her parental house is at Phoolpur, Maurapur PS. Baldev; that she does not know as to how her family members arrived in the morning at about 6 am; that her neighbour's name is Bhawar Singh and his wife's name is Geeta.

She denied the suggestion that she had married one Randheer Singh of village Gajaoli, a resident of PS Farah, District Mathura, about 20 years ago. She also denied the suggestion of having given birth to a daughter named Monika from her wedlock with Randheer Singh. She stated that till date she has not given birth to any child. She stated that she has been brought by her brother to give her statement; she stated that Sundar Singh is Inter pass.

She stated that when Sundar Singh had written the letter, he had been assaulted on that very day in the morning, at about 6.30 or 7; she, however, could not remember the colour of Chappal with which he was assaulted; she stated that she was not interrogated by the police in respect of Exb. Ka-25.

She admitted that on the death of Sundar Singh, all property would come to her. **She stated that she was not killed because she was inside the house; she further admitted that she had not given any statement to the police or any application to the police or SSP Mathura in respect of what she has stated in Court**. She admitted having visited Nagla Bharau, the village where the incident took place, 15-20 days before the incident; she stated that there is a submersible, eight years old, in the house, in front of the bathroom/latrine; and that from the side of the house there is house of Rajendra and Pappu; she also denied the suggestion that she had not seen anyone running away; she, however, admitted that she had not seen any person firing at Sundar Singh; she, again, denied the suggestion that she was married to Randheer Singh 20 years ago and had a daughter named Monika. When confronted with paper no. 37 Ka-3 to 37 Kha-5, she stated that she has no knowledge of those papers and that all those papers are fabricated; she denied the suggestion that the identity documents which she produced are false and fabricated.

(m) **PW-13-Inspector-G.P. Singh**. He proved the various stages of the investigation including lifting of blood-stained earth and plain earth; recovery of the country made pistol; preparation of site plans; inquest reports, arrest of the accused as also that accused Kali Charan and Bhagwati Devi surrendered in Court; and recording of the statement of various persons during the course of investigation. He stated that the accused Chandan Singh made a disclosure on 27.06.2018 that the weapon used by him in the crime was hidden by him in the standing crop in the field near his house. He stated that on the pointing out of Chandan Singh, from that field, about 35 paces away from wall of the house of Chandan Singh, the country made pistol was searched out by Chandan Singh and handed over to the police of which seizure memo was prepared.

In his cross-examination, he stated that initially no witness disclosed the name of any accused to him; and that, while preparing CD -

Parcha No.4, he got hearsay information from persons regarding involvement of Chandan Singh and his family members in the murder. He stated that the country made pistol recovered at the instance of Chandan Singh was lying open in the field, which had a standing crop of Chari (cattle fodder), and was not buried; and that there was an empty cartridge stuck in that pistol. He admitted that there was no public witness of the recovery; and that the case under the Arms Act against Chandan Singh was investigated by S.I. Rajendra Singh. He denied the suggestion that the recovery was bogus and fictitious; and that S.I. Rajendra Singh has wrongly submitted charge-sheet against Chandan Singh.

In his cross-examination, he specifically stated that during the course of investigation, **he did not come to know about any wife by the name Malti Devi of deceased Sundar Singh (D-1).** He denied the suggestion that he has falsely implicated the accused and had shown a false recovery and false conviction of the accused.

(n) **PW-14 - Sub-Inspector - Ram Kishore Gautam**. He proved the inquest reports of Bhawar Singh (D-3) and Sundar Singh (D-1). He stated that on 19.06.2018 while he was posted as a Sub-Inspector at P.S. Baldev, he received information from Delta regarding the three murders.

In his cross-examination he stated that he is not aware as to who brought the bodies of the three deceased to the mortuary, and how. He stated that all the inquest witnesses were already present there at the mortuary.

(o) **PW-15 - Sub-Inspector** - Kamlesh Kumar. He proved the recovery of the country made pistol on the pointing out of the accused Chandan Singh and that after the recovery of country made pistol, the same was sealed and the recovery memo was prepared; he proved the material exhibits with regard to the recovery of country made pistol, empty cartridge, the two bullets recovered from the body including the test cartridges. He also proved material exhibits relating to blood-stained earth, pieces of blanket, etc.

In his cross-examination, in relation to recovery of country made pistol from the appellant Chandan Singh, he stated that he does not remember the time when Chandan Singh was taken from the lock up to effect recovery though, he remembers that recovery was made at 11.30 hrs. He stated that the place from where recovery was made is bounded by houses of Chandan Singh and Sundar Singh (D-1) on the east; Chari field towards west; field towards north; and public Rasta (way) towards south. He stated that Chari was about two feet high. He stated that the public witness was not arranged for though, public had arrived at the time of recovery but he does not remember the name of those persons who gathered there. He stated that the pistol was searched out and given by Chandan Singh to PW-13 and was sealed in a cloth which has been marked as Material Exhibit No.17. He admitted that in the material exhibit - 17 there are no signatures of the accused Chandan Singh. He, however, denied the suggestion that the recovery is false and fabricated.

4. At this stage, we may notice the forensic reports obtained from U.P. Forensic Laboratory, Agra in respect bloodstained earth and plain earth lifted from where the bodies of D-2 and D-3 were found as also in respect of packet of Beedi, blood soaked blanket, piece of cot, etc recovered from the spot where body of D-3 was found. These reports confirmed presence of human blood and the spot of the incident. Ballistic report was also obtained and produced to confirm that the empty cartridge found in the pistol recovered, bore the mark of the strike pin of that pistol. The striations on the bullets

recovered from the body of Sundar Singh (D-1) and Satya Prakash (D-2) could not be matched with striations on test bullets due to insufficient characteristics.

5. After the prosecution had led its evidence, the incriminating material appearing in the prosecution evidence was put to the accused. The accused denied the incriminating material and claimed that they were innocent. The accused Chandan Singh specifically denied the recovery of country made pistol etc. at his instance.

TRIAL COURT FINDINGS

6. The trial court by placing reliance on the testimony of PW-5 and PW-12 found that the accused held motive for the crime as they were not interested in providing share to the deceased who was demanding a share in the property; that the deceased Sundar Singh (D-1) had complained to the police in respect of his apprehension; that the other two deceased were helping deceased Sundar Singh (D-1) to enforce his right therefore, the accused held motive against those two deceased i.e. D-2 and D-3 as well; that PW-12 is the wife of deceased Sundar Singh (D-1); that in the night of the incident, she saw the four accused running away soon after the gun shot and amongst them Chandan Singh was noticed with a gun; that her testimony is corroborated by the recovery of country made pistol from the appellant Chandan Singh and as all the other appellants were seen running from the spot with Chandan Singh in the night of the incident, they shared common intention with Chandan Singh and, therefore, were liable to be convicted for offences punishable under Section 302 read with Section 34 I.P.C. However, upon finding that there was no worthwhile evidence in respect of Bhago Devi hatching a conspiracy of the murder, Bhago Devi was acquitted. The trial court further concluded that all the three murders were committed in the night and there was similar type of injury found on the body of the three deceased, therefore, they appear to have been committed by the same person and could be connected with the weapon alleged to have been recovered from Chandan Singh and, accordingly, awarded death penalty to Chandan Singh, whereas rest of the accused persons were awarded life imprisonment.

7. We have heard Sri Vinay Saran, learned senior counsel, assisted by Sri Pradeep Kumar Mishra, for the appellants in both the appeals including the reference; Sri J.K. Upadhyay, learned A.G.A. for the State, and have perused the record.

SUBMISSION ON BEHALF OF APPELLANTS

8. Sri Vinay Saran, learned counsel for the appellants submitted that admittedly the incident is of midnight; the three bodies were recovered from separate places at a distance from each other and that there is no evidence, either direct or circumstantial, in respect of the murder of Satya Prakash (D-2) and Bhawar Singh (D-3). Further, there is no evidence that all the three murders were part of the same transaction. Thus, in absence of any legally admissible evidence to connect the three murders with the accused put on trial the finding of the trial court that the accused-appellants are guilty of all the three murders is nothing short of being perverse. Further, the eye-witness account of the murder of Sundar Singh (D-1) rendered by PW-12 is not at all reliable and trustworthy. The country made pistol allegedly recovered at the instance of the appellant Chandan Singh could not be connected with the bullet recovered from the body of Sundar Singh through the ballistic report. Hence, he cannot be convicted for the charge of murder. Further, the conviction of Chandan Singh for the offence punishable under the Arms Act is also not proper because, firstly, the recovery of the firearm is false which has no public witness in

its support and, secondly, it is alleged to have been recovered from an open field having direct access to the road and was about 35 paces away from the boundary wall of the house of Chandan Singh therefore, the weapon cannot be said to be in possession of the appellant Chandan Singh.

9. Sri Saran submitted that the prosecution story was to rely on the ocular account rendered by Budh Singh (PW-6) and confessional statements made before Raj Kumar (PW-7) and Dinesh Prakash Singh (PW-8). Budh Singh turned hostile and stated that he did not witness any incident; and PW-7 and PW-8 also turned hostile and stated that no one confessed before them. Under the circumstances, when nothing remained in the prosecution evidence, PW-12, turned up, after over two years of the murder of Sundar Singh (D-1), claiming herself to be wife of D-1 and an eye-witness of the incident. Admittedly, PW-12 never moved an application before the police nor her statement was recorded during the course of investigation. She turns up with an obvious purpose, that is to set up a claim over the property of D-1. Though, she claims herself to be the wife of D-1 but, her conduct is such which casts serious doubt, firstly, as to whether she is the wife of D-1 and, secondly, whether she witnessed the incident. This doubt is amplified when she admits in her cross-examination that she does not remember the year and the date of her marriage with D-1. The identity documents which she submits to disclose herself as the wife of D-1 are prepared post the date of the incident. Sri Saran submits that though, in her cross-examination, she tried to demonstrate that she knew the family members as well as topography of the house but all this could be learnt with effort to set up a false claim. He also submits that though, in the application 34 Kha, moved before the trial court, she stated that her status as the wife of D-1 is admitted to the Pairokar of the bail application moved on behalf of one of the accused persons but the deponent of that affidavit was not examined as a witness and therefore, that circumstance is not at all admissible in evidence. Further, her conduct of leaving her husband and not making any complaint for two years renders her testimony completely untrustworthy.

10. Sri Saran also submitted that on the sole testimony of such an eye-witness, who cannot be termed wholly reliable, or of an unimpeachable character, no conviction can be based. More so, when it is clear that the incident was of night; a single gun shot was fired; witness PW-12, according to her own statement, was upstairs when she heard gun shot and that she had to rush downstairs, open the door of her house to witness the scene of crime, it is but natural that the assailants by that time would have effected their escape. Thus, even if it is accepted that she was inside the house at the time when D-1 was shot, since D-1 was shot outside the house, and PW-12 was inside the house, that too, upstairs and had to rush downstairs, open the gate and come out, by then, the accused in all probability would have effected their escape and would not have stayed there to be noticed. Further, she, during later part of her statement, takes a summersault by stating that the statement, made by her, that all the accused had weapons in their hand, is false and that it was only Chandan Singh who had weapon in his hand whereas, the other accused persons were just running with him. All of this goes to show that she is not wholly reliable.

11. Sri Saran also urged that documents were produced by the defence to demonstrate that she was married to one Randheer Singh of another village; and a document was also produced that in her Adhaar card some amendment had taken place which indicated that she might have got her Adhaar card altered recently to show her relationship with D-1 for the purpose of setting up a false claim over his property. Under these circumstances, there is no occasion to rely on the statement of PW-12.

12. Sri Saran also urged that no source of light has been disclosed by the prosecution at the place of occurrence when D-1 is stated to have been shot at. Admittedly, the incident is of post midnight and the moon chart suggests that at 1.15 am on June 14, 2018 it was new moon therefore, in the night of the incident i.e. June 18, 2018, the moon was less than a quarter as it would have been quarter moon only on June 20, 2018 at 4.22 pm. Thus, in absence of proof of light, there was no natural light in which PW-12 could have spotted the accused persons running away, particularly, when she has not stated that she heard them talking/ shouting/ speaking.

13. In addition to above, it was submitted by Sri Saran that the ballistic report (Paper No. 39 Kha -2) indicated that though, empty cartridge (EC-1) found in the pistol at the time of the recovery was fired from the said pistol but the bullets that were recovered from the body of Sundar Singh (D-1) and Satya Prakash (D-2), which were marked EB-1 and EB-2 could not be connected with the recovered pistol, hence, the recovery of the country made pistol was of no consequence to prove the charge of murder of D-1 or D-2. Further, the trial court failed to notice the dimensions of the entry wound on the body of D-1, D-2 and D-3 which, apparently, were from different firearms. In this context suggestion was also put to PW-10, the Doctor, who conducted the post-mortem. He also agreed that the nature of the injuries found on the three bodies could be from different firearms.

14. Lastly, Sri Saran submitted that Ex. Ka-25 i.e. application dated 05.09.2017, alleged to have been written by Sundar Singh to the Superintendent of Police, Mathura expressing threat to his life from his brother Chandan Singh, Kali Charan and Bhabhi Bhago Devi and nephews Seetu and Sibu, on account of property dispute, appears bogus, as its contents are self-contradictory, inasmuch as, though, it allegedly carries signature of Sundar Singh, but states that Sundar Singh is an innocent, illiterate villager. When, in fact, in the cross-examination, PW-12 admits that Sundar Singh was Intermediate (Inter) pass. Meaning thereby that this application was prepared as Peshbandi.

15. In the alternative, Sri Saran submitted that this case, in any view of the matter, does not call for death penalty.

SUBMISSIONS ON BEHALF OF THE STATE

16. Learned A.G.A. submitted that this is a case where the motive for the crime is established by PW-5 and PW-12; PW-12 is a lady, who was threatened and made to leave her Sasural therefore, the delay in her disclosure about the incident will not render her statement, which is otherwise plain and simple, as false; that although there is no source of light disclosed in the testimony of PW-12 but no suggestion has been put to her with regard to non-existence of light at the time of the incident; that, despite cross-examination at length, nothing could come out from her testimony to demonstrate that she is not aware about the relationship of Sundar Singh with his other family members and the very fact that she discloses the topography of D-1's house, she cannot be termed as an impostor. Once, it has been established that she is the wife of Sundar Singh (D-1) or had been living with him, her presence at the scene of the crime would be natural and, therefore, if she arrived at the spot on hearing gun shot, her testimony cannot be disbelieved merely because she was not interrogated during the course of investigation or that she has turned up late, during the stage of trial. He further submitted that the mere fact that other witnesses turned hostile, would suggest that there was terror. Thus, keeping in mind that three persons were killed in one night by use of deadly weapon, PW-12's courage in coming forward to depose discloses her burning desire to

put forth the truth. Hence, the conviction of the appellants by relying upon the testimony of PW-12 is justified. On the question of sentence, the learned A.G.A. submitted that the same is at the discretion of the Court.

ANALYSIS

17. Having considered the rival submissions and having perused the record carefully, at the outset, we may observe that although the prosecution may have led some evidence with regard to the motive for the murders of the three deceased, namely, Sundar Singh, Satya Prakash (D-2) and Bhawar Singh (D-3) but, with regard to the incident relating to the murder, the evidence led by the prosecution during trial is confined to the murder of Sundar Singh (D-1). Other than the evidence of motive, there is no evidence at all, either circumstantial, or direct, to hold the appellants guilty for the murder of deceased Satya Prakash (D-2) and Bhawar Singh (D-3). No doubt, three persons (D-1, D-2 and D-3) had died in the intervening night of 18/19.06.2018 and their death appear to be a consequence of single gun shot injury but their bodies were found at different places; and, from the evidence brought on record, it appears that these places were at quite a distance from each other. In one of the statements, it has come that they were at a distance of 1 km from each other. Whatever the distance might be, what is important is that there is no substantive evidence brought on record during trial to demonstrate that any of the appellants were seen killing D-2 and D-3 or, on or about the time of the incident, were seen near the spot from where the body of D-2 and D-3 has been recovered. The only circumstance on the basis of which they (appellants) could have been linked with three murders that took place in that night was the extra judicial confession made before witnesses PW-7 and PW-8, but those witnesses turned hostile from the inception therefore, there remains no evidence to connect the appellants with the murder of Satya Prakash (D-2) and Bhawar Singh (D-3). In addition to the failed attempt to prove extra judicial confession before PW-7 and PW-8, the prosecution produced Budh Singh (PW-6) as an eye-witness of the murder of Satya Prakash (D-2). But he too, turned hostile from the beginning, and denied having witnessed the crime. No doubt, a bullet was found from the body of Satya Prakash (D-2) and Sundar Singh (D-1) but the ballistic report does not indicate that the two bullets were fired from one weapon (firearm). Further, the ballistic report could not connect the two recovered bullets from the country made pistol alleged to have been recovered at the instance of Chandan Singh. Thus, the conclusion of the trial court that because there was similarity in the manner of killing and commonality of motive therefore, the three murders must have been committed by same set of accused, in our view, is purely conjectural and in absence of legal evidence, either circumstantial or direct, has no sustainable basis. We, therefore, have no hesitation in holding that in so far as the murder of Satya Prakash (D-2) and Bhawar Singh (D-3) is concerned, there is complete lack of evidence against the appellants. The appellants are therefore held not guilty for the murder of Satya Prakash (D-2) and Bhawar Singh (D-3).

18. In so far as the murder of Sundar Singh is concerned, the evidence against the appellants, that remains, is circumstantial in nature. The prosecution sought to prove its case against the appellants in respect of the murder of Sundar Singh (D-1) by proving motive, which is sought to be proved by PW-5 and PW-12; the circumstance that they were seen running away, with one of them carrying firearm, from the scene of crime, immediately after gun shot was heard, which is sought to be proved from the testimony of PW-12; and, lastly, by recovery of country made pistol on the pointing out of appellant Chandan Singh alleged to have been used in the crime.

19. Before we proceed further, considering that we are dealing with a case which is to be decided on the basis of circumstantial evidence, it would be useful to notice the legal principles to be borne in mind when the court has to decide a criminal trial on the basis of circumstantial evidence. In **Vijay Shankar V. State of Haryana, (2015) 12 SCC 644**, the Supreme Court following its earlier decisions in **Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116** and Bablu V. State of Rajasthan, (2006) 13 SCC 116, in respect of a case based on circumstantial evidence, held that *"the normal principle is that in a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of hypothesis other than that of the guilt of the accused and inconsistent with their innocence"*. Further (vide paragraph 153 of the celebrated judgment in **Sharad Birdhichand Sarda's case**), the circumstances from which the conclusion of guilt is to be drawn should be fully established meaning thereby they 'must or should' and not 'may be' established.

20. In addition to above, we must bear in mind that the most fundamental principle of criminal jurisprudence is 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* (**vide Shivaji Sahabrao Bobade & Another v. State of Maharashtra, (1973) 2 SCC 793**). These settled legal principles have again been reiterated in a three-judge Bench decision of the Supreme Court in **Devi Lal v. State of Rajasthan, (2019) 19 SCC 447** wherein, in paragraphs 18 and 19 of the judgment, it was held as follows:-

"18.On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

(Emphasis Supplied)

21. Having noticed the legal principles as to when an accused can be convicted on evidence of circumstantial nature, we now proceed to weigh the prosecution evidence in respect of each of the three circumstances noticed in paragraph 18 herein above.

22. In so far as motive for the crime is concerned, PW-5 and PW-12 have sought to prove by their deposition that the deceased Sundar Singh (D-1), whose brothers were Chandan Singh and Kalicharan @ Kalua, was

demanding his share in the property but the accused were denying that share. In connection therewith, the deceased Sundar Singh was being helped by the other two deceased, namely, Satya Prakash and Bhawar Singh. It has also come in the testimony of PW-12, that in connection with that there used to be regular fights and bickering. Once, Sundar Singh had also given an application to the police expressing threat to his life from the accused. No doubt, there is a serious dispute with regard to the identity of PW-12, that is whether she is wife of deceased Sundar Singh, but there is hardly any dispute with regard to the relationship between the deceased Sundar Singh and the appellants Chandan Singh, Kalicharan and Anil. Notably, Sundar Singh (D-1), Kalicharan and Chandan Singh are real brothers, all of them sons of Chittar Singh. The accused Bhago, who has been acquitted, is the wife of Chandan Singh. Anil is son of Kalicharan though, Gajraj is not part of the family. According to PW-5, who is the son of Satya Prakash (D-2), the accused Chandan Singh and others were inimical to his father D-2 because he had influenced Chittar Singh to execute a Will in favour of Sundar Singh. Whereas, according to PW-5, Gajraj was inimical to his father (D-2) because D-2 was in possession of Gram Samaj land from which Gajraj wanted to evict D-2. Thus, in view of the evidence led, in absence of any cogent explanation from the accused in their statement recorded under section 313 CrPC, the motive, though might not be too strong, was nevertheless there and has been proved. But, motive alone, though may provide a link to the other circumstances, is not by itself sufficient to record conviction.

23. We, therefore, now proceed to examine the most important circumstance, that is, whether the accused were seen running away from the scene of the crime, with one of them, namely, Chandan Singh, holding firearm in his hand, soon after the gun shot was heard and the deceased Chandan Singh was noticed to have suffered gun shot by PW-12. The proof of this circumstance depends solely on the testimony of PW-12. Therefore, the testimony of PW-12 now comes for analysis.

24. Before we analyse the testimony of PW-12, it would be appropriate to examine the law as to when conviction can be based on the testimony of a sole eye-witness. Although, it is well settled that it is the quality and not quantity of the evidence on which depends the proof of fact but the courts over a period of time have laid down guidelines as to when conviction on the uncorroborated testimony of a solitary witness can be based. In **Anil Phukan vs State Of Assam, (1993) 3 SCC 282**, the Supreme Court held as follows:-

"..... Conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction "

25. In **State of Rajasthan v. Bhola Singh, AIR 1994 SC 542**, the aforesaid statement of law was reiterated in the following words:

" It is well settled that if the case rest only on the sole evidence of the eye-witness, such testimony should be wholly reliable."

26. In ***Bhimapa Chandapa Hosamani and others v. State of Karnataka, (2006) 11 SCC***

323, the apex court reiterated the law in the following words:-

"This Court has repeatedly observed that on the basis of the testimony of a single eye witness a conviction may be recorded, but it has also cautioned that while doing so the Court must be satisfied that the testimony of the solitary eye witness is of such sterling quality that the Court finds it safe to base a conviction solely on the testimony of that witness. In doing so the Court must test the credibility of the witness by reference to the quality of his evidence. The evidence must be free of any blemish or suspicion, must impress the Court as wholly truthful, must appear to be natural and so convincing that the Court has no hesitation in recording a conviction solely on the basis of the testimony of a single witness."

27. In a recent decision in the case of **Jagdish and others v. State of Haryana, (2019) 7 SCC 711**, again, the Supreme Court reiterated the law by observing "conviction on basis of a solitary eyewitness is undoubtedly sustainable if there is reliable evidence cogent and convincing in nature along with surrounding circumstances."

28. A conspectus of the law in respect of when conviction on basis of testimony of a sole eye witness can be recorded, would reveal that though, there is no bar in basing conviction on the testimony of a single eye-witness but, before doing so the court must carefully scrutinise the evidence to be satisfied whether it is free of any blemish or suspicion, is wholly truthful and appears natural and convincing, that is, in short, it is intrinsically reliable, inherently probable and wholly trustworthy.

29. Having noticed the legal position, we now proceed to analyse the testimony of PW-12 as to find out whether the testimony of PW-12 satisfies the criteria of being intrinsically reliable, inherently probable and wholly trustworthy. Before we do so we must notice that PW-12 is coming up with her version for the first time after over two years of the death of Sundar Singh (D-1). Admittedly, she has not given her statement to the police during the course of investigation; she has also not moved any application before the police that she is conversant with the facts of the case which are relevant to the fact in issue; and she gave her testimony only when all the witnesses of fact have been examined and were not supporting the prosecution case. In ***Kali Ram v. State of Himachal Pradesh, (1973) 2 SCC 808***, the apex court had observed that :

"If a witness professed to know about a gravely incriminating circumstance against a person accused of the offence of murder and the witness kept silent for over two months regarding the said incriminating circumstance against the accused, his statement relating to the incriminating circumstances, in the absence of any cogent reason, was bound to lose most of its value."

These observations of the Supreme Court might have been made at a time when witnesses were ready and willing to depose and come forward as compared to the present days when due to fear the witnesses tend to avoid coming forward. But the substratum of the law remains the same, which is, that there ought to be cogent reason for the witness to have remained silent for that long.

30. In the instant case, we find that though PW-12 states that after the murder of Sundar Singh (D-1), her family members had arrived and she had left with them to her parental house but she has not disclosed in what manner, and when, she was threatened by the accused. She has also not disclosed that her conscience had been pricking her as a consequence whereof, she made an attempt to

contact the police in the past for making her disclosure about the incident but, due to intervening circumstances, she could not do so. Interestingly, in the initial part of her statement, she states that in the morning, following the night of the incident, she had informed the I.O. but the I.O. (PW-13), during cross-examination, on 27.11.2020, states that he was not made aware that there was any wife of the deceased by the name of Malti Devi. In that background, her silence of over two years casts a serious doubt on her trustworthiness. This doubt gets amplified when we notice from the record that the documents, which she filed as identity documents, relating to her being wife of Sundar Singh, along with her application 34 Kha, except the Adhaar Card, which carries no date, are documents obtained after the date of occurrence. The defence did make an effort to demonstrate that she was wife of one Randheer Singh and was shown as wife of Randheer Singh in some documents. However, these documents have not been proved in accordance with law to enable us to arrive at a definite conclusion that she is wife of Randheer Singh. But, noticeably, the voter ID card filed by her along with her application 34 Kha is issued on February 20, 2020; and the domicile certificate in which she is reflected as wife of Sundar Singh is dated 14.09.2020. Under these circumstances, there arises a serious doubt with regard to her being the wife of Sundar Singh (D-1) more so, when, to the question whether PW-12 had any photograph of her marriage, she replies by saying that all her photographs are left in her Sasural. Further, when she is cross-examined with regard to the date and year of her marriage, she is unable to answer. The affidavit of Dinesh Kumar, which PW-12 relies upon as an admission by a Pairokar of the accused Gajraj Singh with regard to her being the wife of Sundar Singh, cannot be taken as a piece of admission to bind the accused facing criminal trial and, otherwise also, it is not a substantive evidence, more so, when that person i.e. Dinesh Kumar, who made such deposition in the affidavit, has not been examined as a witness and confronted with the statement made in his affidavit. Keeping in mind all the above circumstances, as also PW-12's statement that Sundar Singh (D-1) was earlier married to one Kallo but, after having a divorce with Kallo, papers of which PW-12 did not produce, Sundar Singh married PW-12, casts a doubt about PW-12's marital status as a legally wedded wife of Sundar Singh. We may clarify that this examination of her marital status as wife of Sundar Singh, is not with a view to make a declaration, which may affect her civil rights, but for the limited purpose of assessing the probability of her presence at the scene of crime. We may further clarify that even if we doubt her marital status as the legally wedded wife of deceased Sundar Singh, her testimony in respect of the incident may still be accepted, if her presence at the scene of crime is proved beyond doubt and her testimony satisfies the criteria of being intrinsically reliable, inherently probable and wholly trustworthy.

31. In this regard, we notice from her deposition that, despite lengthy cross-examination, she has unflinchingly disclosed the topography of the house of Sundar Singh and its surroundings; the names of relatives and family members of Sundar Singh; and what is located where inside the house. All of this, reflects that she is no stranger to the family and has knowledge about Sundar Singh, his house and his relations. Interestingly, during cross-examination, she stated that she came to Nagla Bharau 15 - 20 days before the incident. It is thus clear that she has knowledge about the family of the deceased and could be considered as one having inside information. In this context, a bare denial by the accused about her real status leads us to infer that the defence is hiding

something. However, this, by itself, is not decisive for us to conclude whether the accused appellant are guilty though, it may give rise to suspicion, but, it is well settled, howsoever strong a suspicion might be, it is no substitute for legal proof.

32. Therefore, now, we shall examine whether her testimony in respect of the incident is intrinsically reliable, inherently probable and wholly trustworthy. In this regard, we may notice that in the first half of her testimony, she makes a statement that when she heard gun shot and came out of her room, which is upstairs, and out of the door of the house, she saw all the five accused running away with weapon in their hands. On the same day, thereafter, during the course of her deposition, she alters her statement and clarifies that she only saw Chandan Singh having weapon in his hand and running away, whereas, others were just seen running away. This alteration in her stand is an indication that she is not wholly reliable as she seems to be wavering in her deposition.

33. Now, we shall examine whether her testimony is inherently probable or appears natural. To arrive at a definite conclusion on the aforesaid aspect, it would be apposite to recapitulate her statement. She states that she was sleeping in a room on the upper storey of her house whereas the deceased Sundar Singh was sleeping outside the house in front of the shop on the Chabutra when, at well past midnight, she heard a gun shot. Hearing the gun shot, she woke up, came downstairs, opened the door of her house and came out to see the accused running away. There are few important features in her testimony noticed above. First, that she was sleeping inside the room and woke up when she heard gun shot; second, that the room where she was sleeping is upstairs, that is on the upper floor; third, she climbed down the stairs to open the main door of the house to come out; and, fourth, then, she found Sundar Singh (D-1) lying and the accused running away. Noticeably there is a single gun shot injury on the body of deceased Sundar Singh and it is not PW-12's case that the incident was preceded by an altercation or exhortation. Therefore, the question that now arises is whether in that kind of a scenario there was sufficient opportunity for PW-12 to wake up, come down from her room on the upper floor, open the gate, come out and notice the accused running away. At this stage, we may observe that in her deposition she has also stated two important things: (i) that as soon as she heard gun shot she was sure that murder has been committed; and (ii) that had she not been inside the room she would have also been killed. In that kind of a scenario, it is but obvious that she must have been maintaining a safe distance from the spot to avoid the wrath of her husband's assailants. Whether from that so-called safe distance she could identify the assailants, particularly, when it is not her case that she recognised them by their voices, is also a question which needs to be examined, particularly, when the incident is of night and the source of light is not disclosed at the spot by the prosecution evidence. In this regard, though, it has not come that the assailants were spotted in moon light, but it would be apposite to notice the moon chart to test the possibility of the assailants being spotted in moonlight. From the moon chart of June 18, 2018, it appears that on that night the moon would be less than a quarter as it would have been a quarter moon on June 20, 2018 at 4.22 pm. In **Dr. Hans Gross's Criminal Investigation**, which has been relied upon by the Supreme Court in **State of Uttar Pradesh V. Ashok Kumar and Another, (1979) 3 SCC 1**, it has been observed:

"By moonlight one can recognise, when the moon is at the quarter, persons at a distance of from 21 feet in bright moonlight at from 23 to 33 feet; and at the very brightest period of the full moon, at a distance of from 33 to 36 feet. In

tropical countries the distance for moonlight may be increased."

In the instant case, on the date of the incident, the moon was even less than a quarter. Therefore, taking into account that this is an incident of single gunshot, no other injury, not preceded, or followed, by altercation, or exhortation, or threat, occurring at an open Chabutra adjoining the road, the assailant would have ample time to flee and disappear into the darkness of the night by the time PW-12, sleeping in the room upstairs, could wake up, come downstairs, open the main gate and come out of the confines of her house to witness the assailants running away. Her testimony, therefore, in our view, fails to qualify the test of being inherently probable.

34. Whether PW-12's testimony could be considered trustworthy is what, now, falls for our consideration. Admittedly, PW-12 has an interest in the property of the deceased Sundar Singh (D-1). The accused persons, as per prosecution case, were not interested in providing D-1 his share therefore, by their conviction, PW-12 stands to gain. In that scenario, when we notice that though, she claims herself to be deceased's wife but has remained silent for nearly two years to disclose such an incriminating circumstance, by no stretch of imagination her testimony could be considered trustworthy or of such sterling quality that it could alone form the basis of conviction. Noticeably, there is no cogent explanation for this inordinate delay. The only explanation is that she was threatened and thrown out of her Sasural and next day, her family had come to take her and since, thereafter, she had been staying at her parents' house. This explanation might have been acceptable for a few days or a few months delay but not for the delay as long as two years. Interestingly, PW-12 turns up in the trial when all the key witnesses of the prosecution turn hostile. This suggests that she was keeping a close watch at the proceeding and when she saw that the accused may get acquitted she jumps into the fray to ensure that her interest in the property is secured. When we take a conspectus of all these circumstances discussed above, we come to a definite conclusion that PW-12 is not trustworthy and her testimony is not of that sterling quality which alone can form the basis of conviction or to hold that, on that fateful night, the appellants including Chandan Singh were noticed fleeing from the spot, with appellant Chandan Singh having a gun in his hand.

35. Once we discard the testimony of PW-12 as not reliable, nothing much remains to prove the involvement of the appellants in the murder. Because, as we have already noticed above, the weapon alleged to have been recovered at the pointing out of the appellant could not be connected by forensic evidence with the bullet recovered from the body of the two deceased, namely, Sundar Singh and Satya Prakash. The recovery of the country made pistol therefore, cannot be taken as a circumstance to link the accused Chandan Singh with the murder of the deceased Sundar Singh (D-1) or of Satya Prakash (D-2).

36. For the foregoing reasons, we are of the considered view that the prosecution evidence has failed to bring home the guilt against either Chandan Singh or any of the other accused-appellants put to trial in respect of the three murders. Hence, the charge of murder against the accused-appellants including Chandan Singh is held not proved and, therefore, the conviction of the appellants including Chandan Singh for the murder of Sundar Singh, Satya Prakash and Bhawar Singh is liable to be set aside.

37. Now, we shall examine the validity of the conviction of the accused Chandan Singh for offence punishable under Section 3/25 of the Arms Act. In that

regard, the recovery of country made pistol at the pointing out of the appellant Chandan Singh has been denied by Chandan Singh and has been termed as bogus/fabricated. The memorandum of recovery is not witnessed by any public witness and the place from where the recovery is made, from the statement of PW-15 as well as from the site plan, is an open field having direct access from the road. The spot from where the recovery is stated to have been made is 35 paces outside the boundary wall of the house of Chandan Singh. Further, the recovery is not stated to have been made by digging out the weapon from beneath the surface of the earth rather, it is alleged to have been searched out from the field, where it was stated to be lying. Interestingly, this weapon could not get connected with the bullet recovered from the body of the two deceased therefore, in such circumstances, the disclosure statement that allegedly led to its recovery becomes doubtful. Otherwise also, the weapon lying in open field, not buried, cannot be said to be in the possession of the appellant. We are therefore, of the firm view that the appellant is also entitled to be acquitted of the charge of an offence punishable under Section 3/25 of the Arms Act.

38. For all the reasons recorded above, the judgment and order of the trial court in both the trials cannot be sustained. Both the appeals are **allowed**. The reference to confirm the death penalty is answered in the negative and the prayer to confirm the death penalty awarded to the accused-appellant Chandan Singh is rejected. The judgment and order of the trial court in both the sessions trial is set aside. All the appellants are acquitted of all the charges for which they have been tried. They shall be released forthwith, unless wanted in any other case, subject to compliance of the provisions of Section 437A Cr.P.C. to the satisfaction of the court below.

39. Before parting, we would like to express our anguish with the shoddy manner in which the investigation of the case was done. This was a case where there were three murders in a village. Noticeably, three persons died on or about the same time in the intervening night of 18/19.06.2018. Their bodies were found at three different places. In the age of mobile telephony, ordinarily, most of the citizens including villagers are having mobile phones. With the help of CDR details, the tower location of the mobile phones, an insight can be had to the turn of events that led to the murders. The investigation is completely absent in that regard. A very simplistic approach has been adopted by the investigating agency in presuming as if the same set of accused committed all the three murders without even noticing that the entry wounds apparently were of different dimensions and the ballistic expert report indicated that the two bullets recovered, one from deceased Sundar Singh and the other from deceased Satya Prakash, could neither be connected with the weapon recovered from Chandan Singh nor could be found as to have been fired from a single weapon. Hence, the investigating agency was required to probe further to find out as to who else could have been involved. No effort of that kind appears visible on the record. It is unfortunate that a triple murder has resulted in no conviction. The Courts cannot convict unless the prosecution leads evidence that establishes the guilt beyond the pale of doubt. The burden is on the prosecution and the investigating agency plays an important role in that regard, which, in the present case they have miserably failed to discharge.

40. Let a copy of this order be sent to the trial court for information and compliance.

(2021)12ILR A376
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.12.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE SURESH KUMAR GUPTA, J.

Misc. Bench No. 11355 of 2021
Along with other connected cases.

Shailendra Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Girish Chandra Verma

Counsel for the Respondents:
C.S.C., Dileep Singh, Gaurav Mehrotra, Paavan Awasthi

A. Interpretation of Statute - U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 - Sections 2(k), (l), (o), (I) & 17 - U.P. Sugarcane (Regulation of Supply and Purchase) Rules, 1954 - The U.P. Sugarcane (Supply and Purchase) Order, 1954 - The Essential Commodities Act, 1955 - The Sugarcane (Control) Order, 1966: Clause 3(3), 3-A - When the St. Act is in conflict with the Central Order and the former will have to give way to the latter. The Central Order has its backing and statutory force of a Central enactment and would prevail over any contrary provision contained in the St. enactment. (Para 57)

The Court observes that Section 17(3) of the St. Act, 1953 prescribes a period of fifteen days but the Central Order, 1966 made under the Central Enactment, 1955 prescribes a period of fourteen days for payment of sugarcane dues. Thus**,** for the reasons already given hereinabove, the company/occupier is required to pay the cane dues to the cane farmers directly or to the Cane grower's Co-operative Society within fourteen days from the date of delivery. Similarly, the rate of interest payable in case of delay in payment to the farmers within stipulated period of time would be 15 per cent per annum as is prescribed in the Central Order, 1966 and not 12 per cent per annum as is prescribed in the proviso to Section 17(3) of the Act, 1953. (Para 56, 58)

Writ Petition Disposed of. (E-10)

List of Cases cited:

1. Jaypal Singh & anr. Vs St. of U.P. & ors. Writ C No. 29214 of 2019

2. Kanikram & 3 ors. Vs St. of U.P. & 4 ors. Writ C No. 13313 of 2020

3. St. Bank of Patiala Vs Zila Adhikari & Ors (2013) 11 ADJ 7

4. Ahmadabad Municipal Corporation Vs Virendra Kumar Jayantibhai Patel . AIR (SC) 3002

5. Narendra kumar Chandla Vs St. of Har. & ors. JT 1994 (2) S.C. 94

6. M/s Shakuntla Educational & Welfare Society Vs St. of U.P. & 2 ors. Writ C No. 28968 of 2018

7. Simbholi Sugar Ltd. Vs St. of U.P. & ors. 2010 (3) A.D.J. 628 (LB)

8. CH. Tika Ramji & ors. Etc.. Vs St. of U.P. & ors. AIR 1956 SC 676

9. West U.P. Sugar Mills Association & Ors. Vs St. of U.P. & Ors. (2020) 9 SCC 548

10. Ispat Industries Ltd. Vs Commissioner of Customs, Mumbai (2006) 12 SCC 583

11. Delhi Transport Corporation Vs Balwan Singh & ors. (2019) 18 SCC 126

12. Ch. Tikaramji Vs St. of U.P. (1956) SCR 393

13. Govind Nagar Sugar Ltd. Vs St. of U.P. 2001 ALL LJ 741

14. DCM Shriram Industries Ltd. Vs St. of U.P. 2005 All LJ 2159

15. L.H. Sugar Factories Ltd. Vs St. of U.P. WP. C. No. 1680 of 2017

16. Akram Khan & anr. Vs St. of U.P. (2020) 132 ALR 182

17. Offshore Holdings Pvt. Ltd.Vs Bangalore Development Authorities & Ors (2011) 3 SCC 139

18. CH. Tika Ramji & ors. Etc. Vs St. of U.P. & ors. AIR 1956 SC 676

19. U.P. Cooperative Cane Union Federation Vs West U.P. Sugar Mills Association & ors. (2004) 5 SCC 430

20. St. of M.P. Vs Jaora Sugar Mills & ors. 1997 (9) SCC 207

21. Kalyani Maithivanan Vs K.V. Jeyaraj & ors. (2015) 6 SCC 363 *(followed)*

22. Government of Andhra Pradesh & ors. Vs P. Laxmi Devi (2008) 4 SCC 720

23. Sant Ram Sharma Vs St. of Raj. AIR 1967 SC 1910

24. Dhananjay Malik & ors. Vs St. of Uttranchal & ors. (2008) 4 SCC 171

25. Rashtriya Kisan Mazdoor Sangathan (Regd) thru Convenor Vs St. of U.P. & Anr. PIL No. 67617 of 2014 *(followed)*

26. Saverbhai Amaidas Vs St. of Bombay (1995) 1 SCR 799

27. Raju Anna Shetti & ors. Vs U.O.I .& ors. Writ Petition (s) (Civil) No. 805 of 2021

28. Ratan Lal Adukia Vs U.O.I .& ors. (1989) 3 SCC 537

29. Kanikaram & ors. Vs St. of U.P. & ors. (2020) SCC Online All 1039

30. Ram Keval Vs St. of U.P & ors. Writ Petition No. 866 (M/B) of 2019 *(Distinguished)*

31. Ram Singh Vs St. of U.P. & ors. Writ Petition No. 30937 (M/B) of 2018

32. Dharam Veer Singh & ors. Vs St. of U.P. & ors. P.I.L. No. 1081 of 2013 *(Distinguished)*

33. Tejwal Gangwar Vs St. of U.P. Writ C No. 60912 of 2016 *(Distinguished)*

34. West U.P. Sugar Mills Association & ors Vs St. of U.P. 7 ors. (2009) 9 SCC 548

35. Kaiser-i-Hind Pvt. Ltd. & anr. Vs National Textile Corpn. (Maharashtra North) & ors. (2002) 8 SCC 182

36. Rajiv Sarin & anr. Vs St. of Uttarakhand & ors. (2011) 8 SCC 708

37. Forum for People's Collective Efforts (FPCE) & anr. Vs St. of W.B.l & anr. (2021) 8 SCC 599

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Sri G.C. Verma, learned counsel for the petitioners, Sri H.P. Srivastava, learned Addl. Chief Standing Counsel for the State, Sri Satish Chandra Mishra, learned Senior Counsel along with Sri Paavan Awasthi, Sri Sanjeev Singh, Sri Sunil Kumar Chaudhary and Sri Kapil Mishra, learned counsel for opposite party no. 6, Sri Gaurav Mehrotra & Sri Parmanand Asthana, learned counsels appearing for respective Cane Growers' Co-operative Societies.

2. This is a bunch of writ petitions filed by cane growers seeking their sugarcane dues which have not been paid by the opposite party no.06 i.e. Bajaj Hindustan Sugar Limited (hereinafter referred to as "the Company'). The Company runs 14 sugar mills in the State of U.P. and the petitioners are sugarcane growers who sold their sugar cane to five of these mills situated at Gola Gokaran Nath, Khambhar Khera, Palia Kalan, Barkhera, and Maqsoodapur. This matter relates to these five mills only.

3. Writ Petition No.11355 (M/B) of 2021 has been treated as the leading writ petition. Relief prayed in the writ petition is as under:-

"(i) Issue a writ, order or direction in the nature of mandamus commanding thereby the opposite parties to ensure that the payment of entire cane price is made immediately to the petitioners along with 15 % compound interest from the date on which it becomes. due and till it actually paid, in the light of the Departmental Laws i.e. Sections 17 & 22 of the Uttar Pradesh Sugar Cane (Regulation of Supply and Purchase) Act, 1953, Rule 45 of the Uttar Pradesh Sugar Cane (Regulation of Supply and Purchase) Rules, 1954 & Order 3 (3, 3A, 8, & 9) of the Sugarcane (Control) Order, 1966 as mentioned in para 3 of the W.P. and also in the light of the an AFR judgment passed in the writ petition no. 13313 of 2020 (MB), as contained in

Annexure ho. 4 to the W.P., in the interest of justice.

(ii) Issue a writ, order or direction in the nature of mandamus commanding thereby the opposite party no.2 to take action against the opposite party no.6 for ensuring that the payment of entire cane price is made immediately to the petitioners along with 15 %. compound interest from the date on which it becomes due and till it actually paid, in the light of the Departmental Rules i.e. Sections 17 & 22 of the Uttar Pradesh Sugar Cane (Regulation of Supply and Purchase) Act, 1953, Rule 45 of the Uttar Pradesh Sugar Cane (Regulation of Supply and Purchase) Rules, 1954 & Order 3 (3, 3A, 8, & 9) of the Sugarcane (Control) Order 1966 as mentioned in para 3 of the W.P. and also in the light of the an AFR judgment passed in the writ petition no. 13313 of 2020 (MB), as contained in Annexure no. 4 to the W.P., in the interest of justice.

(iii) Issue a writ, order or direction in the nature of mandamus commanding thereby the opposite party no. 6 to make payment of entire cane price to the petitioner along with 15 %. compound interest from the date on which it becomes due and till it actually paid as the mill is bound to pay in the light of the Departmental Sections 17 & 22 of the Uttar Pradesh Sugar Cane (Regulation of Supply and Purchase) Act, 1953, Rule 45 of the Uttar Pradesh Sugar Cane (Regulation of Supply and Purchase) Rules, 1954 & Order 3 (3, 3A, 8, & 9) of the Sugarcane (Control) Order, 1966 as mentioned in para 3 of the W.P. and also in the light of the an AFR judgment passed in the writ petition no. 13313 of 2020 (MB), as contained in Annexure no. 4 to the W.P., in the interest of justice.

(iv) Pass any other order or direction which this Hon'ble Court may deem fit, just and proper in the circumstances of the case, in favour of the petitioners.

(v) Allow the writ petition with cost."

4. This Court on 05.07.2021 passed a detailed interim order directing payment of sugarcane dues to the petitioners and other sugarcane growers on the principle of "first supply, first payment' so that there is uniformity and fairness in payment of dues.

5. The provisions of law relevant in the case are the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 (hereinafter referred to as "the Act, 1953'); U.P. Sugarcane (Regulation of Supply and Purchase) Rules, 1954 (hereinafter referred to as "the Rules, 1954'); the U.P. Sugarcane (Supply and Purchase) Order, 1954 (hereinafter referred to as "the Order, 1954') made under Section 16 of the Act, 1953; the Essential Commodities Act, 1955 and the Sugarcane (Control) Order, 1966 (hereinafter referred to as "the Order, 1966') issued by the Central Government under Section (3) of the said Act, 1955.

6. The contention of Sri G.C. Verma and other learned counsel appearing for the sugarcane growers-petitioners was that Section 17 (1), (2) and (3) of the Act, 1953 obligate upon the Company to pay sugarcane dues within fifteen days from the date of the sugarcane having been delivered in its factory / purchase centre, which has not been paid. It is also contended that on failure to pay the dues as aforesaid, interest @12 per cent per annum is payable by the company to the cane growers in view of the proviso to sub-Section (3) of Section 17 of the Act, 1953, whereas, as per the Order 1966, it is @ 15 per cent per annum, which has also not been paid. It is contended that for the past five years, no interest has been paid on the delayed payment of dues of sugarcane growers by the Company and in fact, in all the years, the dues have been paid belatedly. It has further been submitted that sugarcane growers have taken loan for growing their crop and on account of delayed payment, great prejudice has been caused to them in the matter of repayment of loan and even otherwise as their livelihood is at stake the said right is being violated by the

Company. Reliance has been placed in this regard upon various decisions of this Court some of which are Writ-C No.29214 of 2019 **'Jaypal Singh and Another vs. State of U.P. and others**.' decided on 16.09.2019; P.I.L. No.67617 of 2014 **'Rashtriya Kisan Mazdoor Sangathan (Regd) Thru. Convenor vs. State of U.P. & Anr**.' and other connected writ petitions decided on 09.03.2017; Writ-C No.13313 of 2020 **'Kanikram & 3 others. vs. State of U.P. and 4 Others'** and other connected writ petitions decided on 21.09.2020; (2013) 11 ADJ 7 **'State Bank of Patiala vs. Zila Adhikari and others'**; AIR (SC) 3002 '**Ahmedabad Municipal Corporation vs. Virendra Kumar Jayantibhai Patel'**; JT 1994 (2) S.C. 94 **'Narendra Kumar Chandla vs. State of Haryana & Ors**.' and Writ-C No.28968 of 2018 **'M/s Shakuntla Educational And Welfare Society vs. State of U.P. and 2 Others'** and connected petitions decided on 28.05.2020.

7. Sri H.P. Srivastava, learned Addl. Chief Standing Counsel for the State has submitted that it is a fact that in the last five years the Company has failed to pay dues of sugarcane growers within time and that no interest has been paid on such delayed payment. He, however, submits that the financial condition of the Company is such that it is not possible to recover the dues even on taking of coercive measures rather a balancing approach has been adopted by the Sugarcane Commissioner so that on the one hand the interest of the sugarcane growers is protected and they are paid their dues and on the other hand, the factory run by the Company is also not shut-down as if this happens then ultimately it is the sugarcane growers of the area who will suffer and they will have to take their sugarcane to a far-off factory incurring additional expenditure and consequent losses in sale consideration. Therefore, the Sugar Commissioner has opened an Escrow account and 85% of the sale proceeds from sale of sugar made by the Company from the sugarcane supplied by the farmers as also certain percentage of sale proceeds from the sale of by-products, namely, Molasses, Ethanol, Bagasse, Electricity, Pressmud and Distillery is deposited in the said Escrow account, remaining 15% having been left for meeting expenditures of the sugar factory being run by the Company, and this amount deposited in the Escrow account is used for payment of sugarcane dues, apart from other sources of payment by the Company. The account is operated jointly by officers of the Company and the Government officials. He says that this arrangement takes care of the interest of the sugarcane growers as also the Company. Almost every day payment is being made to the sugarcane growers. He has relied upon various decisions in support of his contention rendered in Writ-C No.13313 of 2020 **'Kanikram & 3 others. vs. State of U.P. and 4 Others'**; P.I.L. No.67617 of 2014 **'Rashtriya Kisan Mazdoor Sangathan (Regd) Thru. Convenor vs. State of U.P. & Anr**.'; 2010 (3) ADJ 628 (LB) **'Simbholi Sugar Ltd. vs. State of U.P. and Others'**; AIR 1956 SC 676 **'CH. Tika Ramji and others etc vs. State of U.P. and others'**; (2020) 9 SCC 548 ' **West U.P. Sugar Mills Association and others vs. State of U.P. and others'**; (2006) 12 SCC 583 **'Ispat Industries Ltd. vs. Commissioner of Customs, Mumbai'** and (2019) 18 SCC 126 **'Delhi Transport Corporation vs. Balwan Singh and others'**.

8. Sri S.C. Mishra, learned counsel appearing for the Company submitted that only 2.87% farmers have approached this Court in this bunch of petitions, meaning thereby, 97.13% of sugarcane growers are satisfied with the situation as they are assured of a higher return on sale of sugarcane to the Company even if they receive the proceeds belatedly. He submitted that the financial operations of the Company were being managed by a consortium of seventeen Banks. The financial condition of the Company was such that no financial institution was willing to extend any credit or

loan or advance for payment of dues of sugarcane farmers inspite of its best efforts. This situation, according to him, has arisen on account of the Government having renegaded on its promise made in the sugarcane policy, 2004 for providing certain subsidies and incentives to the companies which establish fresh sugar units in the State based on which the units were set-up by the Company, that too, inspite of various decisions by the High Court and Hon'ble the Supreme Court in favour of the Company. He submitted that inspite of the the decisions, the State Government arbitrarily rejected the claim of the Company which has again been put to challenge and the matter is now pending before the High Court. He also submitted that electricity had been generated by the Company in its factory which was sold to U.P. Power Corporation Ltd. and there are dues of few crores in this regard which have not yet been paid by UPPCL to the petitioners. All this has made the financial condition of the Company fragile which in turn has resulted in delayed payment of dues to the sugarcane farmers. If the Government abides by the promise made by it to the Company under the sugarcane policy and the Power Corporation pays the proceeds from sale of electricity to it then this entire matter could be resolved at once. In fact, he submitted that the Government and the Power Corporation need not pay the dues of the Company to it, instead, they may directly pay it to the sugarcane growers which will clear all the dues and the dispute will end.

9. We have already made it clear in our earlier orders that we will not tag the payment of sugarcane dues of farmers with the claim of the Company of dues against the State and UPPCL and the Company can agitate it separately.

10. He, however, could not deny the fact that in the past five years, interest on the delayed payment has not been paid by the Company to the sugarcane growers. In this regard, he submitted firstly that nobody asked for it and secondly, he submitted that there is a provision in sub-Section (3) of Section 17 of the Act, 1953 for waiver of interest. However, on being asked as to whether any such application has been filed for the year 2020-21 or the earlier years, he could not give any satisfactory reply in this regard. The Court was, however, apprised of an order of the High Court directing the Sugarcane Commissioner to take a decision on the application for waiver of interest, if any, filed by the Company within three months but none of the counsels could inform the Court as to whether any such application had been moved and/ or any such decision had been taken thereon or not.

11. Sri Mishra, learned Senior Counsel further submitted that the dues upto the year 2019-20 have been cleared by March, 2021 as Hon'ble the Supreme Court had permitted the Company to clear the dues by the said date in S.L.P. (C) No.11948-11951 of 2020. Therefore, he says that the Company has best of intentions to pay the dues of the farmers but it is only on account of the compelling financial circumstances that it has not been able to pay the same, timely. He did not deny the liability of the Company in this regard, rather asserted its commitment to pay the dues.

12. However, in this regard, he submitted that the provisions of the Act, 1953 had themselves become outdated and were also self-contradictory. He submitted that in the year 1953, the production and sale of sugarcane was not much, certainly not what it is today, therefore, payment of sale proceeds for small quantities of sugarcane could be made by the companies to the sugarcane growers but as of now, the production has increased many fold and it was not possible for anyone including the State Government to make payment of dues within the short period of fifteen days prescribed in the statute as stated by learned counsel for the

petitioners. The provisions of Section 17 of the Act, 1953 are impractical and in fact, they are impossible to be complied with, although, he also submitted that the company is committed to making the payments and also made a statement before this Court that the dues for the years 2020-21 would be cleared by February-March, 2022, a fact which has also been stated on affidavit. On being specifically asked as to whether interest would also be paid, he submitted that subject to any waiver by the Sugarcane Commissioner in this regard if anyone claims interest, the same would also be paid.

13. He, however, invited attention of the Court to Section 17 (1) of the Act, 1953 wherein the words "speedy payment of price of cane' has been mentioned and in the succeeding sub-Section (2) of the aforesaid Section, the words "to pay immediately the price of the cane so supplied' has been used, which, according to him, were incongruous, especially as, in sub-Section (3) of the Section 17 of the Act, 1953, it has been said that if the company defaults in making payment of the price for a period exceeding fifteen days from the date of delivery then interest would be payable. He says that sub-Section (1) of Section 17 of the Act, 1953 uses words "speedy payment' then sub-Section (2) uses the words "liable to pay immediately payment' and then sub-Section (3) says that it should be paid within fifteen days lest interest becomes payable, all this, according to him was contradictory. Moreover, he submitted that sub-Section (1) of Section 17 of the Act, 1953, while referring to speedy payment of price of sugarcane purchased by the occupier, refers to making of such provision in this regard as may be prescribed. He says that there is no such prescription anywhere in the Rules as to how this is to be done.

14. He also submitted that sub-Section (3) of Section 17 of the Act, 1953, in fact, is mainly concerned with payment of interest and does not define the time limit during which the sugarcane dues are to be paid. Based on this, he submitted that unbridled power had been vested in Section 17(4) to the Sugarcane Commissioner for issuance of Recovery Certificate.

15. In this regard, he also referred to the agreement referred in Form B and C mentioned in the Order, 1954 and the provisions contained in the said Order to submit that the company and the cane growers can arrive at an agreement fixing the time limit for payment of dues. Therefore, the time prescribed in sub-Section (3) of Section 17 of the Act, 1953 is not mandatory. However, on being pointed out that Form B and C do not deal with payment of sugarcane price, no satisfactory reply could be given.

16. He further submitted that sugar is a controlled commodity. The company can sell only so much as is permitted by the Central Government. Therefore, this is also a handicap as the company cannot sell as much as it wants. Sugar can't be sold in open market freely. Moreover, the sale price of sugar is also controlled. Minimum price is fixed by the Central Government and the state advisory price is fixed by the State Government which has to be adhered by the company. He went on to say that, in fact, the cost price of sugar is more than the selling price. All this makes the entire exercise unviable ultimately resulting in delayed payment.

17. He also submitted that the land on which sugarcane is being grown in the districts involved in these bunch of petitions has grown. In this regard, he referred to Gola Gokaran Nath where according to him, 80% of the agricultural land is being used for cultivation of sugarcane and as only 2.87% farmers have approached this Court, therefore, obviously, huge majority of the sugarcane growers from whom sugarcane is purchased by the Company accept the fact

situation, as they will be getting higher sale proceeds from the sale of sugarcane even if belatedly, vis-a-vis the proceeds from sale of other agricultural produce. It is only a handful of farmers who are agitated.

18. He also submitted that the principle of "first supply, first payment' is absolutely correct as it leaves no room for arbitrariness otherwise the writ courts are flooded with writ petitions and only those sugarcane growers are paid the dues who get an order from the High Court.

19. He submitted that paying capacity is not a parameter for reserving/ assigning an area under Rule-22 of the Rules, 1954. Various factors have been given and it is not permissible in law to base such decision on any sole factor. He also submitted that considering the financial condition of the company, the area reserved for the company has been reduced by the Sugarcane Commissioner in the recent years by about 30%. Therefore, the Sugarcane Commissioner, who is an expert in the field, is adopting correct approach in the matter by balancing the rights of the company, vis-a-vis the sugarcane growers.

20. He submitted that any drastic measures adopted by the opposite parties or any coercive action directed by the High Court would result in a situation where the factory may itself have to be shut down which would benefit neither the company nor the sugarcane growers and if the factory does not function then the dues will be put in jeopardy. No purpose would be served by putting the Directors in prison if sufficient money is not available as of now to straightaway pay the dues in one go. Gradual payment is being made from the Escrow account which is in the hands of authorities. He referred to various affidavits filed on behalf of the company in this regard in response to various orders of this Court.

21. He also submitted that the Company undertakes various measures under Rule 22 for development of the area and even advances loans etc to the sugarcane growers and no complaint has been received in this regard as regards the Company. Therefore, it is not only about payment of sale proceeds but the development of the entire area where the sugarcane is produced and the welfare measures taken by the company in this regard as such if the factory is closed, it enures to nobody's benefit.

22. He very fairly submitted that the Company does not deny its liability to pay dues to cane growers but considering the situation, the same will be paid in a phased manner but certainly by February-March, 2022.

23. He also referred to prevalence of Covid-19 pandemic which had also resulted in financial losses to the Company/ Occupier as one of the additional reasons for non-payment of dues within time. He submitted that these were circumstances beyond the control of the Company / Occupier. Therefore, they have to be taken into consideration not only with regard to the delayed payment but also with regard to levying of interest in the context of waiver of such interest.

24. Sri Mishra, learned Senior Counsel relied upon the decisions reported in (1956) SCR 393 **'Ch. Tikaramji vs. State of U.P**.'; 2001 ALL LJ 741 **'Govind Nagar Sugar Ltd. vs. State of U.P**.'; 2005 All LJ 2159 **'DCM Shriram Industries Ltd. vs. State of U.P.**'; W.P. C. No.1680 of 2017 **'L.H. Sugar Factories Ltd. v. State of U.P.**' decided on 14.02.2017 and (2020) 132 ALR 182 **'Akram Khan and Anr. vs. State of U.P'** in support of his submissions.

25. Sri Gaurav Mehrotra, learned counsel appearing for the Cane-growers' Co-operative Society supported the stand of the petitioners although in the same vein he also stated that the

Sugarcane Commissioner had, in fact, adopted the correct approach by opening an Escrow account wherein substantial amount of the sale proceeds from the sale of sugarcane by the Company and some percentage of sale from the by-products are deposited and the same are being used for payment of cane dues of cane growers.

26. He submitted that, in fact, though sub-Section (3) of Section 17 of the Act, 1953 referred to a period of fifteen days for payment of sugarcane dues failing which interest @ 12 per cent per annum was payable, the Control Order, 1966 issued by the Central Government, specifically Clause 3(3) and 3(3-A), referred to payment to be made within fourteen days of the date of delivery failing which interest on the amount due @ 15 per cent per annum for the period of such delay beyond fourteen days becomes payable. He stated that thus there is contradiction in this regard as the Order, 1966 refers to 14 days as the period for paying the dues to the cane growers whereas sub-Section (3) of Section 17 of the Act, 1953 refers to a period of fifteen days. The difference is also in the percentage of interest payable.

27. Furthermore, he submitted that as regards Form-B and C of the Order, 1954 are concerned they do not deal with the question of payment of price of sugarcane to the sugarcane growers, therefore, the Company cannot rely on the same. He submitted that it is the Control Order, 1966 which will prevail over the Act, 1953 and/or the Control Order, 1954 made thereunder or for that matter, the Rules of 1954 made thereunder.

28. He submitted that prior to the area being reserved for a company it is required to submit an estimate of requirements of sugarcane under Section 12 of the Act, 1953. Therefore, it is very well aware as to how much cane it is going to purchase and what price it will have to pay. Therefore, the Company should have made provision for such payment in advance so as to protect the interest of the sugarcane growers. He submitted that every sugarcane factory/ company enjoys a monopoly in the area reserved for it subject to certain exceptions which on the one hand protects the interest of the company and makes the enterprise viable and on the other hand also protects the interest of the sugarcane growers. However, in view of this, the sugarcane growers cannot sell their sugarcane to any other factory/ company other than the one for whom the area has been reserved, unless the Cane Commissioner orders otherwise.

29. He laid great emphasis on clause (f) of the Rule 22 of the Rules, 1954 to submit that this clause permitted the assessment of financial condition of the company prior to reserving area for it as this would go a long way in protecting the interest of the sugarcane growers, meaning thereby, if the company already has financial capacity to pay the estimated dues before the area is reserved for it then there will be no question of delayed payment and the intent and scheme of the Act, 1953 and/ or the Control Order, 1966 would be achieved.

30. He submitted that Sugarcane Commissioner was well within his powers to open an Escrow account. The provisions of the Act and the Orders referred hereinabove are not to be interpreted to institutionalise delayed payment of dues by occupiers but to protect interest of cane growers. The dues of the sugarcane growers for the crushing season 2020-21 which started in October, 2020 and ending in July, 2021, have not been cleared as of now nor have the dues been deposited with the Cane growers' Co-operative Society.

31. He relied upon various decisions in support of his contention reported in (2011) 3 SCC 139 **'Offshore Holdings Private Limited vs. Banglore Development Authorities and**

Ors.'; AIR 1956 SC 676 **'CH. Tika Ramji and others etc vs. State of U.P. and others'**; (2004) 5 SCC 430 **'U.P. Cooperative Cane Union Federation vs. West U.P. Sugar Mills Association and others'**; 1997 (9) SCC 207 **'State of M.P. vs. Jaora Sugar Mills and Ors.'**; (2015) 6 SCC 363 **'Kalyani Maithivanan vs. K.V. Jeyaraj and others'**; (2008) 4 SCC 720 **'Government of Andhra Pradesh and others vs. P. Laxmi Devi'**; AIR 1967 SC 1910 **'Sant Ram Sharma vs. State of Rajasthan'**; (2008) 4 SCC **171**'**Dhananjay Malik and ors. vs. State of Uttranchal and Ors**; PIL No.67617 of 2014 **'Rastriya Kisan Mazdoor Sangathan (Regd) Thru Convenor vs. State of U.P. & Another'**; (1955) 1 SCR 799 **'Saverbhai Amaidas vs. State of Bombay'**; Writ Petition (s) (Civil) No.805 of 2021 **'Raju Anna Shetti & Ors. vs. Union of India & Ors.'**; (1989) 3 SCC 537 **'Ratan Lal Adukia vs. Union of India'** and (2020) SCC Online All 1039 **'Kanikram and Ors vs. State of U.P. and Ors**.' in support of his contention.

32. Sri Parmanand Asthana, learned advocate also appearing for the Cane-growers' Co-operative Societies in some of the petitions has submitted in his written submissions that it is the co-operative society which enters into agreement with the sugar factory in Form-'C' mentioned in the Control Order of 1954 for supply of sugarcane to its members and the sugar factory makes payment of the cane price of sugarcane supplied by the society directly to the cane growers in their account through RTGS/ NEFT. The petitioners, therefore, cannot independently file instant writ petition for payment of cane price of sugarcane supplied by them through Cane-growers' Co-operative Society. The petitions by cane growers are thus not maintainable. He has supported the payment of cane dues to the farmers on the principle of "first supply, first payment' and submitted that out of turn payment should not be allowed nor should the que be broken as ultimate sufferers would be the small farmers. He has relied upon two Division Bench judgments rendered by this Court in the Writ Petition No.866(M/B) of 2019 **'Ram Keval vs. State of U.P. and others**' and Writ Petition No.30937 (M/B) of 2018 **'Ram Singh vs. State of U.P. and others**' in support of his contention that these writ petitions by cane growers are not maintainable.

33. In response, learned counsel for the petitioner submitted that the Company is flourishing and is insensitive to the financial needs of the sugarcane growers. He submitted that some of the farmers have committed suicide. However, he could not place before this Court any material in this regard. He submitted that the legal position has already been settled by this Court in the case of **Kanikram (supra), Rastriya Kisan Mazdoor Sangathan (supra), Jaypal Singh (supra),** therefore, nothing was required to be adjudicated so far as the legal position is concerned. The Cane-growers' Cooperative Society having failed to seek legal redress, the petitioners-cane growers are entitled to file this petition seeking their rightful dues. The provisions of Section 17 being mandatory, the Company had no option but to pay the entire amount of dues of the petitioners within the fifteen days mentioned in sub-Section (3) of Section 17 of the Act, 1953 and not having done so, the Sugarcane Commissioner is under an obligation to issue recovery certificate to the concerned Collectors who in turn are under an obligation to recover the entire amount from the Company as arrears of land revenue and pay the same to the cane growers, but this is not being done and interest of the sugarcane growers is not being protected and served by the official opposite parties nor by the Company. He further alleged violation of Article 14 and 21 of the Constitution of India. According to him, the Escrow account mechanism evolved by the Sugarcane Commissioner is in the teeth of the mandatory provisions contained in the Act, 1953. The Company earns hundreds of crores

merely by delaying payment as it does not pay interest on the said delayed payment.

34. It needs to be mentioned that as per the records, crushing of sugar cane started in October/ November, 2020 and ended sometime in March, 2021 in respect of the five mills which are involved in these petitions.

35. We have heard learned counsel for the parties and perused the material available on record.

36. First and foremost, as regards contention of Sri Parmanand Ashthana, learned counsel appearing for Cane-growers' Co-operative Society in some of the writ petitions that the writ petitions by the sugarcane growers/ farmers for payment of dues directly before this Court was not maintainable, it is surprising that such an objection is coming from learned counsel for Cane-growers' Co-operative Society as in view of the admitted factual position that the cane dues have not been paid as also the Company's admission of its liability to pay such dues, it is a question to be pondered by the Cane-growers Co-operative Society as to why it has not itself come forward before the Court raising such a grievance and even if, for some reason, it has not done so, why should it oppose the petitions filed by the sugarcane growers who are claiming their rightful dues to which they are entitled for sale of sugarcane to the company? especially when, these sale proceeds are the source of their livelihood. This plea at the behest of Sri Asthana is not acceptable at least in the facts of the present case where the Company admits to its liability, and as the Co-operative Societies are also party in these proceedings.

37. Sri Gaurav Mehrotra, learned counsel appearing for Cane-growers' Co-operative Society in other petitions, has very fairly stated that he was not raising any such objection considering the interest of the farmers. Furthermore, we find that the decision of this Court in **Ram Keval (supra)** case relied by Sri Asthana, learned counsel, does not contain any reason for holding the petition to be not maintainable it only refers to a decision rendered in P.I.L. No.1081 of 2013 (**Dharam Veer Singh and other vs. State of U.P. and others**) which was not a matter pertaining to sugarcane dues of farmers but some farmers had challenged an order for reservation of cane area, therefore, the said decision does not apply in this case. The decision in '**Tejwal Gangwar vs. State of U.P.**' Writ-C No.60912 of 2016 also did not deal with sugarcane dues but with establishing cane centres. In fact, this issue has been specifically considered by a Co-ordinate Bench of this Court in the case of Kanikram (supra) and it has been held that writ petition under Article 226 of the Constitution of India by sugarcane growers for payment of sugarcane dues is maintainable, cogent reasons have been given in support of this conclusion.

38. As regards the objection of Sri H.P. Srivastava, learned counsel for the State, even if half-hearted, that there was a remedy under Rule 108 of the Rules, 1954 of Arbitration, considering the scope of provision which covers any dispute touching the business of a cane grower's society etc which is not the case here, it is not attracted. Even otherwise, in view of the legal issues involved herein it is not at all an efficacious remedy in the facts of the case. The contention is rejected.

39. Now, we proceed to consider the relevant statutory provisions.

40. In the case of **Ch. Tikaramji (supra),** the Supreme Court of India has held that when Entry 33 of List III of the Seventh Schedule of the Constitution of India was amended by the Constitution Third Amendment Act, 1954 foodstuffs including edible oilseeds and oils were included therein and both Parliament and

State legislatures acquired concurrent jurisdiction to legislate over sugar and sugarcane. Trade and commerce in, and production, supply and distribution of, sugar and sugarcane, could thus be dealt with by Parliament as well as by the State legislatures.

41. The Act, 1953 promulgated by the State Legislature is referable to Entry-33 of the Concurrent List (List III) contained in the Seventh Schedule of the Constitution of India. The Rules, 1954 have been made under the State Act, 1953 likewise the Order, 1954 has been made under Section 16 of the State Act, 1953.

42. The Essential Commodities Act, 1955 which is a Central Legislation and has been promulgated by the Parliament is also referable to the same Entry 33 of List III as has been held by Hon'ble the Supreme Court in the case of **Ch. Tikaramji (supra)** which has been considered in the subsequent decisions reported in (2004) 5 SCC 430 **'U.P. Co-operative Cane Union Federations vs. West U.P. Sugar Mills Association'**; (2009) 9 SCC 548 **'West U.P. Sugar Mills Association and others vs. State of U.P. and others'**. The Order, 1966 has been issued by the Central Government under Section 3 of the Central Act, 1955.

43. The Order, 1966 did not exist when the decision in **Ch. Tikaramji (supra**) was rendered by the Supreme Court of India in 1956 though another Order of 1955 did exist and was considered in the said case. The question of conflict of the Act, 1953 with the Central Order, 1955 also came up for consideration but in the facts of the said case, no conflict as alleged was found.

44. The State Act, 1953 has received the accent of the President on 05.10.1953 and has been published on 09.10.1953 i.e. prior to coming into force of the Central Act, 1955, as informed by Sri Mehrotra, therefore, Article 254 (2) does not come into picture as the presidential accent granted to it is of a date prior to the coming into force of the Central Act, 1955 and the Order of 1966 has also been issued under Section 3 of the said Central Act, 1955 subsequently. The law regarding application of Article 254 of the Constitution of India and its proviso has been considered and declared by Hon'ble the Supreme Court in the cases reported in (2002) 8 SCC 182 **'Kaiser-i-Hind Pvt. Ltd. and Anr. vs. National Textile Corpn. (Maharastra North) and Ors**.'; (2011) 8 SCC 708 **'Rajiv Sarin and Anr. vs. State of Uttarakhand and Ors.**' and (2021) 8 SCC 599 '**Forum For People's Collective Efforts (FPCE) and Anr. vs. State of West Bengal and Anr**.'.

45. The Act, 1953 as is evident from its long title is an Act to regulate the supply and purchase of sugarcane required for use in sugar factories and Gur, Rab or Khandsari Sugar Manufacturing Units. The competence of the Parliament to enact the Essential Commodities Act, 1955 and that it would cover sugarcane within its ambit as has already been considered by Hon'ble the Supreme Court in the case of **Ch. Tikaramji (supra)** as also the subsequent decision in **U.P. Co-operative Cane Union Federations (supra)** and this aspect of the matter is no longer res-integra.

46. It is no longer in doubt that both the Acts relate to the same Entry of the Concurrent List and, therefore, all that is required to be seen is whether there is any conflict between the two enactments or the Rules and Order made thereunder or not, if it is, then which will prevail.

47. As we are only concerned with the payment of sugarcane dues to the sugarcane farmers, we need not delve at length on other provisions but only those relating to this issue.

In this context, Section 17 of the Act, 1953 is relevant and it reads as under:-

"17. Payment of cane price.--(1) The occupier of a factory shall make such provision for speedy payment of the price of cane purchased by him as may be prescribed.

(2) Upon the delivery of cane, the occupier of a factory shall be liable to pay immediately the price of the cane so supplied, together with all other sums connected therewith,

(3) Where the person liable under sub-section (2) is in default in making the payment of the price for a period exceeding fifteen days from the date of delivering, he shall also pay interest at a rate of 7- 1/2 per cent per annum from the said date of delivering, but the Cane Commissioner may, in any case, direct, with the approval of the State Government, that no interest shall be paid such reduced rate as he may fix:

[Provided that in relation to default in payment of price of cane purchased after the commencement of this proviso, for the figure "7-1/2' the 'figure 12' shall be deemed substituted.]

(4) The Cane Commissioner shall forward to the Collector a certificate under his signature specifying the amount of arrears on account of the price of cane plus interest, if any, due from the occupier and the Collector, in receipt of such certificate, shall proceed to recover from such occupier the amount specified therein. as if it were an arrear of land revenue.

(5)(a) Without prejudice to the provisions of the foregoing sub sections, where the owner or any other person having control over the affairs of the factory or any other person competent in that behalf enters into an agreement with a bank under which the bank agrees to give advance to him [on the security of sugar or ethanol (directly produced from the sugarcane juice or B-Heavy molasses)] produced or to be produced in the factory, the said owner or other person shall provide in such agreement that [a percentage determined by such authority and in such manner as may be prescribed] of the total amount of advance shall be set apart and be available only for re-payment to cane growers or their co-operative societies on account of the price of sugarcane purchased or to be purchased for the factory during the current crushing season from those cane growers or from or through those societies, and interest thereon and, such societies commission in respect thereof.

(b) Every such owner or other person as aforesaid shall send a copy of every such agreement to the Collector within a week from the date on which it is entered into."

48. On a reading of Section 17 (1) of the Act, 1953, the Court finds that the occupier of a factory is required to make such provision for speedy payment of price of cane purchased by him as may be prescribed. The term 'occupier' has been defined in Section 2(k) of the said Act and it includes the opposite party no.6-,the Company which is owner of the factory or mill. The term "prescribed' has been defined under Section (2)(l) of the aforesaid Act to mean "prescribed by rules'. The term "rules' has been defined in Section (2)(o) to mean "a rule made under this Act' i.e. the Act, 1953. The Court has perused the Rules, 1954 but it could not find any provision therein prescribing a provision for speedy payment of price of cane purchased by the occupier which could be followed by the latter nor could the counsel for the rival parties show any such provision. The Order, 1954 also does not contain any such provision referable to sub-Section (1) of Section 17 of the Act, 1953. Proviso to Rule 45 says that all arrears of cane price shell be remitted to the cane growers co-operative society concerned within fifteen days of the close of the factory. The factory closes on completion of crushing season which is defined in Section 2(i) to mean the period beginning on

the 1st October in any year and ending on the 15th July next following.

49. Now, as already stated earlier, no such prescription as regards speedy payment of price of cane purchased by the occupier has been made in the rules of 1954 or the Order, 1954 made under the Act, 1953 as is envisaged under sub-Section (1) of Section 17 of the Act, 1953. Sub-Section (3) of Section 17 of the Act, 1953, however, says that where the person liable under sub-section (2) is in default in making the payment of the price for a period exceeding fifteen days from the date of delivering, he shall also pay interest at a rate of 12 per cent per annum from the said date of delivering.

50. We have no hesitation in holding that even though as per the word 'prescribed' used in Section 17(1) of the Act, 1953 which has been defined in Section 2(k) of the Act, 1953, according to which, such prescription has to be made in the rules made under the Act, 1954, in the absence of any such prescription under the Rules, from the scheme of Section 17 of the Act, 1953 itself it is clear that the time limit to pay the cane dues to the farmers is fifteen days from the date of delivering the sugarcane, failing which, not only interest becomes payable but the dues become arrears and the same are recoverable under sub-Section (4) of Section 17 plus interest thereon leviable under sub-Section (3) of the Act, 1953. There can be no other reasonable understanding of the scheme of the Act. This, however, may not be very relevant in view of the discussion made hereinafter.

51. However, in this context, when we peruse the Control Order, 1966 which has been made under Section 3 of the Central Act, 1955, we find a specific provision therein as is contained in Clause 3(3) and 3-A thereof. The entire Clause (3) reads as under:-

"3. Fair and remunerative price of sugarcane payable by producer of sugar.--(1) The Central Government may, after consultation with such authorities, bodies or associations as it may deem fit, by notification in the Official Gazette, from time to time, fix the minimum price of sugarcane to be paid by producers of sugar or their agents for the sugarcane purchased by them having regard to--

(a) the cost of production of sugarcane;

(b) the return to the grower from alternative crops and the general trend of prices of agricultural commodities;

(c) the availability of sugar to the consumer at a fair price;

(d) the price at which sugar produced from sugarcane is sold by producers of sugar; and

(e) the recovery of sugar from sugarcane:

(f) the realization made by sale of by-products viz molasses, bagasse, and press mud or their imputed value.

(g) reasonable margins for the growers of sugarcane on account of risk and profits.

[Provided that the Central Government or with the approval of the Central Government, the State Government, may, in such circumstances and subject to such conditions as specified in Clause 3-A, allow a suitable rebate in the price so fixed.]

Explanation.--(1) Different prices may be fixed for different areas or different qualities or varieties of sugarcane.

Explanation-(2) When a sugar factory produces ethanol directly from sugar juice or B-Heavy molasses, the recovery rate in case of such sugar factory shall be determined by considering every 600 litres of ethanol so produced as equivalent to 1 tonne of production of sugar;

Explanation (3).-Production of ethanol directly from sugarcane juice shall be allowed in case of sugar factories only.

Explanation (4).-Imputed value of the by-products would include unsold value or the notional or transfer value of such by-products

for further value addition in the sugar factory like, alcohol and ethanol production from molasses, use of press mud for making bio-fertilizer and/or distillery effluent treatment, generation of power from bagasse or any other product produced through value addition to the by-products mentioned above but should not include the bagasse used for running the boiler of the main sugar factory for the production of sugar alone.

Explanation (5). The realization made from the sale of by-products namely, molasses, bagasse and press mud or their imputed value means only transfer prices and not the value of or profit from co-generated power, alcohol or ethanol, bio-fertilizers or distillery effluent treatment or any other product produced through value addition to the by-products mentioned above.]

(2) No person shall sell or agree to sell sugarcane to a producer of sugar or his agent, and no such producer or agent shall purchase or agree to purchase garcane, at a price lower than that fixed under sub-clause (1).

(3) Where a producer of sugar purchases any sugarcane from a grower of sugarcane or from a sugarcane growers' co-operative society, the producer shall, unless there is an agreement in writing to the contrary between the parties, pay within fourteen days from the date of delivery of the sugarcane to the seller or tender to him the price of the cane sold at the rate agreed to between the producer and the sugarcane grower or the sugarcane growers' co-operative society or that fixed under sub-clause (1), as the case may be, either at the gate of the factory or at the cane collection centre or transfer or deposit the necessary amount in the Bank account of the seller or the co-operative society, as the case may be.

(3-A) Where a producer of sugar or his agent fails to make payment for the sugarcane purchased within 14 days of the date of delivery, he shall pay interest on the amount due at the rate of 15 per cent per annum for the period of such delay beyond 14 days. Where payment of interest on delayed payment is made to a cane growers' society, the society shall pass on the interest to the cane growers concerned after deducting administrative charges, if any, permitted by the rules of the said society.

(4) Where sugarcane is purchased through an agent, the producer or the agent shall pay or tender payment of such price within the period and in the manner aforesaid and if neither of them has so paid or tendered payment, each of them shall be deemed to have contravened the provisions of this clause.

(5) At the time of payment at the gate of the factory or at the cane collection centre, receipts, if any, given by the purchaser, shall be surrendered by the cane grower or Co-operative society.

(6) Where payment has been made by transfer or deposit of the amount to the Bank account of the seller or the co-operative society, as the case may be, the receipt given by the purchaser, if any, to the grower or the co-operative society if not returned to the purchaser, shall become invalid.

(7) In case, the price of the sugarcane remains unpaid on the last day of the sugar year in which cane supply was made to the factory on account of the suppliers of cane not coming forward with their claims therefor *, it shall be deposited by the producer of sugar with the Collector of the district in which the factory is situated, within three months of the close of the sugar year. The Collector shall pay, out of the amount so deposited, all claims considered payable by him and preferred before him within three years of the close of the sugar year in which the cane was supplied to the factory. The amount still remaining undisbursed with the Collector, after meeting the claims from the suppliers, shall be credited by him to the Consolidated Fund of the State, immediately after the expiry of the time limit of 3 years within which claims therefor could be preferred by the*

suppliers. The State Government shall, as far as possible utilise such amounts for development of sugarcane in the State.]

(8) Where any producer of sugar or his agent has defaulted in furnishing information under Clause 9 of this Order or has defaulted in paying the whole or any part of the price of sugarcane to a grower of sugarcane or a sugarcane growers co-operative society within fourteen days from the date of delivery of sugarcane, or where there is an agreement in writing between the parties for payment of price within a specified time and any producer or his agent has defaulted in making payment within the agreed time specified therein, the Central Government or an officer authorised by the Central Government in this behalf or the State Government or an officer authorised by the State Government in this behalf may either on the basis of information made available by the producer of sugar or his agent or on the basis of claims, if any, made to it or him regarding non-payment of prices or arrears thereof by the concerned grower of sugarcane or the sugarcane growers co-operative society as the case may be, or on the basis of such enquiry that it or he deems fit, shall forward to the Collector of the district in which the factory is located, a certificate specifying the amount of price of sugarcane and interest due thereon from the producer of sugar or his agent for its recovery as arrears of the land revenue.

(9) The Collector on receipt of such certificate, shall proceed to recover from such producer of sugar or his agent the amount specified therein as if it were arrears of land revenue.

(10) After effecting the recovery, the Collector shall intimate to the concerned growers of the sugarcane or the concerned sugarcane growers co-operative societies through a public notice to submit their claims in such a manner as he considers appropriate within thirty days:

Provided that the Collector may, for the reasons to be recorded in writing allow the submission of claims after the period so specified if he is satisfied that there was sufficient cause for not submitting such claim earlier.

(11) If the amount recovered is less than the amount specified in the certificate under sub-clause (8), the Collector shall distribute the amount so recovered among the concerned growers of the sugarcane or the concerned sugarcane growers co-operatives in proportion to the ratio determined by the Collector on the basis of the sugarcane supplied by the concerned growers of sugarcane or the sugarcane growers' co-operative society as the case may be.

(12) If the amount recovered and distributed under sub-clause (11) is less than the amount specified in the certificate under sub-clause (8), the Collector shall proceed to recover the remaining amount, as if it were arrears of land revenue till the full amount is recovered and distributed to satisfy the remaining claims.

(13) If the amount is given to the concerned sugarcane growers co-operative societies, it shall distribute the amount through cheque/draft/or any other recognised banking instrument on any Scheduled Bank to the concerned sugarcane growers within ten days of the receipt of the amount from the Collector.

(14) If the concerned sugarcane grower or the concerned sugarcane growers co-operative society do not come forward to claim or collect the amount so recovered by the Collector within three years from the date of the public notice referred to in sub-clause (10), the unclaimed amount shall be deposited by the Collector in the Consolidated Fund of the State."

52. As per Clause 3(3) of the Order, 1966 where a producer of sugar purchases any sugarcane from a grower of sugarcane or from a sugarcane growers' co-operative society, the producer shall, unless there is an agreement in writing to the contrary between the parties, pay within fourteen days from the date of delivery of the sugarcane to the seller or tender to him the

price of the cane sold at the rate agreed to between the producer and the sugarcane grower or the sugarcane growers' co-operative society or that fixed under sub-clause (1), as the case may be, either at the gate of the factory or at the cane collection centre or transfer or deposit the necessary amount in the Bank account of the seller or the co-operative society, as the case may be.

53. This provision categorically requires the purchaser of sugarcane to pay the price of such sugarcane within fourteen days from the date of delivery of the sugarcane to the seller etc. as referred therein etc unless there is an agreement in writing to the contrary between the parties.

54. None of the learned counsel for the rival parties could show any agreement between the parties laying down any time period for payment of such dues other than what is envisaged in the aforesaid provision.

55. Clause 3(3-A) of the Order, 1966 provides that where a producer of sugar or his agent fails to make payment for the sugarcane purchased within 14 days of the date of delivery, he shall pay interest on the amount due at the rate of 15 per cent per annum for the period of such delay beyond 14 days. Where payment of interest on delayed payment is made to a cane growers' society, the society shall pass on the interest to the cane growers concerned after deducting administrative charges, if any, permitted by the rules of the said society.

56. Thus, sub-Section (3) of Section 17 of the State Act, 1953 prescribes a period of fifteen days but the Central Order, 1966 made under the Central Enactment, 1955 prescribes the period of fourteen days for payment of sugarcane dues. Therefore, the State Act is in conflict with the Central Order and the former will have to give way to the latter. This is, as, the Order 1966, is a Central Order made under a central enactment of 1955, therefore, as it has backing and statutory force of a Central enactment, as such, it would prevail over any contrary provision contained in the State enactment, especially as, the State enactment of 1953 and the Central enactment of 1955 both are referable to Entry-33 of the Concurrent List as already discussed with reference to the decision of Supreme Court in **Ch. Tikaramji (supra)** and other decisions. In support of this one may refer to a decision reported in (2015) 6 SCC 363 **'Kalyani Maithivanan vs. K.V. Jeyaraj and others'** wherein, in the context of the U.G.C. Act and the State University Act, after considering the relevant constitutional provisions contained in Article 254 etc and the respective entries in the lists in the Seventh Schedule, it has been held that "to the extent the State legislation is in conflict with the Central legislation including the subordinate legislation made by the Central Legislation under Entry-25 of the Concurrent List, it shall be repugnant to the Central Legislation and would be in operative". The ratio of the decision applies in this case also.

57. In this view of the matter, considering the Central Order, 1966, as it contains a clear stipulation of the time period within which cane dues have to be paid i.e. fourteen days of the date of delivery, it will prevail over the Act, 1953. Therefore, we are of the considered opinion that the time period within which the company/ occupier as defined under the Act, 1953 is required to pay the cane dues to the cane farmers directly or to the Cane growers' Co-operative Society, is fourteen days from the date of delivery.

58. Now, under the proviso to sub-Section (3) of Section 17 of the Act, 1953 interest @ 12 per cent per annum becomes payable if the payment of the price is not made within the stipulated period but under Clause 3 and 3(3-A) of the Central Order, 1966, interest @ 15 per

cent per annum becomes payable. In view of this conflict and for the reasons already given hereinabove, as, the Central Order, 1966 will prevail on this score also, therefore, not only the time period has to be fourteen days but the rate of interest also has to be 15 per cent per annum as is prescribed in the Central Order, 1966 and not 12 per cent per annum as is mentioned in the proviso to sub-Section (3) of Section 17 of the Act, 1953. This however is subject to the provisions contained in sub-Section (3) of Section 17 of the Act, 1953 which provides "but the Cane Commissioner may, in any case, direct, with the approval of the State Government, that no interest shall be paid or be paid at such reduced rate as he may fix". The Order, 1966 does not prohibit such waiver of interest or its reduction as has also been considered in the case of **Rashtriya Kisan Mazdoor Sangathan (supra)**.

59. This discussion was necessary to clear the cloud on this issue.

60. In this very context, we may also refer to another Division Bench judgment of this Court in the case of **'Rashtriya Kisan Mazdoor Sangathan (supra)** decided on 09.03.2017 wherein though there is not a detailed discussion as to whether the interest would be @ 15 per cent per annum or @ 12 per cent per annum, nevertheless, it has been provided that the same would be @15 per cent per annum and the said Division Bench has also provided that speedy payment is to be made within fourteen days of delivery. Therefore, obviously, it had the Central Order, 1966 in mind while so ordering.

61. Now, as per sub-Section (4) of Section 17 of the Act, 1953 the Cane Commissioner shall forward to the Collector a certificate under his signature specifying the amount of arrears on account of the price of cane plus interest, if any, due from the occupier and the Collector, in receipt of such certificate, shall proceed to recover from such occupier the amounts specified therein as if it were arrears of land revenue.

62. Correspondingly when we read the provisions of Central Order, 1966, we find that Clause 3(8) of the Central Order, 1966 provides that where any producer of sugar or his agent has defaulted in furnishing information under Clause 9 of this Order or has defaulted in paying the whole or any part of the price of sugarcane to a grower of sugarcane or a sugarcane growers co-operative society within fourteen days from the date of delivery of sugarcane, or where there is an agreement in writing between the parties for payment of price within a specified time and any producer or his agent has defaulted in making payment within the agreed time specified therein, the Central Government or an officer authorized by the Central Government in this behalf or the State Government or an officer authorized by the State Government in this behalf may either on the basis of information made available by the producer of sugar or his agent or on the basis of claims, if any, made to it or him regarding non-payment of prices or arrears thereof by the concerned grower of sugarcane or the sugarcane growers co-operative society, as the case may be, or on the basis of such enquiry that it or he deems fit, shall forward to the Collector of the district in which the factory is located, a certificate specifying the amount of price of sugarcane and interest due thereon from the producer of sugar or his agent for its recovery as arrears of the land revenue. This provision does not prevent the Sugarcane Commissioner from issuing a recovery certificate as is envisaged in Section 17(4) of the Act, 1953, rather it permits it, therefore, there is no conflict between the Act, 1953 and the Order, 1966 on this count. We may in this context refer to the opinion expressed by a Coordinate Bench of this Court in **Rashtriya Kisan Mazdoor Sangathan (supra)** as under:-

"It is true that under Sugarcane Control Order 1966, there is a higher rate of interest

provided as compared to the interest provided for under Sugarcane Act, 1953 and State Government, in its turn as obedience to both the provisions is possible, has accepted in principle to award higher rate of interest as it is more beneficial to the farmers, therefore the submission made that once the field regarding interest stands occupied by Control Order, the power to waive interest in terms of Section 17(3) Sugarcane Act 1953 stands divested is also being adverted to by us.

The Apex Court in the case of State of M.P. vs. Jaora Sugar Mills and others 1997 (9) SCC 207 has clearly proceeded to mention that the respondents are liable to pay interest on the late payment under the Act read with order.

Apex Court in the case of Belsund Sugar Company Ltd. Vs. State of Bihar 1999 (9) SCC 620, while considering akin provisions vis.a.vis. Sugarcane (Control) Order, 1966 as well as Bihar Sugarcane (Regulation of Supply and Purchase) Act, 1981 took the view that both are harmoniously operating in same field and compliment each other. View to the similar effect has once again been taken in the case of Krishi Upaj Mandi Samiti Vs. Shiv Shankar Khandsari Udyog 2012 (9) SCC 368 wherein the provisions of M.P. Sugarcane (Regulation of Supply and Purchase) Act, 1958 alongwith the provisions of Sugarcane (Control) Order, 1966 was being dealt with and Apex Court has found and ruled that entire field of sale and purchase of sugarcane is covered by Sugarcane Act and Control Order, which are special provisions. In the case of U.P. Cooperative Cane Union Federation Vs. West U.P. Sugar Mill Association 2004 (5) SCC 430, Apex Court though in the matter of fixation of price took the view that there will be no inconsistency or repugnancy as it is possible for both the orders that is Sugarcane (Control) Order, 1966 and the provisions of U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 to operate simultaneously and to comply with both of them.

In the present case, what we find that there is no repugnancy arising for the simple reason that under the provision of Sugarcane (Control) Order, 1966, there is no provision that empowers the authorities to waive the interest, whereas under sub-section (3) of Section 17 the State Authorities are empowered to waive the interest on the recommendation of the Cane Commissioner.

Legislative Competence of U.P. State Legislature to enact law in regard to supply and purchase of sugarcane required or to be used in sugar factories has not at all been disputed before us, and once legislative competence is there to enact law with regard to sugarcane wherein authority has also been inhered to waive interest on delayed payment, hence there is no question of trenching upon the authority covered under Sugarcane Control Order 1966.

Apex Court in the case of Yogendra Kumar Jaiswal and others Vs. State of Bihar 2016(3) SCC 183 has clearly mentioned that repugnancy would arise when there is clear and direct inconsistency between Central Law and State Law and such inconsistency irreconcilable. Question of repugnancy can arise only with reference to legislation made by Parliament falling under the Concurrent list or an existing law with reference to one of the matter enumerated in Concurrent list. If a law made by the State Legislature covered by an entry in the State List incidentally touches any of the entries in the Concurrent List. Article 254 is not attracted but where a law covered by an entry in the State List (or an amendment to a law covered by an entry in the State List) made by the State Legislature contains a provision, which directly and substantially relates to a matter enumerated in the Concurrent List and is repugnant to any provision of an existing law with respect to that matter in the Concurrent List then such repugnant provision of the State law will be void. Such a provision of law made

by the State Legislature touching upon a matter covered by the Concurrent List, will not be void if it can co-exist and operate without repugnancy with the provisions of the existing law. It needs no special emphasis to state that the issue of repugnancy would also arise where the law made by Parliament and the law made by the State Legislature occupy the same field.

On such parameters, the question of repugnancy would not at all arise and to the contrary both the provisions would co-exist for the simple reason that under the scheme of things provided for interest has been made admissible on delayed payment under both the statutory provisions and in addition to it under State Act, State has inhered in itself authority to waive the interest on the recommendation of Cane Commissioner. Accordingly to suggest that once the field regarding the interest has been completely occupied by the Control Order, the power to waive the interest in terms of Section 17(3) Sugarcane Act, 1953 no longer exists with the Commissioner cannot be accepted by us.

In view of this, the objection that has been raised by the petitioners association/sangathan that State Authorities has got no authority to waive the interest, cannot be accepted by us..."

63. Clause 3(9) of the Order, 1966 further provides that the Collector, on receipt of such certificate, shall proceed to recover from such producer of sugar or his agent, the amount specified therein as if it were arrears of land revenue.

64. As per Clause 3(10) of the Order, 1966 after effecting the recovery, the Collector shall intimate to the concerned growers of the sugarcane or the concerned sugarcane growers co-operative societies through a public notice to submit their claims in such a manner as he considers appropriate within thirty days provided that the Collector may, for the reasons to be recorded in writing allow the submission of claims after the period so specified if he is satisfied that there was sufficient cause for not submitting such claim earlier.

65. Clause 3(11) of the Order, 1966 provides that if the amount recovered is less than the amount specified in the certificate under sub-clause (8), the Collector shall distribute the amount so recovered among the concerned growers of the sugarcane or the concerned sugarcane growers co-operatives in proportion to the ratio determined by the Collector on the basis of the sugarcane supplied by the concerned growers of sugarcane or the sugarcane growers' co-operative society as the case may be.

66. Clause 3(12) provides that if the amount recovered and distributed under sub-clause (11) is less than the amount specified in the certificate under sub-clause (8), the Collector shall proceed to recover the remaining amount, as if it were arrears of land revenue till the full amount is recovered and distributed to satisfy the remaining claims. The procedure for recovery of arrears of land revenue is prescribed in the U.P. Revenue Code, 2006 and the U.P. Revenue Code Rules, 2016 which will be followed in such circumstances.

67. Clause 3(13) provides that if the amount is given to the concerned sugarcane growers co-operative societies, it shall distribute the amount through cheque/draft/or any other recognized banking instrument on any Scheduled Bank to the concerned sugarcane growers within ten days of the receipt of the amount from the Collector.

68. Clause 3(14) provides that if the concerned sugarcane grower or the concerned sugarcane growers co-operative society do not come forward to claim or collect the amount so recovered by the Collector within three years

from the date of the public notice referred to in sub-clause (10), the unclaimed amount shall be deposited by the Collector in the Consolidated Fund of the State.

69. Thus, entire mechanism for speedy payment of cane price to sugarcane growers or the Cane-grower's Co-operative Society is provided in Order 3 of the Central Order, 1966 including the recovery of arrears/ dues thereof as arrears of land revenue. Whereas, though, there is a provision for the same in Section 17 of the Act, 1953, in view of the fact that the Central Order, 1966 has been made under a Central enactment, for the reasons already given hereinabove, the latter will have to prevail to the extent the former is in conflict with the latter subject of course to the condition that the recovery proceedings including issuance of Recovery Certificate would have to be undertaken by the state officials which is also permissible under Clause 3 of the Central Order, 1966.

70. Clause 9 of the Order, 1966 which is referred in Clause 3(8), *inter alia*, empowers the concerned authority to maintain and furnish within seven days of close of each fortnight details of cane purchased, cane price due, cane price paid, cane price arrears for each fortnight as specified in the Third Schedule to the said Order. This facilitates the mechanism mentioned in Clause (3) of the Order referred earlier. Similar provisions are there under the State Rules, 1954.

71. Now, from the provisions of Clause 3 of the Central Order, 1966, it is evident that if the payment has not been made within fourteen days from the date of delivery then the procedure for recovery of the same as arrears of land revenue will be set in motion as per Clause 3(8) of the Order, 1966.

72. Clause 3(7) of the Order, 1966 deals with a situation where the the price of the sugarcane remains unpaid on the last day of the sugar year in which cane supply was made to the factory on account of the suppliers of cane not coming forward with their claims therefor or for any other reason, therefore, this will also come into play when the aforesaid eventuality is satisfied.

73. The contention of Sri S.C. Mishra that provisions of sub-Sections (3) and (4) of Section 17 of the Act, 1953 nowhere provides as to when the Cane Commissioner will issue recovery certificate to the Collector for recovery of the arrears of cane dues, therefore, the provisions of the Act, 1953 are arbitrary and give uncannalized power to the Sugarcane Commissioner, are not acceptable and have to be repelled as in such a scenario, the provisions of the Clause 3 of the Order, 1966 will come into play and on expiry of fourteen days period, the State Officials can issue the recovery certificate to the Collector for recovery of arrears of sugarcane.

74. As regards the contention of Sri Mishra, learned Senior Counsel that fourteen days' period is impractical as it is impossible to pay the price of sugarcane within such a short period considering the huge production and purchase of sugarcane, it is a separate matter which the concerned Government or the legislature can look into as to whether there is a requirement of amending the Act, 1953 or the rules and orders made thereunder or for that matter the Central Order, 1966, but in the absence of any challenge to the vires of relevant provisions of the Act, 1953 or the Order, 1966, the provisions of law stand as they are as of now and as have been discussed hereinabove.

75. This also takes care of the ambiguity alleged in the provisions contained in Section 17 as regards the time limit for payment of dues of the sugarcane in view of the words "speedy payment' used in sub-Section (1) of Section 17 of the Act, 1953 and the word "immediately'

used in sub-Section (2) of Section 17 of the aforesaid Act, as also the words "fifteen days' used in sub-Section (3) of Section 17 of the aforesaid Act, as, now, this aspect has to be governed by Clause 3(3) and 3(3-A) of the Central Order, 1966.

76. In this very context, we may consider the plea raised by Sri Mishra that interest payment under sub-Section (3) of Section 17 of the Act, 1953 is not mandatory and it is subject to any waiver by the Sugarcane Commissioner with the approval of the State Government. Firstly, the interest from the very language used in Section 17 and for that matter the provisions of Clause 3 of the Central Order, 1966 is mandatory. In both the provisions, not only the words "shall' has been used but the very purpose of levying interest is to prevent financial loss to sugarcane growers and also to prevent the occupier/ company from gaining undue financial advantage by making delayed payment as, considering the huge amount of money which is required to be paid by the occupier, if levying of interest is held as not mandatory then this would result in undue enrichment of the company/ occupier and that too at the cost of poor farmers and sugarcane growers which is not the intent of the provisions of law discussed hereinabove.

77. As regards the other aspect of waiver or reduction of interest under Section 17(3) of the Act, 1953, we find that, firstly, there is nothing on record to show that in any of the earlier years, the Company/ Occupier had applied for waiver but as it is not the subject matter of these petition we leave it at that, nevertheless, as regards the year 2020-21, with which we are concerned, assuming that any such application has been made or could be made, this aspect of the matter relating to waiver of interest has already been dealt with by a Division Bench judgment in **Rashtriya Kisan Mazdoor Sangathan (supra)** and it is fruitful to refer to its observations / opinion in this regard which are as under:

"..and we also make it clear that the co-ordinate Bench of this Court of which one of us was member, has already taken view to the similar effect and therein a clear cut caution has been made that at the point of time when authority of waiver of interest is to be exercised by the authority, the said exercise is not to be undertaken in routine manner and the exercise of authority has to be fair and equitable and only in exceptional cases such an authority could be exercised. "

78. Waiver of interest by the Sugarcane Commissioner which has to be with the approval of the State Government can neither be mechanical nor in a routine manner but can only be for exceptional circumstances, in a fair and equitable manner. The parameters and factors referred by the Division Bench in **Rashtriya Kisan Mazdoor Sangathan (supra)** as quoted hereinabove have to be kept in mind and the Sugarcane Commissioner as also the State Government are bound by the same.

79. In fact, the Court pointedly asked Sri Mishra, learned Senior Counsel as to whether interest on the delayed payment has been given to the sugarcane growers in the last five years but he could not give any satisfactory reply. However, as far as the years prior to 2020-21 are concerned as the same are not the subject matter of these proceedings, therefore, we leave it open for the petitioners to claim interest thereon, unless there is some legal impediment in this regard, separately, or for that matter it is for the Sugarcane Commissioner and the concerned Cane growers co-operative society to take up this matter to protect the interest of farmers.

80. As regards opening of an Escrow account, in the facts of this case provision of Section 17(5) are not attracted as admittedly the Company has not entered into agreement with any Bank to get an Advance on the Security or ethanol produced in the factory as is evident

from its counter affidavit. No cash credit facility has been utilized by the Company for this purpose as it has not been made available for the reason given in the affidavit filed on behalf of the Company-opposite party no.6, therefore, we are not in agreement with the contention of Sri Gaurav Mehrotra, learned counsel that the same is referable to sub-Section (5) of Section 17 read with Rule 48A of the Rules, 1954 nor that the Sugarcane Commissioner has incidental powers under Section 16 of the Act, 1953 to do so, as the language used therein does not lend itself to such interpretation.

81. On being asked as to why financial capacity of the Company to pay the estimated sugarcane dues was not assessed before reserving or assigning an area for it, the Sugarcane Commissioner submitted that it was not one of the parameters to be taken into consideration under Rule 22 of Rules, 1954, moreover, considering the factors mentioned in Rule 22 and law on the subject, it was inevitable to reserve or assign sugarcane area to the Company which had a factory in the area. He submitted that in the coming years there was going to be a shift to 'ethanol' and this would prevent such a situation, such as the one which has arisen in this case, from arising in future. We have perused Rule 22 of the Rules, 1954 which lays down the factors to be taken into consideration by the Cane Commissioner in reserving / assigning an area to a factory or determining the quantity of cane to be purchased from an area by a factory. We have also considered clause (f) thereof, according to which, the arrangements made by the factory in previous years for payment of cess, cane price and commission is one of the factors to be taken into consideration. We find substance in the submission of Sri Mehrotra, learned counsel that an assessment of paying capacity of the factory or company for payment of the estimated dues of the sugarcane growers, which can always be estimated in view of the provisions and mechanism especially contained under Section 15 of the Act, 1953 and the rules made thereunder and similar provision contained in the Order, 1954 and 1966, can be taken into consideration as one of the factors implicit in clause (f) of the Rule 22 of the Rules, 1954. If required, the Rules can be suitably amended to leave no room for ambiguity in this regard as it is necessary to protect the interests of the sugarcane growers that the Company should have adequate financial capacity to pay the dues of the farmers.

82. It is not in dispute that the Company/ Occupier is in default in payment of cane dues of farmers. The Company/ Occupier admits its liability to pay the dues. It has undertaken to pay it completely by March, 2022. Needless to say that dues along with interest @ 15 per cent per annum has to be paid for the year 2020-21 subject to any waiver in this regard by the Sugarcane Commissioner with the approval of the State Government. There is no provision for payment of compound interest as has been prayed.

83. During the course of hearing, the Court was informed that in respect to the five mills at Gola Gokaran Nath, Khambhar Khera, Palia Kalan, Barkhera and Maqsoodapur, total dues were Rs.510.1288 (crores), Rs.387.0157 (crores), Rs. 212.8306 (crores), Rs.295.9202 (crores), Rs.328.4919 (crores), against which an amount of Rs.183.1706 (crores), Rs.111.7938 (crores), Rs.125.9812 (crores), Rs.162.3050 (crores), Rs.130.4158 (crores) respectively had been paid by the first week of October. This was possible as the factory continued to run. It was submitted that the remaining dues will be cleared positively by 31st March, 2022.

84. Sri Mishra, learned counsel submitted in this context that all the assets of the Company were already encumbered, therefore, the best way out was to permit the Company to pay the

dues by February-March, 2022 as had been done by Hon'ble the Supreme Court vide order dated 16.10.2020 in S.L.P. No.11948-11951 of 2020 arising out of judgment dated 21.09.2020 rendered in **Kanikram's case (supra)** with respect to the earlier year 2019-20.

85. Sri S.C. Mishra, learned Senior Counsel assisted by Sri Pawan Awasthi, learned counsel for opposite party no.6 informed the Court during the course of argument that out of total 6455 petitioners in all these writ petitions pertaining to five mills, more than 50% of the petitioners had been paid 50-70 % of the dues and the remaining amount would also be paid to all the petitioners by March, 2022.

86. The only question is should we direct recovery of arrears of dues as arrears of land revenue at this stage or we should allow the Company/ Occupier time in the light of its undertaking before this Court as also before the authorities, which is on record, purely in the facts and circumstances of the case.

87. The Sugarcane Commissioner had earlier informed the Court on a query being put to him as to why proceedings for recovery of dues were not initiated effectively especially against the Company, instead of merely against the factory, for which he submitted that the past experience is that nobody comes forward to purchase the factory and if it is shutdown it does not in any manner help the cause of farmers. However, he had no answer to the query of the Court as to why no proceedings are initiated against the parent Company - opposite party no.6 which is included in the definition of 'occupier' under Section 2(k) of the Act, 1953. In this regard, Sri Mishra submitted that its assets were already mortgaged with lenders.

88. We have perused the counter affidavit of opposite party no.3-Sugar Cane Commissioner and Opposite party no.6-Company. In paragraph nos.3 to 18 of the short counter affidavit filed along with an application dated 01.09.2021, the opposite party no.6-Company has given details of its immovable properties in response to the earlier order/ direction of this Court. It has stated that the total book value of the said immovable properties is Rs.3711.53 crores. However, in the earlier affidavit filed by it along with an application dated 09.08.2021, it has been stated that all the immovable properties and assets of the Company are mortgaged with the consortium of banks against the outstanding debt of the Company and the lenders have the first charge over the said immovable properties and assets of the Company. A chart has been annexed in this regard as SCA-2.

89. In the affidavit filed by the Company-opposite party no.6 along with an application dated 05.07.2021, it has been mentioned that the total value of the property, plant and equipment of the Bajaj Hindustan Sugar Mills Limited is at Rs.6985.26 crores as per the balance sheet of 2020-21. The Company has been in considerable financial stress for the past few years due to certain factors. The entire financial mechanism and operation of the Company is under direct monitoring and scrutiny of consortium of Banks headed by State Bank of India and the audit firm namely, M/s Deloitte Haskins & Sells, LLP. The Company's funds are directly controlled and monitored in real time by the consortium of Banks through Trust and Retention Account System (T.R.A.) since last five years and the direct control is always supervised by M/s Deloitte Haskins & Sells, LLP All the payments are rooted through the T.R.A. system and scrutinized and reviewed by the consortium of Banks. The Company has a sanctioned cash credit limit of Rs.926 crores from 11 Banks out of the consortium of Banks. The cash credit limit is sanctioned for the company as a whole and not sanctioned for a specific sugar plant. However, the Bank permits utilization of cash

credit limit only against the available drawing power of the company. On account of huge outstanding dues of the Company, the drawing power of the Company has been negative in the previous three years and therefore, no amount was permitted/ available for utilization from the cash credit limit as such the only available option for payment of cane dues is from the proceeds of sale of sugar and other by-products which are being religiously followed and complied with under the tagging orders of the respective District Magistrates and office of Cane Commissioner by which the proceeds are to be deposited in the Escrow account and payment has to be made to the farmers therefrom. The Company could not taken advantage of soft loans under the schemes of the State and the Central Government meant for sugar mills due to the restructured loan accounts and stressed financial conditions. The cane area of the factories of the Company has been reduced substantially in the last few years.

90. These facts themselves highlight the importance of the need to assess the financial capacity/ paying capacity of the Company before reserving/ assigning a cane area for it as has been emphasized by us earlier.

91. In the affidavit filed along with application dated 19.09.2021 on behalf of the opposite party no.6, it has been stated that from 05.07.2021 to 31.08.2021, the Company has made a total payment of Rs.253.01 crores to the cane growers in respect to the five units in question namely, Gola Gokaran Nath, Khambhar Khera, Palia Kalan, Barkhera and Maqsoodapur. The details of payment made has also been given.

92. Reference has also been made in the said affidavit to the recommendations of the C. Rangarajan Committee constituted to look into all the issues related to regulation of sugar sector which according to Sri Mishra, learned counsel have not been implemented and the report itself shows that there is a wide gap between the ground reality and the statutory framework in place which is impractical.

93. Details of immovable properties of opposite party no.6-Company have been given in the short counter affidavit of opposite party no.6 dated 31.08.2021 but it is stated that the lenders have first charge over all these assets.

94. The details of balance sheet including its assets and liability including loans etc for the past five years including the year ending March, 2020 have been disclosed as part of Annexure no.6 to the short counter affidavit of opposite party no.6 dated 04.07.2021.

95. The Sugarcane Commissioner has also filed another short counter affidavit along with an application dated 03.07.2021 stating that resorting to opening of Escrow account mechanism has improved the situation of cane price payment in Uttar Pradesh tremendously. He has stated that allotment of sugarcane area to each sugar mill is according to its crushing capacity keeping in view the availability of the sugar cane in the area and the relevant factors as prescribed in Rule 22 of the Rules, 1954. This is done in such a way that the sugar cane supply tickets can be available proportionately to the sugarcane farmers and the sugar mills can do daily crushing work according to its crushing capacity. In paragraph no.32 of his affidavit, he has also delved into the issue of assigning/ reserving a cane area which is at present available with the Company to any other mill and the adverse effect it will have upon the viability and profitability of the mills as also the availability of supply tickets to farmers considering the crushing capacity of the mills which will be severely stressed.

96. It has also been stated in the affidavit of opposite party no.6 that on 02.07.2021, an

undertaking has been given by the Company to the Cane Commissioner vide letter dated 02.07.2021 contained in SCA-7 to the said affidavit that the balance cane price payment for the season 2020-21 will be completed for some units in February, 2022 and the remaining units cane price payment will be finished by March, 2022.

97. The petitioners have not able to rebut the aforesaid facts regarding the financial condition of the Company as also the facts mentioned in the affidavit of the Sugarcane Commissioner, satisfactorily. The Company on its part admits the liability to clear the dues of the farmers and undertakes to do so by February-March, 2022. It has admitted that it has not paid interest on the delayed payment to the farmers in the counter affidavits filed by it. We have already said that it is bound to pay interest @ 15 per cent per annum as already discussed.

98. The Sugarcane Commissioner who had addressed the Court on the earlier occasions had also mentioned about the financial condition of the Company and hence the via-media adopted by him by opening an Escrow account and issuance of tagging orders by which substantial amount of the proceeds from sale of sugar and by-products are to be deposited in the said account which is jointly operated by the officials of the State and the Company and is used for payment of sugarcane dues.

99. It appears that the Sugarcane Commissioner has tried to resolve the dispute by ensuring due payment of cane dues of farmers by resorting to an Escrow Account to which the sale proceeds as already referred by the Company are deposited and are used for paying to the cane growers. This arrangement, according to him, on the one hand protects the interest of the farmers and also prevents the factory of the Company from shutting down. If the factory is shut down then this would not be in the interest of the sugarcane growers of the area.

100. Although we are of the opinion that the Escrow Account opened by the Sugarcane Commissioner in this case is not referable to Section 17(5) of the Act, 1953 read with Rule 48A of the Rules, 1954, we do not wish to interfere with this mechanism as doing so would be counter-productive to the interests of the farmers/ petitioners.

101. We are also of the considered view that while exercising powers under Article 226 of the Constitution of India, we have to take a practical and reasonable view of the matter as regards the relief prayed keeping in mind the facts of the case, especially in the circumstances of the present case where, from the facts averred in the counter affidavits filed by the Sugarcane Commissioner and the Company/ Occupier, it is evident that the financial condition of the Company is not such that it could have paid the sugarcane dues within the stipulated period of fourteen days, and the same in fact are being paid on daily basis, in phases, from the Escrow Account opened by the order of the Sugarcane Commissioner in which 85% of the proceeds from sale of Sugarcane by the Company and certain percentage of proceeds from sale of it by products are deposited thereby leaving 15 % of the sale proceeds for the Company to meet its expenses and the remaining 85% are being utilized to pay the dues of sugarcane growers and as per records almost everyday such payments are being made. Such payments, as is evident from the affidavit of opposite party no.3, are being made partially from other sources of opposite party no.6 also. All the assets/ immovable properties of the Company are already encumbered and lenders have first charge on them. If the factory is attached and shut down, it does not help the payment of dues.

102. Considering the totality of facts and circumstances discussed hereinabove, especially the interest of farmers, so that on the one hand, the sugar mills may continue to run and on the other hand, the farmers of the area may be able to sell their crop to it and reap benefits thereof, we are of the opinion that any direction for coercive measures for recovery of the dues in the present scenario at this stage will not serve the interest of the petitioners. We, accordingly, provide and direct that the Company/ Occupier should clear all the dues of the farmers / petitioners herein along with interest @ 15 per cent per annum on delayed payment, subject to any waiver or reduction in this regard under Section 17(3) of the Act, 1953 as discussed, on the principle of 'first supply, first payment', positively, by 31.03.2022, failing which the Sugarcane Commissioner shall proceed to issue recovery certificate to the Collector for recovery of such dues whereupon the Collectors shall be under an obligation to recover the said dues by exercising all means permissible in law including coercive action against the concerned including the opposite party no.6-Company and its Directors.

103. The Sugarcane Commissioner would be under an obligation to seriously consider the continued default by the Company in this regard as also to assess its financial capacity to pay cane dues etc, and shall give due weightage to this aspect before reserving/ assigning cane area for the Company for the next crushing season along with other factors mentioned in Rule 22 of the Rules, 1954.

104. All the writ petitions are **disposed of** in the aforesaid terms.

(2021)12ILR A402
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.11.2021

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE JASPREET SINGH, J.

P.I.L.(Civil) No. 26081 of 2020

People Action Justice for All Foundation ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mr. Bajrang Bahadur Singh

Counsel for the Respondents:
Mr. Q.H. Rizvi, Standing Counsel, Mr. Rajendra Kumar Dwivedi

A. Practice & Procedure - Concealment of material facts by the petitioner entitles the Court to dismiss the petition. (Para 8)

The present petition has been filed through Vice President concealing the factum of filing of earlier petition by the petitioner which pertains to the same property and allegations against the respondent no. 7. (Para 7) (E-10)

List of Cases cited:

1. K.D. Sharma Vs Steel Authority of India Limited & ors. (2008) 12 SCC 481

2. Abhyudya Sanstha Vs U.O.I. (2011) 6 SCC 145

3. Hari Narain Vs Badri Das AIR 1963 SC 1558

4. G. Narayanswamy Reddy Vs Govt. of Karn. (1991) 3 SCC 261

5. Dalip Singh Vs St. of U.P. (2010) 2 SCC 114

6. Moti Lal Songara Vs Prem Prakash @ Pappu & anr. (2013) 9 SCC 199

7. ABCD Vs U.O.I. & Ors. (2020) 2 SCC 52

(Delivered by Hon'ble Rajesh Bindal, C.J.)

01. The present writ petition has been filed alleging that the respondent no.7 has raised illegal construction by encroaching the

Government land and the same be directed to be removed.

02. Learned counsel for the official respondents submitted that the present writ petition deserves to be dismissed on the ground of concealment of material facts.

03. The petitioner had earlier filed a Writ Petition bearing Misc. Bench No. 21352 of 2019 through its Secretary raising the issue that respondents no. 7 therein has been wrongly granted recognition for running the school by producing documents showing it to be the owner of the land, though it was not the owner, however, the aforesaid writ petition was withdrawn with liberty to the petitioner to pursue other remedy available for the aforesaid purpose in law.

04. The learned counsel for the petitioner further argued that the present writ petition has been filed through Vice President concealing the factum of filing the earlier petition, though, the property in question and the school are same.

05. The learned counsel for the petitioner sought to explain the position stating that issues sought to be raised in both the petitions are different, hence, the fact of filing of the earlier petition was not mentioned.

06. After hearing learned counsel for the parties, in our opinion, the petition deserves to be dismissed only on the ground of concealment of material facts. It is not in dispute that the earlier writ petition was filed by the petitioner through its Secretary raising certain issues with reference to the same land and the allegations that the respondent no.7 had been given recognition of the school by producing forged documents. The aforesaid petition was dismissed as withdrawn on 05.08.2019 with liberty to the petitioner to pursue any other remedy available in law.

07. The present petition has been filed through Vice President concealing the factum of filing of earlier petition by the petitioner which pertains to the same property and allegations against the respondent no.7.

08. As there is material concealment of facts in the present petition, the same deserves to be dismissed.

09. As to how a litigant who conceals material facts from the Court, has to be dealt with, has been gone through by Hon'ble the Supreme Court time and again and the consistent opinion is that he is not entitled even to be heard on merits.

10. **In K.D. Sharma v. Steel Authority of India Limited and others, (2008) 12 SCC 481** it was observed:

"39. If the primary object as highlighted in Kensington Income Tax Commrs., (1917) 1 KB 486 : 86 LJKB 257 : 116 LT 136 (CA) is kept in mind, an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the court with "soiled hands". Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the court does not reject the petition on that ground, the court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of court for abusing the process of the court."

In Dhananjay Sharma v. State of Haryana and others, (1995) 3 SCC 757 filing of a false

affidavit was the basis for initiation of action in contempt jurisdiction and the concerned persons were punished."

11. In **Abhyudya Sanstha v. Union of India, (2011) 6 SCC 145**, Hon'ble the Supreme Court, while declining relief to the petitioners therein, who did not approach the court with clean hands, opined as under:

"16. In our view, the appellants deserve to be non suited because they have not approached the Court with clean hands. The plea of inadvertent mistake put forward by the learned senior counsel for the appellants and their submission that the Court may take lenient view and order regularisation of the admissions already made sounds attractive but does not merit acceptance. Each of the appellants consciously made a statement that it had been granted recognition by the NCTE, which necessarily implies that recognition was granted in terms of Section 14 of the Act read with Regulations 7 and 8 of the 2007 Regulations. Those managing the affairs of the appellants do not belong to the category of innocent, illiterate/uneducated persons, who are not conversant with the relevant statutory provisions and the court process. The very fact that each of the appellants had submitted LPASW No. 82/2019 Page 7 application in terms of Regulation 7 and made itself available for inspection by the team constituted by WRC, Bhopal shows that they were fully aware of the fact that they can get recognition only after fulfilling the conditions specified in the Act and the Regulations and that WRC, Bhopal had not granted recognition to them. Notwithstanding this, they made bold statement that they had been granted recognition by the competent authority and thereby succeeded in persuading this Court to entertain the special leave petitions and pass interim orders. The minimum, which can be said about the appellants is that they have not approached the Court with clean hands and succeeded in polluting the stream of justice by making patently false statement. Therefore, they are not entitled to relief under Article 136 of the Constitution. This view finds support from plethora of precedents. In **Hari Narain v. Badri Das** AIR 1963 SC 1558, **G. Narayanaswamy Reddy v. Govt. of Karnataka** (1991) 3 SCC 261 and large number of other cases, this Court denied relief to the petitioner/appellant on the ground that he had not approached the Court with clean hands. In **Hari Narain v. Badri Das (supra)**, the Court revoked the leave granted to the appellant and observed:

"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave made under Article 136 of the Constitution, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it LPASW No. 82/2019 Page 8 would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Thus, if at the hearing of the appeal the Supreme Court is satisfied that the material statements made by the appellant in his application for special leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained special leave from the Supreme Court on the strength of what he characterises as misrepresentations of facts contained in the petition for special leave, the Supreme Court may come to the conclusion that in such a case special leave granted to the appellant ought to be revoked."

In **G. Narayanaswamy Reddy v. Govt. of Karnataka's case** (supra), the Court while noticing the fact regarding the stay order passed by the High Court which prevented passing of the award by the Land Acquisition Officer within the prescribed time period was concealed and in the aforesaid context, it observed that :

" .....Curiously enough, there is no reference in the special leave petitions to any of the stay orders and we came to know about these orders only when the respondents appeared in response to the notice and filed their counter-affidavit. In our view, the said interim orders have a direct bearing on the question raised and the non-disclosure of the same certainly amounts to suppression of material facts. On this ground alone, the special leave petitions are liable to be rejected. It is well settled in law that the relief under Article 136 of the Constitution is discretionary and a petitioner who approaches this Court for such relief must come with frank and full disclosure of facts. If he fails to do so and suppresses material facts, his application is liable to be dismissed. We accordingly dismiss the special leave petitions."

In **Dalip Singh v. State of U.P**. (2010) 2 SCC 114, Hon'ble the Supreme Court noticed the progressive decline in the values of life and observed:

"For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahinsa" (non- violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice- delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

(emphasis supplied)

In **Moti Lal Songara v. Prem Prakash @ Pappu and another, (2013) 9 SCC 199**, Hon'ble the Supreme Court, considering the issue regarding concealment of facts before the court, while observing that "court is not a laboratory where children come to play, opined as under:

"18. The second limb of the submission is whether in the obtaining factual matrix, the order passed by the High Court discharging the accused-respondent is justified in law. We have clearly stated that though the respondent was fully aware about the fact that charges had been framed against him by the learned trial Judge, yet he did not bring the same to the notice of the revisional court hearing the revision against the order taking cognizance. It is a clear case of suppression. It was within the special knowledge of the accused. Any one who takes recourse to method of suppression in a court of law, is, in actuality, playing fraud with the court, and the maxim supressio veri, expression faisi , i.e., suppression of the truth is equivalent to the expression of falsehood, gets attracted. We are compelled to say so as there has been a calculated concealment of the fact before the revisional court. It can be stated with certitude that the accused- respondent tried to gain advantage by such factual suppression. The fraudulent intention is writ large. In fact, he has shown his courage of ignorance and tried to play possum. The High Court, as we have seen, applied the principle "when infrastructure collapses, the superstructure is bound to

collapse". However, as the order has been obtained by practising fraud and suppressing material fact before a court of law to gain advantage, the said order cannot be allowed to stand." (emphasis supplied)

12. In a recent judgment in **ABCD v. Union of India & Ors., (2020) 2 SCC 52**, Hon'ble the Supreme Court in matter where material facts had been concealed, while issuing notice to the petitioner therein, exercising its suo-motu contempt power observed as under :

"15. Making a false statement on oath is an offence punishable under Section 181 of the IPC while furnishing false information with intent to cause public servant to use his lawful power to the injury of another person is punishable under Section 182 of the IPC. These offences by virtue of Section 195(1)(a)(i) of the Code can be taken cognizance of by any court only upon a proper complaint in writing as stated in said Section. In respect of matters coming under Section 195(1)(b)(i) of the Code, in Pushpadevi M. Jatia v. M.L. Wadhawan etc., (1987) 3 SCC 367 prosecution was directed to be launched after prima facie satisfaction was recorded by this Court.

16. It has also been laid down by this Court in Chandra Shashi v. Anil Kumar Verma, (1995) 1 SCC 421 that a person who makes an attempt to deceive the court, interferes with the administration of justice and can be held guilty of contempt of court. In that case a husband who had filed a fabricated document to oppose the prayer of his wife seeking transfer of matrimonial proceedings was found guilty of contempt of court and sentenced to two weeks imprisonment. It was observed as under:

"1. The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned.

2. Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice.

The legal position thus is that if the publication be with intent to deceive the court or one made with an intention to defraud, the same would be contempt, as it would interfere with administration of justice. It would, in any case, tend to interfere with the same. This would definitely be so if a fabricated document is filed with the aforesaid mens rea. In the case at hand the fabricated document was apparently to deceive the court; the intention to defraud is writ large. Anil Kumar is, therefore, guilty of contempt."

13. Thus, for the aforesaid reasons, the petition deserves to be dismissed.

14. Accordingly, the petition is dismissed, however, in the facts and circumstances, there shall be no order as to costs.

(2021)12ILR A406
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2021

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 748 of 2020

M/s Birla Corp. Ltd. ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sujeet Kumar, Ms. Chhya Gupta, Sri Santosh Kumar Bagaria

Counsel for the Respondents:
C.S.C., Sri C.B. Tripathi

A. Interpretation of Statute - U.P. Trade Tax Act, 1948 - U.P. V.A.T. Act, 2008: Section 40 - U.P. Tax on Entry of Goods into Local Areas Act, 2007: Section 13(xv) - Section 40 of the Vat Act does not provide for recovery of any amount of tax that may have been due under the Entry Tax Act. (Para 29) (E-10)

Writ Petition Allowed. (E-10)

List of Cases cited:

1. Ashok Service Centre Vs St. of Orissa (1983) 2 SCC 82

2. Paresh Chand Chatterjee Vs The State of Assam & ors. AIR 1962 SC 167

3. M/s Eastern Spinning & Textiles Mills Vs St. of U.P. 2010 TLD 41

4. Siddhartha Viyas & anr. Vs Ravi Nath Misra & ors. (2015) 2 SCC 701

(Delivered by Hon'ble Naheed Ara Moonis, J. & Hon'ble Saumitra Dayal Singh, J.)

1. H eard Shri Santosh Kumar Bagaria, learned Senior Advocate assisted by Shri Sujeet Kumar and Ms. Chhaya Gupta, learned counsel for the petitioner and Shri C.B. Tripathi, learned Special Counsel for the revenue.

2. Present petition has been filed to quash the communications dated 07.07.2020 and 11.08.2020 issued by the Deputy Commissioner, Commercial Tax, Sector 3, Prayagraj and for a further direction in the nature of Mandamus to refund Rs. 17,45,68,741/- along with interest at the rate of 15% from 04.07.2020.

3. In short, undisputedly, the aforesaid amount of refund was found due to the petitioner under the provisions of the U.P. Trade Tax Act, 1948 (hereinafter referred to as the "Erstwhile Act") for the A.Y. 2004-05 to 2007-08. Owing to legislative changes, that claim was made and considered under UP VAT Act, 2008 (hereinafter referred to as the "VAT Act"). The refund payment has been denied on a solitary ground of the entire amount Rs. 17,45,68,741/- adjusted against the dues of interest on Entry Tax claimed against the petitioner, being Rs. 18,10,01,347/- arising under the U.P. Tax on Entry of Goods into Local Areas Act, 2007 (hereinafter referred to as the "Entry Tax Act").

4. The core issue to be addressed is, whether by virtue of section 13(xv) of the Entry Tax Act read with section 40 of the VAT Act, the amount of refund under the VAT Act could be adjusted against the dues arising under the Entry Tax Act.

5. In brief, the petitioner set up a unit to manufacture cement using fly ash as a raw material. At the relevant time, on 18.06.1997, the Government of U.P. (in exercise of its power under section 5 of the Erstwhile Act), had issued a rebate notification granting rebate on payment of tax under the Erstwhile Act, to eligible units, for a period of ten years. Admittedly, the petitioner was granted that benefit for the period 14.12.1998 to 13.12.2008. Mid-way into that scheme, the said rebate notification came to be rescinded on 14.10.2004, by the State Government. Consequently, for the period 14.10.2004 to 13.12.2008, no rebate was allowed to the petitioner under the Erstwhile Act. Consequently, tax payments were made.

6. The notification dated 14.10.2004 rescinding the rebate notification dated 18.06.1997 was challenged by the petitioner and others before this Court. First, writ petition ***M/s Jai Prakash Associates Ltd. vs. State of U.P. and Another 2010 UPTC 757***, came to be decided by the judgment dated 29.03.2010.

Paragraph 125 of the said decision reads as under:-

*"**125**. The writ petition is allowed in part to the extent petitioner's entitlement for tax exemption for the period available under the original notification dated 27th February, 1998. Accordingly, a writ in the nature of mandamus is issued directing the opposite parties to provide tax exemption to the petitioner industry from the date of production for the period of entitlement under original notification dated 27th February, 1998."*

7. On 16.04.2010, the petition filed by the present petitioner being ***Writ Petition (Misc. Bench) No. 6176 of 2004, M/s Birla Corporation Ltd. vs. State of U.P and others*** came to be decided by the order dated 16.04.2020 on the following terms:-

"Keeping in view the fact that the controversy has been set at rest, present writ petitions too are decided finally in terms of the judgment and order dated 29.3.2010, passed in writ petition No. 5861(M/B) of 2010.

No order as to costs."

8. The above judgments, were carried in appeal by the revenue, to the Supreme Court. Vide judgment dated 12.11.2019, in ***State of Uttar Pradesh and Another vs. Birla Corporation Ltd. (2019) SCC OnLine SC 1569***, the Supreme Court dismissed the revenue's appeal with certain observations. Relevant to our issue, paragraph nos. 34 and 36 of the said decisions read as below:-

*"**34**. A priori, the respondents and similarly placed persons would be entitled to rebate for the relevant period prescribed in the notification dated 27th February, 1998 which would continue to remain in vogue until the expiry of the specified period, namely, ten years. In the case of BCL up to 13 th December, 2008 and in the case of JPAL up to 17th September, 2014 respectively. <u>The amount of rebate, however, would depend on the verification of their refund claim pending before the concerned authorities and would be subject to just exceptions including the principle of unjust enrichment. The respondents should be able to substantiate that the amount claimed by them has not been passed on to their consumers. Only then, they would be entitled for refund. The competent authority may verify the claim for refund of each of the respondent(s) in accordance with law and pass appropriate orders, including about the interest for the relevant period.</u>*

35. .....

36. In view of the above, these appeals must fail. Hence, the same are dismissed with observations. There shall be no order as to costs. All pending applications are also disposed of."

(emphasis supplied)

9. As was noted in the order of the Supreme Court, upon the petitioner's writ petition being allowed by this Court, the petitioner had filed applications dated 20.11.2010 claiming refund Rs. 17,90,61,418/- being the total amount of rebate denied to the petitioner during pendency of its writ petition before this Court, for different Assessment Years, during the period 14.10.2004 to 31.12.2007. It may be noted, no refund was claimed for the period beyond 01.01.2008 when the VAT Act was enforced.

10. Separate orders were passed by the respondent no. 4 on the petitioner's applications claiming refund, all on 29.06.2020. Thus, instead of granting the refund of the amount claimed, the respondent-assessing authority of the petitioner only quantified the total amount of trade tax refundable at Rs. 17,45,68,741/- for A.Y.s 1998 (from 14.12.2008)-1999 to 2007-2008 (upto 31.12.2007). It is also undisputed, at that stage, the assessing authority of the

petitioner found the petitioner had not passed on that liability (of disputed trade tax). Thus, neither the principle of unjust enrichment was found applicable nor any other ground was found existing to deprive the petitioner of the refund claimed. At the same time, the assessing authority found, no interest was payable to the petitioner on the delayed refund. Thereafter, on 07.07.2020, instead of paying out the refund, the assessment authority of the petitioner issued a further ex-parte communication to the petitioner informing adjustment of the entire amount of refund Rs. 17,45,68,741/- against the outstanding demand of dues of interest on Entry Tax Rs. 18,10,01,347/-, for the A.Ys. 2003-04 to 2009-10.

11. A similar communication giving full details of such adjustments made was issued to the petitioner on 11.08.2020. In such circumstances, the petitioner again wrote to its assessing authority on 31.08.2020 stating, no amount of tax was due against him either under the erstwhile Act or the VAT Act or the Central Sales Tax Act, 1956 (hereinafter referred to as the "Central Act"). It reiterated its demand for payment of refund due. In the present writ petition in paragraph 3, it has been specifically stated, there is no amount of tax outstanding or due against the petitioner under the provisions of the Erstwhile Act or the VAT Act or the Central Act. In reply thereto in paragraph 29 of the counter affidavit, only this much has been stated, on the date of the refund order dated 29.06.2020 being passed, interest on Entry Tax Rs. 18,10,01,347/- was outstanding against the petitioner for the A.Ys. 2003-04 to 2009-10.

12. Referring to the provisions of Section 29 of the Erstwhile Act and Section 40 of the VAT Act read with Section 2(k) thereof, it has been submitted, the VAT Act only authorizes adjustment of an amount of refund due against any outstanding amount of tax either under (i) the Erstwhile Act or (ii) the VAT Act or (iii) the Central Sales Tax Act. By virtue of Section 13(xv) of the Entry Tax Act, the provisions of Section 40 of the VAT Act have been incorporated in the Entry Tax Act on the principle, *mutatis mutandis*. Referring to the decision of the Supreme Court in ***Ashok Service Centre vs. State of Orissa (1983) 2 SCC 82*** as followed by the Supreme Court in ***Mariyappa and others vs. State of Karnataka and others (1998) 3 SCC 276*** and in ***Indian Oil Corporation Ltd. Vs. State of Uttar Pradesh and others (2019) 16 SCC 482***, it has been urged - that principle applies with limitations inherently attached to it. Thus, a statutory law borrowed on the principle mutatis mutandis may be applied to the enactment to which it has been borrowed, with necessary changes only. That principle may not allow for a new provision or legal effect to be created, de hors the language of the borrowed provision of law-here section 40 of the VAT Act.

13. Thus, it has been submitted, read into the Entry Tax Act, section 40 of the VAT Act only provides, in case any amount is found refundable under the Entry Tax Act, the same may first be applied to any tax dues under (i) the Entry Tax Act (ii) U.P. Trade Tax Act (iii) Central Sales Tax Act. However, the amount refundable under the Entry Tax Act may not be applied or be adjusted against any tax due under the VAT Act. Since, in the present case, the amount is refundable not under the Entry Tax Act but under the VAT Act read with erstwhile Act, section 13(xv) of the Entry Tax Act read with section 40 of the VAT Act, would have no application. The authorities have wholly misconstrued the law and have illegally adjusted the refund due to the petitioner.

14. As to the decision of the Constitution-bench of the Supreme Court in ***Paresh Chand Chatterjee vs. The State of Assam and Ors. AIR 1962 SC 167***, it has been submitted, rather than helping the case of the revenue, that decision

only makes clear the proposition - the principle *mutatis mutandis* cannot introduce a completely new legislative provision, to the borrower-enactment as may not be found specifically existing in the parent enactment of which the borrowed provision is a part. Neither the Erstwhile Act nor the VAT Act provided for a scheme whereby an amount due by way of refund could be adjusted against dues of Entry Tax Act, such a provision of law cannot be imagined and thus created or introduced in the Entry Tax Act. In **Paresh Chand (Supra),** a question arose whether under Section 8(1) of the Assam Land (Requisition and Acquisition) Act, 1948, by use of words mutatis mutandis, any right existed or duty arose to value the land requisitioned under that enactment. Explaining the principle mutatis mutandis, it was held, once the provision of Land Acquisition Act, 1894 had been made applicable on a mutatis mutandis principle, to the provisions of the Assam Land (Requisition and Acquisition) Act, 1948 with respect to determination of compensation under that Act, clearly the word 'acquisition' used under the Land Acquisition Act, 1894 would have to be read to include within its ambit and sphere the word 'requisition' used under the Assam Land (Requisition and Acquisition) Act, 1948. That due alteration of detail or that appropriate modification was necessary to give life to the borrowed provision of law, in the context of the borrower-enactment.

15. Opposing the petition, learned Special Counsel for the revenue has first fairly brought on record a decision of the division bench of this Court in ***M/s Eastern Spinning and Textiles Mills vs. State of U.P. 2010 TLD 41***. Though that decision records a conclusion in favour of the petitioner, at the same time, the decision in that case did not adjudicate the issue arising herein. The said direction was issued without reference to the provision of Section 13(xv) of the Entry Tax Act.

16. Next, heavy reliance has been placed on the language of the proviso to Section 40 of the VAT Act applied mutatis mutandis to the provisions of Entry Tax Act, by virtue of Section 13(xv) of the Entry Tax Act. Relying on the five-Judge Constitution Bench decision of the Supreme Court in the case of ***Paresh Chand Chatterjee vs. The State of Assam and Ors. (supra)***, it has been submitted, appropriate modifications to the provisions of section 40 of the VAT Act are necessary and due alternation of details must be made to that provision of law in the context of the Entry Tax Act. It would necessarily mean, the proviso to section 40(1) of the VAT Act refers to any amount that may be refundable be first applied to satisfy an outstanding demand of tax under the Entry Tax Act or under the Central Act or the VAT Act. Unless that full effect is given to the proviso in the manner suggested by the learned counsel for the revenue, that plain effect of the borrowed provision would remain from being enforced.

17. Thus, according to learned counsel for the revenue, the proviso as to Section 40 of the VAT Act, as applied to the provisions of Entry Tax Act has to be given free play to carry out the object of that (latter) Act. To that end, he would also rely on a three-judge bench decision of the Supreme Court in ***Siddhartha Viyas and another vs. Ravi Nath Misra and others (2015) 2 SCC 701***. Heavy reliance has been placed to the ratio contained in that decision to the effect-proviso cannot be read to nullify or not to set at naught the real object of the main enactment. Insofar as, it is an object of the Entry Tax Act to seek recovery of the admitted/assessed amount of Entry Tax, the same cannot be defeated by giving a restricted meaning to the proviso to include therein, the outstanding demands under the VAT Act or the Central Sales Tax Act but to exclude the demand under the Entry Tax Act. Thus, Shri Tripathi has also invoked the principle of purposive interpretation.

18. Having heard learned counsel for the parties and having perused the record, the controversy involved in the present case is neither to the entitlement of refund or its quantification. Insofar as the Erstwhile Act is concerned, the petitioner claims it became entitled to refund of Rs. 17,45,68,741/- by virtue of the decision of this Court in **Writ Petition (Misc. Bench) No. 6176 of 2004** decided on 16.04.2010 as affirmed by the Supreme Court (on certain conditions) in ***State of U.P. vs. Birla Corporation Ltd. (Supra).*** That entitlement to refund was preserved and protected under UP VAT Act. To that effect, orders of refund have also been passed on 29.06.2020. Those have attained finality. As to the demand of Entry Tax Act, again there is no dispute that Entry Tax demands were raised for the A.Ys. 2003-04 to 2009-10. Though, those demands were later discharged, owing to the delay on part of the petitioner in discharging that liability, interest liability Rs. 18,10,01,347/- had arisen thereon.

19. Examined in that light, what survives for our consideration is whether the amount of refund due under the Erstwhile Act could be adjusted against the demand of interest on Entry Tax. Since no issue of competance of the proceedings for refund has been raised by either party, the provisions to which reference is necessary are-section 13(xv) of the Entry Tax Act and section 40 of the VAT Act. Section 13(xv) of the Entry Tax Act reads as below:-

Section 13*. Applicability of certain provisions of the Uttar Pradesh Value Added Tax Act, 2008.*

The following provisions of the Uttar Pradesh Value Added Tax Act, 2008 shall mutatis mutandis apply to all dealers and proceedings under this Act:-

(xv)	*Section 40*	*Refund and adjustment*

20. Then, section 40(1) of the VAT Act reads as below:-

Section 40*. Refund and adjustment-*

(1) Subject to other provisions of this Act, the assessing authority shall in the manner prescribed, refund to the dealer an amount of tax, fee, or other dues paid in excess of the amount due from him under this Act.

PROVIDED that amount found to be refundable shall first be adjusted towards tax or any other amount outstanding against the dealer under this Act or under The Central Sales Tax Act, 1956 or under the erstwhile Act and only the balance if any shall be refunded.

21. Thus, the Entry Tax Act itself does not contain a separate provision for refund and adjustment. It borrows that provision from the VAT Act. Legislation by incorporation is a fairly common and well established legislative practice. Clearly, it is a rule of brevity in legislative action. Thereby the legislative directly borrows and applies a time-tested fully mature provision of law to a new/later enactment. In **Ashok Service Centre (Supra)** dealing with the expression mutatis mutandis it was held as under:-

*"**17**. Section 3 (2) of the Act which makes the provisions of the principal Act mutatis mutandis applicable to the levy of additional tax is a part of the charging provision of the Act and it does not say that only those provisions of the Principal Act which relate to assessment and collection of tax will be applicable to the proceedings under the Act. Before considering what provisions of the Principal Act should be read as part of the Act, we have to understand the meaning of the expression 'mutatis mutandis'. Earl Jowitt's 'The Dictionary of English Law (1959)' defines 'mutatis mutandis' as 'with the necessary changes in points of detail'. Black's Law Dictionary (Revised 4th Edn. 1968) defines 'mutatis mutandis' as 'with*

the necessary changes in point of detail, meaning that matters or things are generally the same, but to be altered when necessary as to names, offices, and the like. Houseman v. Waterhouse. In Bouvier's Law Dictionary (3rd Revision, Vol. II), the expression 'mutatis mutandis' in defined as "[T]he necessary changes. This is a phrase of frequent practical occurrence, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like. Extension of an 'earlier Act mutatis mutandis to a later Act brings in the idea of adaptation, but so far only as it is necessary for the purpose, making a change without altering the essential nature of the thing changed, subject of course to express provisions made in the later Act. Section 3 (2) of the Act shows that the State Legislature intended not to depart substantially from the Principal Act except with regard in matters in respect of which express provision had been made in the Act. The assumption made by the High Court that the Act was an independent Act having nothing to do with the Principal Act is not correct. The Act only levied some extra sales tax in addition to what had been levied by the Principal Act. The nature of the taxes levied under the Act and under the Principal Act was the same and the Legislature expressly made the provisions of the Principal Act mutatis mutandis applicable to the levy under the Act. The additional sales tax was in the nature of a surcharge over and above what was due and payable by assessee under the Principal Act. The Act, though it had a long title, a short title and other usual features of every statute, could not be, considered as an independent statute. It had to be read together with the Principal Act to be effective. In the circumstances the conclusion reached by the High Court that the two Acts were independent of each other was wrong. We are of the view that it is necessary to read and to construe the two Acts together as if the two Acts are one, and while doing so to give effect to the provision, of the Act which is a later one in preference to the provisions of the Principal Act wherever the Act has manifested an intention to modify the Principal Act. The following Observations of Lord Simonds in Fendoch Investment Trust Co. v. Inland Revenue Commissioners(1) made in connection with the construction of certain fiscal statutes are relevant here."

"My Lords, I do not doubt that in construing the latest of a series of Acts dealing with a specific subject matter, particularly where all such Acts are to be read as one, great weight should be attached to any scheme which can be seen in clear outline and amendments in later Acts should if possible be construed consistently with that scheme".

(emphasis supplied)

22. That principle was then applied in ***Mariyappa and others vs. State of Karnataka and others (supra)***. It was again followed by later decision of the Supreme Court in ***IOCL vs State of U.P. And others (supra),*** wherein, in paragraphs 54 and 57 of the decision, reached in the context of Entry Tax Act.

54. What is the nature of the provision of Section 33 of the VAT Act, 2008 which has been made applicable by virtue of Section 13 of the 2007 Act is the question to be answered. Section 13 "mutatis mutandis" applies certain provisions of the VAT Act, 2008 as mentioned in Section 13. The words "mutatis mutandis" came to be considered in Ashok Service Centre v. State of Orissa. In the aforesaid case, this Court had occasion to consider the provisions of the Orissa Additional Sales Tax Act, 1975. Section 2(2) of which provision mutatis mutandis applies the provisions of the Orissa Sales Tax Act, 1947.

57. Thus, application of the provisions of the VAT Act, 2008 is provided by Section 13 of the 2007 Act with certain changes in points of details. Section 33 of the VAT Act, 2008 which has been mentioned to apply under Section 13

has to be applied with respect to payment and recovery of tax. Thus, the payment of interest which is contemplated under Section 33 on the amount of tax has to be applied with regard to the payment of entry tax and the interest thereon. Even if provision of Section 33 of the VAT Act, 2008 to be treated as machinery provision which is to be applied by virtue of Section 13 of the 2007 Act, the machinery provision has to be interpreted in a manner so as to make the liability effective and treated to be substantive law."

23. In borrowing a provision, some change of language or meaning to terms and phrases used in the statutory provision being borrowed may become necessary to give effect to the same in the different context of the statute to which it is borrowed. Since, section 13 of the Entry Tax Act borrows, amongst others the provisions of Section 40 of the VAT Act on the principle "mutatis mutandis", we may first try and read that provision as it is, into the provisions of the Entry Tax Act. Any incongruity or conflict that may arise upon that language of the borrowed provision as read into the Entry Tax Act, may be identified and resolved, thereafter. If however, there exists no incongruity or conflict, that provision may be applied without offering any intervention or alteration or modification to the original language of the borrowed provision. No rule of interpretation would be attracted to give full effect to the meaning of the provision, except the rule of literal interpretation.

24. Thus, we may first read Section 40 of the VAT Act as a part of the Entry Tax Act by reading the words "this Act" used in Section 40 of the VAT Act to be a reference made to the Entry Tax Act as that presumption is self-apparent from section 13(xv) of the Entry Tax Act. Applying this first principle, Section 40 of the VAT Act as borrowed by the Entry Tax Act would read as under:-

<u>Refund and adjustment-</u>

(1) Subject to other provisions of this Act (i.e. Entry Tax Act), the assessing authority shall in the manner prescribed, refund to the dealer an amount of tax, fee, or other dues paid in excess of the amount due from him under this Act (i.e. Entry Tax Act).

PROVIDED that amount found to be refundable shall first be adjusted towards tax or any other amount outstanding against the dealer under this Act (i.e. Entry Tax Act) or under The Central Sales Tax Act, 1956 or under the erstwhile Act and only the balance if any shall be refunded.

25. Clearly, no incongruity or ambiguity or doubt emerges from the above exercise. Under the VAT Act, the main part of section 40(1) provided for adjustment of any amount found refundable under that Act against specified dues under other enactments namely under that Act, i.e. the U.P. VAT Act, 2008, the Central Sales Tax Act, 1956 and, the U.P. Trade Tax Act, 1948 (i.e. The "Erstwhile Act" defined under Section 2(k) of the VAT Act). It did not contemplate adjustment of a refund against any dues under the Entry Tax Act. Read into the Entry Tax Act, that provision only allows for adjustment of any amount of tax due, either under that Act, i.e. the Entry Tax Act or the Central Tax Act or the "erstwhile Act". Only ambiguity may exist as to the true meaning of the term "erstwhile Act". In absence of any contrary intention shown, it may be given the same meaning as assigned under the VAT Act. Therefore, it may be read to mean the UP Trade Act, 1948 only. To read the words "this Act" (appearing in the later part of section 40 of the VAT Act), as "VAT Act" in the Entry Tax Act, would be without any basis, logic or reasoning. It would be a passionate interpretation made in favour of the revenue i.e. a construction made devoid of reasoning and therefore unacceptable in law.

26. Then, as explained in the decision relied upon by the learned counsel for the revenue in ***Siddhartha Viyas and another Vs. Ravi Nath Misra and others (Supra),*** a proviso may principally serve any of the three purposes namely, to provide an extension to the main provision or an exception to the main provision or it may contain substantively, a new provision. In any case, the proviso may not be read to defeat the object of the main enactment.

27. Accepting and applying that test invoked by learned counsel for the revenue, we find it difficult to sustain the submission based thereon. In the present case, we have examined Section 40 of the VAT Act as it existed in that enactment. Here, we find, the first proviso to sub-section 1 of Section 40 is merely an exception to the main provision. Thus, the main provision mandated the authorities under the VAT Act to refund to an assessee any amount of tax, fee or other dues paid in excess of the amount due from him under that Act for any assessment year. At the same time, the proviso restricted that refund payment to only such amount as may remain in excess after adjustment of any outstanding dues (for any Assessment Year or tax period) either under the VAT Act or the Central Act or the Erstwhile Act i.e. the Trade Tax Act.

28. Besides the fact that it is the plain grammatical meaning of the language used, it can never be said that the proviso thus interpreted would defeat the object of the VAT Act. We find that the object of the VAT Act could only be to impose, determine and recover VAT in accordance with that Act. There is no legislative intent shown to exist, under that Act, to recover dues of Entry Tax Act. In the context of a fiscal legislation, an exception to that principle has been offered by the first proviso to Section 40(1) by allowing for recoveries of other dues of tax, specified therein, namely, Central Sales Tax and the U.P. Trade Tax from any amount of VAT that may be found refundable.

29. Section 40 of the VAT Act does not provide for recovery of any amount of tax that may have been due under the Entry Tax Act. That interpretation and plain grammatical sense cannot be read to defeat the object of the VAT Act, to any extent. The VAT Act does not provide and it does not contemplate imposition of Entry Tax on any goods or transactions. Then, it provides for assessment and recovery of amounts of VAT assessed or due, from individual assessees. Therefore, by way of reasoning even if any amount of Entry Tax imposed under another enactment may remain unpaid while a refund under the VAT Act may be allowed or be granted, would be a factor extraneous to the scheme, object and purpose of the VAT Act.

30. In absence of express words used to that effect, it is neither permissible nor required to read into the language of section 40 of the VAT Act, any word or introduce any meaning as may allow for recovery of dues of Entry Tax. That provision, read as it is, is wholly complete, meaningful and functional. It does not lead to any ambiguity, doubt, conflict, absurdity or unworkability. Therefore, there is no room to apply the rule of purposive construction invoked by the revenue. The objection raised by the revenue to that effect is misconceived.

31. Applied Section 40 of the VAT Act, mutatis mutandis to the Entry Tax Act, it would provide for refund of excess amount of Entry tax, fees or other dues deposited by a dealer under the Entry Tax Act, after adjustment of any other amount due either under the Entry Tax Act or the Central Tax Act or the Trade Tax Act, 1948. Correspondingly, the fact that any amount of VAT may remain unpaid upon such refund of Entry Tax being paid would remain an

extraneous consideration to a refund claim made under the Entry Tax Act. The provision of section 40 having been applied mutatis mutandis to the provision of the Entry Tax Act it would require, no amount of Entry Tax be refunded to an assessee unless other specified tax amounts due against that assessee were first adjusted.

32. However, in the present case, the petitioner was not seeking any refund under the Entry Tax Act. Therefore, the provisions of that Act could not be invoked while rejecting a claim for refund made under the VAT Act. It is for that reason, we have chosen to first consider the interpretation to be given to Section 40(1) of the VAT Act in the context of a refund claimed arising under the VAT Act as that is the only factual and legal context that exists in the present case. The petitioner has neither claimed nor appears to be entitled (at this stage) to any refund under the Entry Tax Act. Therefore, the submission advanced by learned counsel for the revenue appears to be totally misconceived and it cannot therefore be accepted.

33. It is only to deal with the merits of the submissions advanced by the revenue, we have chosen to consider the effect of Section 40(1) of the VAT Act as applied in the statutory context of the Entry Tax Act. At the same time we reiterate, the fact situation to apply that provision to in the context of Entry Tax Act is plainly non-existent.

34. Thus in the above conspectus the communications dated 7.07.2020 and 11.08.2020 are hereby quashed to the extent they seek to adjust the amount of refund claimed under the VAT Act, against dues of interest claimed under the Entry Tax Act. The respondent is directed to pay out the refund Rs. 17,45,68,741/-, in accordance with law together with statutory interest due from the date of the impugned order dated 07.07.2020 till the date of actual payment.

35. Thus, the writ petition succeeds and is accordingly ***allowed***. No order as to costs.

(2021)12ILR A415
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2021

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 760 of 2021

M/S Maa Geeta Traders ...Petitioner
Versus
Comm. Commercial Tax & Anr.
...Respondents

Counsel for the Petitioner:
Pooja Talwar

Counsel for the Respondents:
C.S.C.

A. Interpretation of Statute - U.P. Goods and Services Tax Act, 2017: Section 2(24), 2(91), 5(3) - Section 5(3) of the Act provides the source of power to be exercised by the Commissioner for the purpose of Section 4 read with section 2(91) of the Act. The power under section 5(3) of the Act is a general power of sub-delegation vested in the Commissioner, by the legislature. **It is not the requirement of law that the source of power must necessarily be recited in the order passed in exercise of that power to validate the power exercised. It is enough that the source of power exercised and it is exercised in the manner prescribed by law. (Para 25 -27)**

There are two different methods to create function assignment/delegation in favour of officers of "State tax" and officers of "Central tax" (i.e., officers appointed under the Central Act). Function assignment/jurisdiction in favour of officers of the "State tax" may be created by the "Commissioner" by issuing an order/communication in exercise of his powers of sub-delegation vested under Section 5(3) of the Act. However, function assignment/ jurisdiction in favour of the officers of the Central Act, may be notified by the State Government which alone has

power to cause the sub-delegation in favour of those officers. (Para 38)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Commissioner of Customs Vs Sayed Ali & anr. 2011 (3) SCC 537 *(distinguished)*

2. M/s Canon India Private Ltd. Vs Commissioner of Customs AIR 2021 SC 1699 *(distinguished)*

(Delivered by Hon'ble Naheed Ara Moonis, J. & Hon'ble Saumitra Dayal Singh, J.)

1. Heard Ms. Pooja Talwar, learned counsel for the petitioner, Mr. Manu Ghildyal, learned Standing Counsel for the revenue.

2. By means of the present petition, challenge has been raised to the ex-parte adjudication order dated 07.08.2021 passed by Deputy Commissioner, Commercial Tax, Sector-I, Shajahanpur (hereinafter referred to as the 'Deputy Commissioner), purportedly in exercise of powers vested under section 74 (9) of the U.P. Goods and Services Tax Act, 2017 (hereinafter referred to as the "Act"), for the tax period/Financial Year 2018-2019.

3. Solitary ground pressed in the present petition is - lack of inherent jurisdiction with the Deputy Commissioner to issue a notice, conduct proceedings and pass the impugned adjudication order under section 74 of the Act. In the first place, learned counsel for the petitioner submits, the Commissioner, State Tax (hereinafter referred to as the "Commissioner") as defined under section 2 (24) of the Act, is vested with the jurisdiction over the entire State of Uttar Pradesh to exercise all powers and perform all or any function under the Act. The other officers, who may be subordinate to the "Commissioner" may derive their particular function-jurisdiction to initiate, continue and conclude any proceedings in the nature of adjudication proceedings only under a valid delegation of power made under section 5 (3) of the Act. Since no delegation of power existed in favour of the Deputy Commissioner, the adjudication proceedings initiated and concluded by that authority lacked inherent jurisdiction. Thus, relying upon the provisions of section 2 (91) read with sections 3, 4 and 6 of the Act, it has been submitted, in the absence of any notification issued, authorising the Deputy Commissioner to act as a "proper officer" under the Act, he could never claim any inherent jurisdiction to pass the impugned order. In that regard, heavy reliance has been placed on two decisions of the Supreme Court in ***Commissioner of Customs Vs Sayed Ali and another***, reported in **2011 (3) SCC 537** and ***M/s Canon India Private Limited vs Commissioner of Custom***s, reported in **AIR 2021 SC 1699**.

4. Responding to the above, learned Standing Counsel for the revenue submitted, section 5(3) of the Act has no application to the present facts inasmuch as the Deputy Commissioner is an officer included in the list of officers described under section 3 of the Act. Also, relying on the clear language of the proviso thereto and referring to the Office Orders dated 01.07.2017 and 19.11.2018, both issued by the Commissioner, in exercise of powers vested in that Authority under section 2(91) of the Act read with section 4(2) of the Act, it has been submitted, the necessary function assignment contemplated under section 4 of the Act was complete and valid in law, in favour of the Deputy Commissioner. No other officer could act as the "proper officer" to initiate, conduct and/or conclude the adjudication proceedings in the case of the petitioner, for the tax period/Financial Year 2018-19. The decisions cited by learned counsel for the petitioner are wholly distinguishable. In those cases, the issue had arisen in a different statutory and fact context.

5. Having heard learned counsel for the parties and having perused the record, by the impugned order, the inward supply received by

the petitioner against ten (10) invoices has been disbelieved. The ITC claim of Rs. 2,92,500/- each, made under the Act and the Central Goods and Service Tax Act, 2017 (hereinafter referred to as the 'Central Act') has been rejected. Accordingly, penalty has been imposed.

6. Before proceeding further, it may be relevant to notice certain provisions of the Act. Section 2 of the Act defines various words, terms and, phrases used in the Act. Thus, the term "Commissioner" has been defined in section 2 (24) of the Act. It reads:

"(24) "Commissioner" means the Commissioner of State tax appointed under section 3 and includes the Chief Commissioner, Principal Commissioner, Special Commissioner or Additional Commissioner of State tax appointed under section 3;"

7. Similarly, section 2(91) of the Act defines the term "proper officer". It reads:

"(91) "proper officer" in relation to any function to be performed under this Act, means the Commissioner or the officer of the State tax who is assigned that function by the Commissioner;"

8. Section 2(104) of the Act defines the term "State tax". It reads:-

"104. "State tax" means the tax levied under this Act;"

9. Then sections, 3, 4, 5 and 6 of the Act, read as below:

"Section 3. Officer under this Act.-

The Government shall, by notification, appoint the following classes of officers for the purposes of this Act, namely:-

(a) Principal Commissioner, Chief Commissioner or Commissioner of State tax

(b) Special Commissioners of State tax,

(c) Additional Commissioners of State tax,

(d) Joint Commissioners of State tax,

(e) Deputy Commissioners of State tax,

(f) Assistant Commissioners of State tax,

(g) State tax officers, and

(h) any other class of officers as it may deem fit:

PROVIDED that, the officers appointed under the Uttar Pradesh Value Added Tax Act, 2008 (U.P. Act No. 5 of 2008) shall be deemed to be the officers appointed under the provisions of this Act."

"Section 4. Appointment of officers.-

(1) The Government may, in addition to the officers as may be notified under section 3, appoint such persons as it may think fit to be the officers under this Act.

(2) The Commissioner shall have jurisdiction over the whole of the State, the Special Commissioner and an Additional Commissioner in respect of all or any of the functions assigned to them, shall have jurisdiction over the whole of the State or where the State Government so directs, over any local area thereof, and all other officers shall, subject to such conditions as may be specified, have jurisdiction over the whole of the State or over such local areas as the Commissioner may, by order, specify."

Section 5. Powers of officer.-

(1) Subject to such conditions and limitations as the Commissioner may impose, an officer of State tax may exercise the powers and discharge the duties conferred or imposed on him under this Act.

(2) An officer of State tax may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of State tax who is subordinate to him.

(3) The Commissioner may, subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other officer who is subordinate to him.

(4) Notwithstanding anything contained in this section, an Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other officer of State tax.

Section 6. Authorisation of officers of central tax as proper officer in certain circumstances.-

(1) Without prejudice to the provisions of this Act, the officers appointed under the Central Goods and Services Tax Act, 2017 (Act No. 12 of 2017) are authorised to be the proper officers for the purposes of this Act, subject to such conditions as the Government shall, on the recommendations of the Council, by notification, specify.

(2) Subject to the conditions specified in the notification issued under sub- section (1),-

(a) where any proper officer issues an order under this Act, he shall also issue an order under the Central Goods and Services Tax Act 2017 (Act No. 12 of 2017), as authorised by the said Act under intimation to the jurisdictional officer of central tax;

(b) where a proper officer under the Central Goods and Services Tax Act, 2017 (Act No. 12 of 2017) has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter.

(3) Any proceedings for rectification, appeal and revision, wherever applicable, of any order passed by an officer appointed under this Act, shall not lie before an officer appointed under the Central Goods and Services Tax Act, 2017 (Act No. 12 of 2017).

10. Also, Section 74 of the Act, under which impugned proceedings were drawn and concluded, reads as under:

"Section 74.-Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub- section (1), pay the amount of tax along with interest

payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made there under.

(7) Where the proper officer is of the opinion that the amount paid under sub- section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under subsection (1)pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1.- For the purposes of section 73 and this section,-

(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.

Explanation 2.- For the purposes of this Act, the expression suppression shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

11. By virtue of section 74 (1) of the Act, a "proper officer" alone, may issue a notice requiring any "person chargeable with tax", to show cause as to the subject matter of that proceeding. Again, by virtue of section 74 (9) of the Act, it is the "proper officer" alone, who may consider the reply that may be submitted by the concerned "person chargeable with tax" and, determine the amount of tax, interest or penalty due upon such person. Therefore, it necessarily flows from section 74 of the Act, other than a "proper officer" no other authority under the Act may pass such an order.

12. As to the description of a "proper officer", by virtue of section 2(91) of the Act it has to be either the "Commissioner" himself and/or the officer of the "State tax", who may have been assigned that function by the Commissioner. Here, there is no dispute between the parties that the Office Orders dated 01.07.2017 and 19.11.2018 were issued by the "Commissioner" as defined under section 2(91) of the Act. Its effect will be examined a little later.

13. Thus, there would be no dispute between the parties, if the "Commissioner" had himself issued the notice or passed the order giving rise to the present petition. The issues that arise are whether there is any function assignment/sub-delegation made in favour of the Deputy Commissioner, with reference to section 74 of the Act and, whether the assignment made, if any, validly confers jurisdiction on the Deputy Commissioner.

14. Then, different provisions of the Act exist for different purposes. section 3 of the Act defines the "classes of officers", who may be appointed under the Act. That provision does not create any function assignment or sub-delegation in favour of any class of officers and it does not define the function jurisdiction of any class of officers. However, it does create a fiction of law. Thus, under the proviso thereto it includes, on deemed basis, all officers appointed under the U.P. Value Added Tax Act, 2008, to be officers appointed under the Act. At the same time, no jurisdiction or function assignment has been created or sub-delegated in favour of such officers or class of officers.

15. Then, section 4(1) of the Act, empowers the State Government to appoint a person as an officer under the Act, in addition to the class of officers specified under section 3 of the Act. Since, the Deputy Commissioner is an officer falling under the proviso to section 3 of the Act, section 4(1) of the Act has no relevance to the present controversy. Insofar as section 4(2) of the Act is concerned, it first specifies the territorial limits of the jurisdiction of the "Commissioner", the "Additional Commissioner" and the "Special Commissioner". The Commissioner has been vested with territorial jurisdiction over the entire State. Second, the Special Commissioner and the Additional Commissioner, would also have jurisdiction over the whole of the State of Uttar Pradesh so however, they may exercise that jurisdiction with respect to all or any of the functions that may be "assigned"/sub-delegated to them and where State Government so directs such jurisdiction may be exercised over any local area of the State. Crucially, by way of the third part of section 4 (2) of the Act, all other officers i.e. officers subordinate to the rank of Special Commissioner and Additional Commissioner shall have jurisdiction over the whole of the State or over such local area as the Commissioner may by order specify. Thus, so far as the respondent-Deputy Commissioner is concerned, his territorial jurisdiction would arise under the third part of section 4(2) of the Act, by an order of the Commissioner and subject to conditions as may be specified by the Commissioner.

16. In view of the Office Orders dated 01.07.2017 and 19.11.2018, there is no dispute raised in this petition to territorial jurisdiction of the respondent-Deputy Commissioner. The dispute is confined to the function assignment/sub-delegation if any, made in his favour. Prima-facie, section 4(2) of the Act does not appear to directly deal with function assignment/sub-delegation or creation of subject matter jurisdiction of the Deputy Commissioner or any other authority. That provision speaks of but does not itself provide for or specify/sub-delegate function jurisdiction in favour of any officer under the Act.

17. Clause 1 of the Office Order dated 01.07.2017 first refers to and provides that jurisdiction specification on the following terms:

"1– उ0प्र0 माल एवं सेवा कर अधिनियम 2017 (उ0प्र0 अधिनियम संख्या 1 सन् 2017) की विभिन्न धाराओं में उल्लिखित कृत्य के संबंध में उचित अधिकारी (त्तवचमत वपिबमत) नामित करने के उद्देश्य से अधिनियम की धारा 2 (91) तथा धारा 4(2) में प्रदत्त शक्तियों का प्रयोग करते हुए मैं, आयुक्त, राज्य कर, उत्तर प्रदेश राज्य के अन्तर्गत राज्य कर खण्डों के अधिक्षेत्र की भौगोलिक सीमाओं को इस परिपत्र के अनुलग्नक ''क'' के अनुसार, राज्य कर के मण्डलों की भौगोलिक सीमा इस परिपत्र के अनुलग्नक ''ख'' के अनुसार,

राज्य कर के सम्भाग एवं जोंन की भौगोलिक सीमा इस परिपत्र के अनुलग्नक ''ग'' के अनुसार अवधारित करता हूँ।"

18. Insofar as section 5(3) of the Act is concerned, learned counsel for the petitioner has vehemently urged, unless the Commissioner first sub-delegates his specified powers, no function jurisdiction may arise in favour of the respondent-Deputy Commissioner. Thus, it is her submission, originally, all function jurisdiction vest in the Commissioner. He may sub-delegate the same to other officers by specific orders. In absence of any order issued under section 5(3) of the Act, the Deputy Commissioner never acquired function jurisdiction under Section 74 of the Act.

19. On a plain reading of section 5(3) of the Act, we find, the Commissioner has been granted a general power to sub-delegate all or any of his powers/functions to any other officer who may be subordinate to him. It would include within its plain ambit, the sub-delegation of function jurisdiction or the power to act as the "proper officer", to adjudicate a dispute under section 74 of the Act.

20. In absence of any other procedure or manner being prescribed under the Act to effectuate or create that sub-delegation or to create that function assignment, and in face of the powers vested in the "Commissioner" under section 4(2) and 5(3) of the Act, we may test the true purport and scope of the Office Orders dated 01.01.2017 and 19.11.2018 to determine if such sub-delegation of power or necessary function assignment had been made, in accordance with law.

21. Clearly, the respondent-Deputy Commissioner is an officer of the "State tax" in view of the language of the proviso to section 3 of the Act. Even otherwise, there is no dispute to that, in the present petition. From a plain reading of section 2(91) of the Act the sub-delegation of function assignment is to be made by the Commissioner. Here, clearly, the "Commissioner" had himself issued the Office Orders dated 01.07.2017 and 19.11.2018. Paragraph 2 of the office order dated 01.07.2017 reads as below:-

"2– उ0प्र0 माल एवं सेवा कर अधिनियम 2017 (उ0प्र0 अधिनियम संख्या 1 सन् 2017) की धारा 2 (91) में प्रदत्त शक्तियों का प्रयोग करते हुए मैं, आयुक्त, राज्य कर, उत्तर प्रदेश, उक्त अधिनियम की विभिन्न धाराओं के स्तम्भ में नीचे अंकित तालिका के स्तम्भ 2 में अंकित अधिकारियों को उनके सम्मुख स्तम्भ 3 में अंकित अधिनियम की धाराओं के प्रयोजन हेतु उचित अधिकारी ;च्तवचमत वदिबमतद्ध नामित करता हूँ:–

क्र0 सं0	अधिकारी का पदनाम	उ0प्र0 माल एवं सेवा कर अधिनियम 2017 (उ0प्र0 अधिनियम संख्या 1 सन् 2017)
1	1. खण्ड में तैनात राज्य कर के उप आयुक्त 2. खण्ड में तैनात राज्य कर के सहायक आयुक्त 3. खण्ड में तैनात राज्य कर अधिकारी	10, 35, 54, 61, 62, 63, 64, 65, 66, 67(11), 68, 70, 73, 74, 75, 76, 78, 79, 81, 123, 126, 127, 129, 130, 142
2	1. खण्ड में तैनात राज्य कर के उप आयुक्त 2. खण्ड में तैनात राज्य कर के सहायक आयुक्त	25, 27, 28, 30, 60
3	जेन में तैनात संयुक्त आयुक्त कारपोरेट सर्किल	28, 29, 30, 60, 35, 54, 61, 62, 63, 64, 65, 66, 67(11), 68, 70, 71, 73, 74, 75, 76, 78, 79, 81, 123, 129, 127, 129, 130, 142
4	1. वि0अनु0शा0 इकाई में तैनात राज्य कर के उप आयुक्त 2. वि0अनु0शा0 इकाई में तैनात राज्य कर के सहायक आयुक्त 3. वि0अनु0शा0	68, 70, 126, 127, 129, 130

	इकाई में तैनात राज्य कर अधिकारी	
5	1. जोन में तैनात राज्य कर के संयुक्त आयुक्त (टैक्स आडिट) 2. जोन में तैनात राज्य कर के उप आयुक्त (टैक्स आडिट) 3. जोन में तैनात राज्य कर के सहायक आयुक्त (टैक्स आडिट)	65, 66
6	1. सम्भाग में तैनात राज्य कर के संयुक्त आयुक्त (कार्यपालक) 2. सम्भाग में तैनात राज्य कर के संयुक्त आयुक्त (वि0अनु0शा0)	67, 68, 70, 71, 72
7	1. सचलदल में तैनात राज्य कर के उप आयुक्त 2. सचलदल में तैनात राज्य कर के सहायक आयुक्त 3. सचलदल में तैनात राज्य कर अधिकारी	67(11), 68, 70, 126, 127, 129, 130

22. Doubts, if any, to any as to overlapping jurisdictions (amongst the sub-delegates) came to an end upon issuance of the subsequent Office Order dated 19.11.2018. Therein, the pecuniary jurisdiction was dissected and distributed, exclusively, amongst the officers of the rank of Commissioner Tax Officer, Assistant Commissioner and Deputy Commissioner. The relevant part of that Office Order reads as below:-

"1. डिप्टी कमिश्नर (उपायुक्त)– 50 लाख से अधिक करयोग्य विक्रयधन वाले निर्माता इकाई तथा 1 करोड. से अधिक करयोग्य बिक्री करने वाली ट्रेडिंग ईकाइयाँ।

2. असिस्टेंट कमिश्नर (सहायक आयुक्त)– 15 लाख से 50 लाख तक करयोग्य विक्रयधन वाली निर्माता ईकाइयाँ तथा 25 लाख से 1 करोड. तक करयोग्य बिक्री करने वाली ट्रेडिंग ईकाइयाँ।

3. वाणिज्य कर अधिकारी (राज्य कर अधिकारी)– 15 लाख तक करयोग्य वियधन निर्माता ईकाइयाँ तथा 25 लाख तक करयोग्य बिक्री करने वाली ट्रेडिंग ईकाइयाँ।"

23. The function-jurisdiction that have been sub-delegated and thus assigned to the officers falling in the class of officers-Deputy Commissioner, Assistant Commissioner and the Commerical Tax Officer are clearly mentioned in Column-3 of the chart below paragraph 2 of the Office Order dated 01.07.2017 (quoted above). Thereby, the function-jurisdiction of adjudication under Section 74 has been assigned to the officers of the above mentioned three classes (specified under Section 3). The pecuniary jurisdiction of each of the three class of officers namely, Commercial Tax Officer, Assistant Commissioner and Deputy Commissioner has been delineated by the subsequent Office Order dated 19.11.2018. Thus, there is no overlapping jurisdiction. Both, pecuniary and territorial jurisdiction are clearly demarcated and visible.

24. Then section 5(3) is the source of the power to sub-delegate the function-jurisdiction vested in the Commissioner, to be exercised in favour of any officer subordinate to him. Neither there exists any procedure or stipulation prescribed by law with respect to the mode or the manner in which that power to sub-delegate may be exercised nor the Commissioner was required to obtain any approval of the State Government in that regard nor there exists any requirement in law prescribing issuance of a

notification etc. to evidence a valid sub-delegation made under section 5(3) of the Act.

25. Therefore, the fact, composite Office Orders 01.07.2017 and 19.11.2018 were issued by the Commissioner, makes no difference to the validity of the power exercised. Non-recital of section 5(3) of the Act in either of those orders is inconsequential and even extraneous to the valid exercise of power made by the Commissioner. The power was admittedly existing and it is seen to have been exercised. It is not shown to have been exercised in contravention of any statutory provision or principle of law. Hence, the validity of the power exercised would remain by established firm and undoubted.

26. Section 5(3) of the Act provides the source of power to be exercised by the Commissioner for the purpose of section 4 read with section 2(91) of the Act. As noted above, the power under section 5(3) of the Act is a general power of sub-delegation vested in the Commissioner, by the legislature. Once that power is shown to exist and the same is seen to have been exercised, no fetters may be searched and attached to the exercise of that power and no challenge may arise thereto, de hors the statutory scheme, to defeat that exercise of power.

27. It is not the requirement of law that the source of power must necessarily be recited in the order passed in exercise of that power to validate the power exercised. It is enough that the source of power existed and it was exercised in the manner prescribed by law. Its recital in the order passed in exercise of that power would not lend or add to the legitimacy of the power exercised. It is not a spell that may cause a magical effect only upon its incantation in a ritualisticaly correct manner.

28. As to the further submission advanced by learned counsel for the petitioner on the strength of section 6 of the Act, we find, the same is misconceived. It has no applicability to the present facts. That provision would apply only to officers appointed under the Central Act. Those officers may act as "proper officer" under the Act subject to conditions as the State Government may notify in that regard, and not otherwise.

29. Thus, the statutory scheme appears to be - the legislature has first recognised the Commissioner as the "proper officer" for all fuctions under the Act. It also recognises the classes of officers who may be appointed officers under the Act. Further, officers of the UP VAT Act have been recognised as officers under the Act, on deemed basis. As to the officers of the Central Government, the State Government has been delegated the power (under section 4(1) of the Act) to appoint them officers under the Act. Second as to the functions to be performed by various officers under the Act, the Commissioner may sub-delegate absolutely, any functions to an officer of "State tax" [as defined under section 2(104) of the Act]. On the contrary, an officer of the Central Government may not be sub-delegated such powers generally. He may be sub-delegated that power and he may act as a "proper officer" subject to the conditions as the State Government may by notification (under section 6 of the Act), specify, in that regard.

30. Insofar as the present respondent-Deputy Commissioner is an officer under section 3 of the Act, section 6 of the Act has no application. Only with respect to officers appointed under the Central Act, the exercise of jurisdiction would be circumscribed by a notification that would have to be first issued by the State Government, before such jurisdiction may be created in their favour. Upon clear language of the provisions of the Act, the officers appointed under the Act would continue to be governed by the provisions of sections 3 and 4 read with section 2(91) of the Act and the

general orders issued by the "Commissioner" in that regard, issued with reference to the power exercised under section 5 of the Act.

31. Hence, the decision relied upon by learned counsel for the petitioner are found to be wholly distinguishable. In **Commissioner of Customs Vs. Syed Ali and Others (Supra)**, two conflicting orders of the Tribunal existed. In the first set, the Customs, Excise and Gold (Control) Appellate Tribunal had reasoned, the Commissioner of Customs (Preventive), Mumbai was not a "proper officer" under Section 2(34) of the Customs Act, 1962. In the second set, a contrary view had been expressed by the Central Excise and Service Tax Appellate Tribunal. Both sets of orders of the Tribunal came to be examined by the Supreme Court in that decision. Dealing with the same and after taking notice of the provision of section 28 of the Customs Act, 1962 (hereinafter referred to as the Customs Act); the definition of "proper officer" given under section 2(34) of the Customs Act and, after taking note of the fact that the Collector of Customs, (Preventive) had not been assigned any function under section 28 of the Act it was held, the adjudication order passed by the Collector Customs (Preventive) lacked inherent jurisdiction.

32. Relevant to our discussion, in paragraph nos. 20, 21 and 24 of the report, it was held as under:-

*"**20**. From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a Customs Officer who has been assigned the specific functions of assessment and reassessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under Section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose inasmuch as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions.*

***21**. Moreover, if the Revenue's contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act is accepted, it would lead to a situation of utter chaos and confusion, as much as all officers of Customs in a particular area be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be "proper officer". In our view, therefore, it is only the officers of Customs, who are assigned the function of assessment, which of course, would include reassessment, working under jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act.*

24. Nothing has been brought on record to show that the Collector of Customs (Preventive), who had issued the show cause notices was assigned the functions under Section 28 of the Act as "proper officer" either by the Board or the Collector/Commissioner of Customs. We are convinced that Notifications Nos. 250-Cus. and 251 Cus., both dated 27.8.1983, issued by the Central Government in exercise of the powers conferred by sub-section (1) of the Section 4 of the Act, appointing Collector of Customs (Preventive), etc. to be the Collector of Customs for Bombay, Thane and Kolaba Districts in the State of Maharashtra did not ipso facto confer jurisdiction on him to exercise power entrusted to the "proper officers' for the purpose of Section 28 of the Act."

(emphasis supplied)

33. Then in **Canon India (Supra),** a question arose whether the Additional Director General, Revenue Intelligence had the authority to issue a Show Cause Notice under section

28(4) of the Customs Act, 1962. After taking note of the provisions of section 28(4) read with section 2(34) and section 6 of the Customs Act, 1962, the Supreme Court reasoned, the Additional Director General, Revenue Intelligence was not a "proper officer". In reaching that conclusion, the Supreme Court observed in paragraph nos. 13, 15, 16, 18, 19, 20 and 21 of the report as under:-

"13. Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.

15. It is obvious that the re-assessment and recovery of duties i.e. contemplated by Section 28(4) is by the same authority and not by any superior authority such as Appellate or Revisional Authority. It is, therefore, clear to us that the Additional Director General of DRI was not "the" proper officer to exercise the power under Section 28(4) and the initiation of the recovery proceedings in the present case is without any jurisdiction and liable to be set aside.

16. At this stage, we must also examine whether the Additional Director General of the DRI who issued the recovery notice under Section 28(4) was even a proper officer. The Additional Director General can be considered to be a proper officer only if it is shown that he was a Customs officer under the Customs Act. In addition, that he was entrusted with the functions of the proper officer under Section 6 of the Customs Act. The Additional Director General of the DRI can be considered to be a Customs officer only if he is shown to have been appointed as Customs officer under the Customs Act.

18. The next step is to see whether an Additional Director General of the DRI who has been appointed as an officer of Customs, under the notification dated 7.3.2002, has been entrusted with the functions under Section 28 as a proper officer under the Customs Act. In support of the contention that he has been so entrusted with the functions of a proper officer under Section 28 of the Customs Act, Shri Sanjay Jain, learned Additional Solicitor General relied on a Notification No.40/2012 dated 2.5.2012 issued by the Central Board of Excise and Customs. The notification confers various functions referred to in Column (3) of the notification under the Customs Act on officers referred to in Column (2). The relevant part of the notification reads as follows:-

"[To be published in the Gazette of India, Extraordinary, Part II, Section 3 Sub-section (ii)] Government of India Ministry of Finance (Department of Revenue) Notification No.40/2012-Customs (N.T.) New Delhi, dated the 2nd May, 2012 S.O. (E). - In exercise of the powers conferred by sub-section (34) of Section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs, hereby assigns the officers and above the rank of officers mentioned in Column (2) of the Table below, the functions as the proper officers in relation to the various sections of the Customs Act, 1962, given in the corresponding entry in Column (3) of the said Table: -

Sl No.	Designation of the officers	Functions under Section of the Customs Act, 1962
1	2	3
1	Commissioner of Customs	(i) Section 33
2	Additional	(i) Sub-section (5) of

	Commissioner or Joint Commissioner of Customs	Section 46; and (ii) Section 149
3	Deputy Commissioner or Assistant Commissioner of Customs and Central Excise	(i) (ii).. (iii).. (iv).. (v).. (vi) Section28;

19. It appears that a Deputy Commissioner or Assistant Commissioner of Customs has been entrusted with the functions under Section 28, vide Sl. No.3 above. By reason of the fact that the functions are assigned to officers referred to in Column (3) and those officers above the rank of officers mentioned in Column (2), the Commissioner of Customs would be included as an officer entitled to perform the function under Section 28 of the Act conferred on a Deputy Commissioner or Assistant Commissioner but the notification appears to be ill-founded. The notification is purported to have been issued in exercise of powers under sub-Section (34) of Section 2 of the Customs Act. This section does not confer any powers on any authority to entrust any functions to officers. The sub-Section is part of the definitions clause of the Act, it merely defines a proper officer, it reads as follows:-

"2. Definitions - In this Act, unless the context otherwise requires, -

... (34) "proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the [Principal Commissioner of Customs or Commissioner of Customs]. "

20. Section 6 is the only Section which provides for entrustment of functions of Customs officer on other officers of the Central or the State Government or local authority, it reads as follows:-

"6. Entrustment of functions of Board and customs officers on certain other officers - The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this Act.

21. If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 04.12.1957 issued by the Ministry of Finance and Customs officers who, till 11.5.2002, were appointed by the Central Government. The notification which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2 (34) of the Customs Act. The notification is obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power.

(emphasis supplied)

34. Thus, at the surface it appears, the Supreme Court had principally reasoned, unless there existed a specific exercise of power made by the competent authority to assign the function of adjudication, no function jurisdiction could have been assigned/sub-delegated in favour of

the Commissioner of Customs (Preventive) or the Additional Director General, Directorate of Revenue Intelligence. At the same time, it cannot be accepted as the true reasoning of the aforesaid decisions. In fact, in those decisions issue had arisen whether the Commissioner of Customs (Preventive)/Additional Director General, Directorate of Revenue Intelligence were officers falling within the class of Officers of Customs defined under section 3 of the Customs Act and whether there was any notification issued under section 6 of the Customs Act assigning any function to those officers.

35. Section 3 of the Customs Act reads as under:

"3. Classes of officers of customs.- There shall be the following classes of officers of customs, namely:-

(a) Principal Chief Commissioners of Customs;

(b) Chief Commissioners of Customs;

(c) Principal Commissioners of Customs;

(d) Commissioner of Customs;

(e) Commissioners of Customs (Appeals);

(f) Joint Commissioners of Customs;

(g) Deputy Commissioners of Customs;

(h) Assistant Commissioners of Customs;

(i) such other class of officers of customs as may be appointed for the purposes of this Act."

36. Though any officer other than the person of the Customs could be appointed as a Custom Officer by virtue of section 4 of the Customs Act, such an officer could not hold any function jurisdiction in his favour unless a specific entrustment/sub-delegation were first made in his favour by issuance of a notification under section 6 of that Act. Therefore, the Commissioner of Customs (Preventive) and the Additional Director General, Directorate of Revenue Intelligence though became Customs Officers by virtue of Notification dated 02.05.2012 read with earlier Notification dated 07.03.2002 yet, in the absence of any further notification issued under section 6, (it was reasoned), they could not act as a "proper officer" to adjudicate a dispute under section 28 of the Customs Act, 1962.

37. Similarly, in the context of the Act, any officer of the Central Government who may become an officer under Act by virtue of his appointment thus made, under section 4(1) of the Act, would remain dependent on a further notification that may be issued under section 6 of the Act, regarding function assignment/sub-delegation made in his favour, by the State Government, before he may act as a "proper officer", under Act. However, that requirement and condition of law would not attach to an officer of the "State tax". As noted above, undisputedly, the respondent-Deputy Commissioner is an officer of the State Tax whose function assignment has been made in terms of section 2(91) read with sections 4(2) and 5(3) of the Act, by virtue of Office Order dated 01.07.2017 read with further Office Order dated 19.11.2018.

38. Thus, similar to the two methods of function assignment/delegation prescribed under the Customs Act, under the Act as well, there exist two different methods to create function assignment/delegation in favour of officers of "State tax" and officers of "Central tax" (i.e. officers appointed under Central Act). As noted above, function assignment/jurisdiction in favour of officers of the "State tax" may be created by the "Commissioner" by issuing an order/communication in exercise of his powers of sub-delegation vested under section 5(3) of the Act. However, function assignment/jurisdiction in favour of the officers of the Central Act, may be created and such officers may act as "proper officer" subject to conditions as may be notified by the State

Government which alone has the power to cause the sub-delegation in favour of those officers. Under section 5 of the Customs Act, the Board may authorise any officer of Customs to exercise the powers under that Act. Yet, any other officer of the State or the Central Government or a local authority may be entrusted any power, (under that enactment), either of the Board or any officer of the Customs, as may be notified by the Central Government and, not otherwise.

39. The Commissioner of Customs (Preventive), Mumbai [in the case of **Commissioner of Customs Vs. Syed Ali & others (Supra)]** and the Additional Director, Directorate of Revenue Intelligence [in the case of Canon India (Supra)] were not officers of Customs (under section 5 of the Customs Act), in the first place. Hence, though appointed (clearly with reference to section 4 of the Act, no function came to be entrusted to them under the Customs Act, in absence of any sub-delegation made in their favour by a further notification under section 6 of that Act. That analogy and reasoning would arise and apply (in the context of the Act), to officers of the "Central tax", only. It would not apply to functioning of officers of the "State tax" who may draw their function-jurisdiction from simple sub-delegation under an administrative order issued by the "Commissioner" with reference to his powers to sub-delegate granted under section 5 of the Act, without any gazette notification of such order.

40. Thus no defect exists in the exercise of power made by the Deputy Commissioner. The challenge raised in the present petition thus fails. Accordingly, the writ petition is ***dismissed***. No order as to costs.

41. It is left open to the petitioner to test the merits of the impugned order dated 07.08.2021 before the statutory forum of appeal, if that cause exists. Such appeal, if any, may be filed within a period of four weeks from today. If filed within time granted, the same may be heard and decided on its own merits without any objection to its limitation.

(2021)12ILR A428
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.10.2021

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ-B No. 35477 of 1997

Keshav & Anr. ...Petitioners
Versus
D.D.C. & Ors. ...Respondents

Counsel for the Petitioners:
Sri G.N. Verma, Sri H.M.B. Sinha, Sri Radha Kant Singh, Sri Rahul Mishra

Counsel for the Respondents:
S.C., Sri Ramesh Chandra, Sri Tawvab Ahmed Khan

A. Consolidation of Holding Act, 1953 – Section 48 - Explanation [3] – Allotment of chak – Revisional power of Deputy Director of Consolidation – Scope – Held, Explanation [3] gives the Deputy Director of Consolidation power to re-appreciate the evidence, both oral and documentary and to record its own findings of fact and of law, contrary to those recorded by any subordinate authority – Ram Dular's case and Gayadin's case of Apex Court followed. (Para 17)

B. Interpretation of law – Literal meaning – The words used in an enactment are to be given their literal meaning – It is not open for the courts to read in something which does not emerge from a bare reading of a provision after giving the words used therein, there literal meaning. (Para 16)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Karan Singh & ors. Vs Deputy Director of Consolidation, Aligarh & ors.; 2003 (1) AWC 630

2. Writ B No. 54395 of 2009; Ram Nivas & ors. Vs Deputy Director of Consolidation & ors. decided on 25.11.2016

3. Jagdamba Prasad Vs Kripa Shanker; 2014 (5) SCC 707

4. Ram Dular Vs Deputy Director of Consolidation, Jaunpur; 1994 supplementary (2) SCC 198

5. Gayadin Vs Hanuman Prasad & ors. 2001 Vol (1) SCC 501

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard learned counsel for the parties on the recall application.

2. The order dated 29.01.2020 is recalled and I have heard counsel for the parties on the merits of the writ petition and perused the record.

3. The writ petition arises out of proceedings for allotment of chaks and seeks a writ of certiorari for quashing the order dated 20.09.1997 passed by the Deputy Director of Consolidation whereby the chak of the petitioner has been disturbed.

4. The contention of Shri Rahul Mishra, counsel for the petitioners is that the Deputy Director of Consolidation has himself modified the chak of the petitioners at the revisional stage. He submits that in case there was an illegality in the order passed by the Settlement Officer Consolidation, the Deputy Director of Consolidation could only have remanded the matter back to the appellate authority for reconsideration. The Deputy Director of Consolidation was not competent to substitute his findings as the revisional court is a court of limited jurisdiction and does not have power akin to a court of appeal.

5. In support of his contention he has placed reliance upon the following two decisions.

Karan Singh and Others vs. Deputy Director of Consolidation, Aligarh and Others 2003 (1) AWC 630 wherein, in paragraph 7, it has been observed as follows:-

"7. ..... In case the Deputy Director of consolidation was of the opinion that the findings recorded were bad in law, he could set aside the same after reappraisal of the evidence and could remand the case for decision afresh. ....."

6. The Court further went on to hold that the order impugned before it suffered from a misreading of the evidence on record.

7. The other judgement relied upon is the judgment dated 25.11.2016 passed in **Writ B No. 54395 of 2009 Ram Nivas and Others vs. Deputy Director of Consolidation and Others**. Paragraph 23 of this judgment reads as follows:-

"23. In view of above exposition of law and considering the facts and circumstances of the case, in my view the order impugned in this writ petition passed by DDC cannot sustain being beyond the scope of Section 48 of Act, 1953. In the present case, revisional authority has neither examined regularity of the proceedings conducted by subordinate authority nor has examined correctness and propriety of such order and has passed its order, which has the effect of upsetting the order passed by lower authority without pointing out any illegality or inaccuracy or incorrectness therein."

8. In the case at hand, the order impugned, is dated 20.09.1997. Section 48 of the UP Consolidation of Holdings Act has undergone various amendments. The last amendment was by means of UP Act No. 3 of 2002, with effect from 10.11.1980. By this amendment Explanation [3] has been added to the said section. The said Explanation [3] reads as follows:-

"Explanation [3].-The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any findings, whether of fact or law, recorded by any subordinate authority, and also includes the power to reappreciate any oral or documentary evidence."

9. From a bare reading of Explanation [3], incorporated in the year 2002 with effect from 10.11.1980, it is clear that it makes the revisional court the last court of fact.

10. The judgment in Karan Singh (supra) relied upon by counsel for the petitioners has not noticed or considered Explanation [3] to Section 48.

11. The judgment of the case of Ram Nivas has noticed the amendment in Section 48 of the UP Consolidation of Holdings Act but has gone on to hold that the power of the revisional court is limited. This view has been taken relying upon the decision of the Apex Court in **Jagdamba Prasad vs. Kripa Shanker 2014 (5) SCC 707** wherein it appears that the revisional authority had admitted new facts either in the form of document or otherwise to come to a conclusion i.e. it had permitted and relied upon additional evidence to arrive at its conclusion. Such is not the position in the case at hand. This judgement has also placed reliance upon the decision of the Karan Singh, the first judgement cited by the counsel for the petitioners. In this connection it has been observed as follows. "In ***Karan Singh vs. Deputy Director of Consolidation and Others 2003 (94)RD 382***, *this Court, however, said even after addition of Explanation-[3], DDC cannot substitute its own finding in place of subordinate authorities."*

12. In view of the above observation, I have carefully scrutinized the judgement in the case of Karan Singh and, I do not find any reference therein to Explanation [3] added to Section 48 of the UP Consolidation of Holdings Act by UP Act No. 3 of 2002. It would be relevant to reiterate that this amendment has not been taken note of, by the Court, in the judgement in Karan Singh (supra), even in passing. The observation made in Ram Nivas is, therefore, unfounded.

13. The revisional power under Section 48 of the UP Consolidation of Holdings Act as it existed prior to the amendment made therein vide UP Act No. 3 of 2002 with effect from 10.11.1980 was considered by the Apex Court in the case of Ram Dular vs. Deputy Director of Consolidation, Jaunpur 1994 supplementary (2) SCC 198 and it was observed as follows:-

".....in considering the correctness, legality or propriety of the order or correctness of the proceedings or regularity under Section 48 of the Consolidation Act, the Deputy Director of Consolidation could not assume the jurisdiction of the original authority as a fact-finding authority by appreciating for himself those facts de novo; he had to consider whether the legally admissible evidence had been considered by the authorities in recording a finding of fact or law or the conclusion reached by hem was based on evidence or any patent illegality or impropriety had been committed or there was any procedural irregularity, which would go to the root of the matter....."

14. Relying upon the aforesaid judgement as also other judgements, the Apex Court in **Gayadin vs. Hanuman Prasad and Others 2001 Vol (1) SCC 501** has held in paragraph 14 as follows:-

"14. Thus, it is clear that notwithstanding of the fact that Section 48 has been couched in wide terms, it only permits interference where the findings of the subordinate authority are perverse in the sense that they are not supported by the evidence brought on record or they are

against the law or where they suffer from the vice of procedural irregularity."

15. From a perusal of the objects and reasons for enactment and consequential amendment of Section 48 of the Consolidation of Holdings Act by UP Act No 3 of 2002, it emerges that Explanation [3] has been added thereto, to clarify the position of law, in view of the law laid down in Gayadin (supra).

16. Thus Explanation [3] which has been added by UP Act No. 3 of 2002 with effect from 10.11.1980 is absolutely clear and does not call for any interpretation. It is settled rule of statutory interpretation that the words used in an enactment are to be given their literal meaning. It is not open for the courts to read in something which does not emerge from a bare reading of a provision after giving the words used therein, there literal meaning.

17. In my considered opinion, Explanation [3] gives the Deputy Director of Consolidation power to reappreciate the evidence, both oral and documentary and to record its own findings of fact and of law, contrary to those recorded by any subordinate authority. Any interpretation to the contrary would necessarily entail reading something into the provision which is not contained therein. Moreover, it would be travesty of justice if the Deputy Director of consolidation is held competent to appreciate the oral and documentary evidence and upset the findings recorded by the subordinate authority and yet, is required to remand the matter back for fresh consideration. Such interpretation in my considered opinion, could not have been the object behind including the amendment in the Act and thereby prolonging the litigation between the parties. It needs to be borne in mind that the litigation generated by the U.P. Consolidation of Holdings Act is largely, forced litigation. If a court is competent to reappreciate the oral and documentary evidence and interfere with the findings recorded by the subordinate courts, it necessarily implies that such court also has the power to substitute its own finding after such reappreciation of the oral and documentary evidence. There exists nothing in the Act or the amendment itself to support any view to the contrary.

18. For the reasons given above, the petitioners are not entitled to any benefit under the judgements cited by them.

19. From the submissions made on the merits as also perusal of the grounds taken in the writ petition, it transpires that the petitioners seek to convey that by the order passed by the Deputy Director of Consolidation, they were deprived of their original holdings completely. This averment and import of the grounds in the writ petition is contrary to the finding returned by the Deputy Director of Consolidation himself. In the impugned order the Deputy Director of Consolidation has categorically stated that on account of the modifications being made by him in the chaks of the parties by the impugned orders, the parties will be shifted to their original holdings. This finding, returned by the Deputy Director of Consolidation, could have been challenged only by documentary evidence, especially the CH Form 23 of the petitioners. This has not been done. It is not open for the petitioners to claim that a finding returned in the impugned order is either illegal or perverse without bringing adequate documentary material on record, in support of such a contention

20. Under the circumstances, therefore the order impugned even on its merits, is not liable to be interfered with.

21. In view of the foregoing discussion, this writ petition fails and is dismissed.

(2021)12ILR A432
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.10.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ-C No. 7905 of 2020

Sandeep Nagar ...Petitioner
Versus
Presiding Officer, Labour Court, U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Man Mohan Singh

Counsel for the Respondents:
C.S.C.

A. Labour law – Working Journalists & ors. Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 – Petitioner claimed himself to be appointed as 'Working journalist' and entitled to get the wages & ors. benefits recommended by the Majithia Wage Board Award – Appointment letter disclosed that his principal avocation is teaching and not journalism – Signature to the appointment letter of the petitioner was admitted – Effect – Held, the finding of the labour court that that petitioner does not fall within the ambit of 'working journalist' as defined in the Act of 1955 cannot be faulted. (Para 13, 17 and 20)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Ballubhai Javerbhai Panchal Vs Sandesh Ltd. & ors.; 1997 SCC OnLine Bom 598

(Delivered by Hon'ble Ajay Bhanot, J.)

1. By the impugned award dated 24.01.2020, reference made to the labour court has been decided against the petitioner. In substance, the labour court has found that the petitioner is not a "working journalist" and does not come within the ambit of the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 (hereinafter referred to as the 'Act of 1955').

2. Shri Man Mohan Singh, learned counsel for the petitioner submits that the petitioner is a journalist within the meaning of the Act of 1955. The labour court had earlier decided the issue in favour of the petitioner by order dated 02.01.2019 and hence could not reverse the aforesaid findings in favour of the petitioner. The findings of the labour court are perverse.

3. Per contra, Shri Mukund Tripathi, learned Standing Counsel submits that the order dated 02.01.2019 passed by the labour court was without receiving full evidence on behalf of the parties. The final order was passed upon due consideration of the evidence introduced by both the parties and the judgement cannot be faulted. This Court in exercise of writ jurisdiction cannot adjudicate any disputed findings of fact, particularly, when no perversity in the award has been established.

4. Heard learned counsel for the parties.

5. The following reference was made to the labour court:

A. Whether the workman is entitled to the benefits of Majithia Wage Board Award? if yes, the nature of relief which can be granted to the workman Sandeep Nagar?

6. The said reference was made under Section 17(2) of the Act of 1955 read with Section 4K of the U.P. Industrial Disputes Act, 1947. Benefits of the Majithia Wage Board Award could be granted to the petitioner only if

he was a working journalist as contemplated in the Act of 1955.

7. Upon consideration of the pleadings, oral and documentary evidences in the record as well as the submissions on behalf of the parties, the labour court made these findings. The principal avocation of the petitioner is teaching and not journalism. The petitioner was a part time journalist. The petitioner does not come within the embrass of definition "working journalist" as contemplated in the Act of 1955.

8. Some of the pleadings and evidences which led the labour court to make the aforesaid findings shall now be discussed.

9. The petitioner claimed in his application before the labour court that he was engaged as a reporter w.e.f. 07.04.2011 with the respondent establishment. He claimed entitlement to wages and other benefits recommended by the Majithia Wage Board Award. The respondent employer in the written pleadings submitted before the labour court strenuously contested entitlements claimed by the petitioner and asserted that the principal avocation of the petitioner was teaching". He used to send stories and news from time to time as a hobby. Only a person whose principal avocation is a journalism is covered under the definition of "working journalist" defined under Section 2f of the Act of 1955.

10. The petitioner deposed before the labour court that he was appointed on 07.04.2011. Prior to his appointment the petitioner had submitted an application for appointment along with his educational testimonials. Upon an interview conducted by the employers, the petitioner was engaged as a full time reporter. An appointment letter was issued to him two and a half months after his appointment. He submitted a number of stories and reports and was paid lump sum of Rs. 5,000/- per month.

11. On behalf of the employers, one Pankaj Kumar Srivastava who was working as Regional H.R. Head deposed as E.W.-1. E.W.-1 in his testimony before the labour court stated that Sandeep Nagar (workman) had made an application to the respondent employer/establishment stating that he wanted to engage in journalism as a hobby and that his principal avocation was teaching. On the foot of the aforesaid application the petitioner was appointed in the respondent establishment.

12. The petitioner received appointment letter on 16.06.2011. The appointment letter dated 16.06.2011 was introduced by the employer as a documentary evidence and was marked as Exh.1. The said document and its contents were proved by EW-1. The recitals in the letter dated 16.06.2021 were reiterated by EW-1 before the labour court. The petitioner admitted his signatures to the aforesaid documents.

13. Exh. E-1 is a critical piece of evidence and would require slightly detailed consideration. The letter of appointment dated 16.06.2011 references the application filed by the petitioner for appointment wherein he had disclosed that his principal avocation is teaching and not journalism and that he was contributing news, stories and report for publication in our Hindi daily, Hindustan, Meerut. On the foot of the said credentials given by the petitioner in the letter dated 07.04.2011, the terms and conditions of his appointment are stated.

14. It would be apposite to extract the relevant part of the appointment letter dated 16.06.2021:

"Apropos to your application dated April 7, 2011, that you intend to contribute news, reports and stories for publication in our Hindi daily, Hindustan, Meerut, from xxxx and that your principal avocation is Teaching and not

journalism, we wish to inform you that your application has been accepted on the following terms and conditions:

I. You will be sending news reports/stories about sports, political, culture, social matters, education, crime etc. which you consider of public interest and fit to be published in our paper.

II. You will be paid a fixed amount of Rs. 5,000/- (Rupees Five thousand only) per month for sending news reports/stories.

III. You will not be getting any other expenses spent on collecting news reports/stories nor will you be reimbursed secretarial expenses on this account except to the extent, which may be specified agreed to by the Company. You will also not be supplied any stationary.

IV. You will inform the Company at least one month in advance in case you change your principal avocation."

15. The labour court which had the benefit of observing the demeanor of the witnesses disbelieved the defence of the petitioner that he had repudiated the appointment letter.

16. To the contrary, the labour court which also observed E.W. -1 Pankaj Kumar Srivastava during his deposition and found his testimony to be credible. A perusal of the testimony of Pankaj Kumar Srivstava as appended to the writ petition discloses that the credibility of the said witness could not be shaken after cross examination.

17. The petitioner had also admitted his signatures to the aforesaid appointment letter. Heavy burden lay upon the petitioner to dispute the correctness of the contents of the appointment letter dated 16.06.2011 which, as seen earlier, he failed to discharge. Denial of the letter dated 16.06.2011 of the petitioner was weak and self serving and was rightly distrusted by the labour court. Similarly there is no error in the labour court award upholding the credit of EW-1 as a witness and believing his testimony.

18. The arrative shall now be fortified by statutory provisions and good authority in point.

Section 2f of the Act, 1955 is reproduced below:

"working journalist" means a person whose principal avocation is that of a journalist and 2[who is employed as such, either whole-time or part-time, in, or in relation to, one or more newspaper establishments], and includes an editor, a leader-writer, news editor, sub-editor, feature-writer, copy-tester, reporter, correspondent, cartoonist, news-photographer and proof-reader, but does not include any such person who--

(i) is employed mainly in a managerial or administrative capacity, or

(ii) being employed in a supervisory capacity, performs, either by the nature of the duties attached to his office or by reason of the powers vested in him, functions mainly of a managerial nature."

19. The Bombay High Court in ***Ballubhai Javerbhai Panchal Vs. Sandesh Limited and others***, reported at 1997 SCC OnLine Bom 598, while considering the provisions of the Act of 1955 as well as the Industrial Disputes Act, 1947, held that to come within the ambit of "working journalist" as defined in the Act of 1955, the employee has to establish that his principal avocation is journalism.

20. It was thus duly proved by legal evidence before the labour court that the petitioner was not a full time journalist and that his principal avocation was teaching. Further the respondent no.2 was not his sole employer. With these facts conclusively established in the above said manner, the finding of the labour court that that petitioner does not fall within the ambit of "working journalist" as defined in the Act of 1955 cannot be faulted.

21. I also see merit in the submission of the learned Standing Counsel that the order dated 02.01.2019 only refused to non suit the petitioner in absence of evidence and allowing the parties to lead evidence and subsequent to 02.01.2019.

22. The issue whether the petitioner was a working journalist within the meaning of Section 2f of the Act of 1955, could be decided only after receiving complete evidence of parties. The order dated 02.01.2019 does not adjudicate the said issue in accordance with law as full evidence of parties had not been adduced till then. To treat the order dated 02.01.2019 as final, would preempt an adjudication on merits as per law and occasion a miscarriage of justice.

23. In wake of the preceding narrative, this Court finds no infirmity in the award passed by the learned labour court. 24. The writ petition is liable to be dismissed and is dismissed.

(2021)12ILR A435
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 9518 of 2001

Radha Kishan Yadav & Ors. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Madhav Jain

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Article 226 & 227 – Writ – Maintainability – Certiorari – Scope – Eviction order – Nature – Proper remedy against it – Held, the expression 'inferior court' is not referable to judicial courts and accordingly judicial orders of civil courts are not amenable to a writ of certiorari under Article 226 and a writ of mandamus does not lie against a private person not discharging any public duty – Judicial orders of civil court would not be amenable to writ jurisdiction under Article 226 and that challenge thereagainst can be raised under Article 227 – High Court permitted the petitioner to move appropriate amendment application. (Para 43, 44 and 47)

B. UP Public Premises (Eviction of Unauthorised Occupants) Act, 1972 – Sections 4 & 9 – Eviction order – Exercise of appellate power by the District Judge, whether it acted as the Persona designate or as the Civil Court –Held, appellate Officer, while exercising powers under Section 9 of the UP PP Act does not act as a persona designata but in his capacity as a pre-existing judicial authority in the district — a District Judge – The designation though having been made as an Appellate Officer, the District Judge, for the purposes of deciding of an appeal under Section 9, therefore is to be held to exercise powers of the civil court. (Para 29 and 35)

Petition kept pending. (E-1)

Cases relied on :-

1. Radhey Shyam Vs Chhabi Nath; (2015) 5 SCC 423

2. Thakur Das Vs St. of M.P.; (1978) 1 SCC 27

3. Mukri Gopalan Vs Cheppilat Puthanpurayil Aboobacker; (1995) 5 SCC 5

4. Central Talkies Ltd. Vs Dwarka Prasad; AIR 1961 SC 606

5. Parthasaradhi Naidu Vs Koteswara Rao; AIR 1924 Mad 561 (FB)

6. Brajnandan Sinha Vs Jyoti Narain; AIR 1956 SC 66

7. Virindar Kumar Satyawadi Vs St. of Pun. AIR 1956 SC 153

8. Asnew Drums Pvt. Ltd. Vs Maharashtra St. Finance Corporation; (1971) 3 SCC 602

9. Maharashtra St. Financial Corporation Vs Jaycee Drugs & Pharmaceuticals (P) Ltd.; (1991) 2 SCC 637

10. National Sewing Thread Co. Ltd. Vs James Chadwick & Bros. Ltd.; AIR 1953 SC 357

11. National Telephone Co. Ltd. Vs Postmaster-General; 1913 AC 546

12. Adaikappa Chettiar Vs R. Chandrasekhara Thevar; AIR 1948 PC 12

13. Secretary of St. for India Vs Chellikani Rama Rao; AIR 1916 PC 21

14. Ram Chandra Aggarwal & anr. Vs St. of U.P. & anr.; AIR 1966 SC 1888

15. Chatur Mohan Vs Ram Behari Dixit; AIR 1964 All 562

16.L.I.C. Vs Nandini J.Shah & ors.; (2018) 15 SCC 356

17. Radhey Shyam & anr. Vs Chhabi Nath & ors.; (2009) 5 SCC 616

18. Sohan Lal Vs U.O.I.; AIR 1957 SC 529

19. Mohd. Hanif Vs St. of Assam; (1969) 2 SCC 782

20. Hindustan Steel Ltd. Vs Kalyani Banerjee; (1973) 1 SCC 273

21. Naresh Shridhar Mirajkar Vs St. of Mah.; AIR 1967 SC 1

22. Surya Dev Rai Vs Ram Chander Rai; (2003) 6 SCC 675

23. Kemp Vs Balne; (1844) 1 Dow & L 885

24. Rex Vs Chancellor of St. Edmundsbury and Ipswich Diocese, Ex Parte White; (1948) 1 KB 195, pp. 205-06

25. Writ - C No. 16753 of 2010; M/S. Magma Leasing Ltd. Vs Badri Vishal & ors. decided on 18.11.2021

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

1. Heard Sri Madhav Jain, learned counsel for the petitioner and Sri Amit Manohar, learned Additional Chief Standing Counsel appearing for the State respondents.

2. The present petition under Article 226 of the Constitution of India has been filed seeking a writ of certiorari for quashing the orders dated 21.12.2000 and 30.6.1995 passed in proceedings under the Uttar Pradesh Public Premises (Eviction of Unauthorised Occupants) Act, 19721.

3. Pleadings in the petition indicate that proceedings under Section 4 of the UP PP Act were initiated against the petitioner and an order dated 30.6.1995 was passed by the prescribed authority for eviction and damages. Aggrieved against the aforesaid order, an appeal under Section 9 of the Act was filed before the District Judge, Firozabad which also came to be decided in terms of an order dated 21.12.2000 confirming the order of eviction whereas the order with regard to damages was set aside. It was at this stage, that the present writ petition was filed.

4. The issue which arises for determination is, therefore, as to whether an order passed in an appeal under the UP PP Act can be held to be a judicial order passed by a civil court and as to whether the same would be amenable to writ jurisdiction under Article 226.

5. Learned Additional Chief Standing Counsel has raised an objection with regard to the maintainability of the petition under Article 226 by pointing out that the order passed in appeal by the appellate officer under the UP PP Act is a judicial order passed by civil court and in view of the authoritative pronouncement made in the case of **Radhey Shyam vs. Chhabi Nath**2, the same would not be amenable to the writ jurisdiction under Article 226.

6. In order to appreciate the aforesaid contention, the relevant provisions of the UP PP Act would be required to be adverted to.

7. The UP Public Premises (Eviction of Unauthorised Occupants) Act, 1972 [Act no. 22 of 1972 dated 28 April, 1972] is an Act to

provide for the eviction of unauthorised occupants from public premises and for certain incidental matters. The provisions of the aforesaid Act which would be relevant for the purposes of the controversy involved in the present case are extracted below:

"2.(b) "premises" means any land (including any forest land or trees standing thereon or covered by water or a road maintained by the State Government or land appurtenant to such road) or any building or part of a building and includes--

(i) the garden, grounds, and out-houses, if any, appertaining to such building or part of a building, and

(ii) any fittings or fixtures affixed to or any furniture supplied with such building or part of a building for the more beneficial enjoyment thereof.

But does not include land which for the time being is held by a tenure-holder under any law relating to land tenure.

(d) "Prescribed Authority" means an officer appointed as Prescribed Authority by the State Government under Section 3.

(e) "public premises" means any premises belonging to or taken on lease or requisitioned by or on behalf of the State Government, and includes any premises belonging to or taken on lease by or on behalf of--

(i) any company as defined in Section 3 of the Companies Act, 1956, in which not less than fifty-one per cent of the paid-up share capital held by the State Government; or

(ii) any local authority; or

(iii) any Corporation (not being a company as defied in Section 3 of the Companies Act, 1956 or a local authority) owned or controlled by the State Government; or

(iv) any society registered under the Societies Registration Act, 1860, the governing body whereof consists, under the rules or regulations of the society, wholly of public officers or nominees of the State Government or both;

and also includes--

(i) Nazul land or any other premises entrusted to the management of a local authority (including any building built with Government funds on lands belonging to the State Government after the entrustment of the land to that local authority, not being land vested in or entrusted to the management of a Gaon Sabha or any other local authority under any law relating to land tenures);

(ii) any premises acquired under the Land Acquisition Act, 1894 with the consent of the State Government for a company (as defined in that Act) and held by that company under an agreement executed under Section 41 of that Act providing for re-entry by the State Government in certain conditions.

4. Issue of notice to show-cause against order of eviction-- (1) If the prescribed authority, either of its own motion or on an application or report received on behalf of the State Government or the corporate authority, is of opinion that any persons are in unauthorised occupation of any public premises and that they should be evicted, the prescribed authority shall issue in the manner hereinafter provided a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made.

(2) The notice shall--

(a) specify the grounds on which the order of eviction is proposed to be made; and

(b) require all persons concerned that is to say, all persons who are, or may be, in occupation of, or claim interest in the public premises to show cause, if any, against the proposed order on or before such date as is specified in the notice being a date not earlier than ten days from the date of issue thereof.

(3) The prescribed authority shall cause the notice to be served either personally

on all those persons concerned or by having it affixed on the outer door or some other conspicuous part of the public premises and in any other manner, provided in the Code of Civil Procedure, 1908.

(4) Where the prescribed authority knows or has reasons to believe that any persons are in occupation of the public premises, then, without prejudice to the provisions of sub-section (3), he shall cause a copy of the notice to be served on every such person by registered post or by delivering or tendering it to that person or in such other manner as may be prescribed.

5. Eviction of unauthorized occupants--(1) If, after considering the cause, if any, shown by any person in pursuance of a notice under Section 4 and any evidence he may produce in support of the same and after giving him a reasonable opportunity of being heard, the prescribed authority is satisfied that the public premises are in unauthorised occupation, the prescribed authority may make an order of eviction, for reason to be recorded therein, directing that the public premises shall be vacated, on such date as may be specified in the order, by all person who may be in occupation thereof, or any part thereof, and cause a copy of the order to be affixed to the outer door or some other conspicuous part of the public premises.

(2) If any person refuses or fails to comply with the order of eviction within thirty days of the date for its publication under sub-section (1), the prescribed authority or any other officer duly authorised by the prescribed authority in this behalf may evict that person from, and take possession of, the public premises and may, for that purpose, use such force, as may be necessary.

6. Disposal of property left on public premises by unauthorised occupants--(1) Where any person have been evicted from any public premises under Section 5, the prescribed authority may, after giving not less than fourteen days' notice to the persons from whom possession of the public premises has been taken and after publishing the notice in at least one newspaper having circulation in the locality, remove or cause to be removed or dispose of by public auction any property remaining on such premises, including any material of a demolished building or ungathered crop or fruits of trees.

(2) Where any property is sold under sub-section (1), the sale proceeds thereof shall, after deducting the expenses of the sale and the amount, if any, due to the State Government or the corporate authority, on account of arrears of rent or damages or costs, be paid to person or persons as may appear to the prescribed authority to be entitled to the same:

Provided that where the prescribed authority is unable to decide as to the person or persons to whom the balance of the amount is payable or as to the apportionment of the same, it may refer such dispute to the Civil Court of competent jurisdiction and the decision of the Court thereon shall be final.

7. Power to require payment of rent or damages in respect of public premises--(1)Where any person is in arrears of rent for four months payable in respect of any public premises, the prescribed authority may, by order, require that person to pay the same within such time and in such instalments as may be specified in the order, and on the failure of such person to pay the same or any instalment thereof, he shall be deemed to be in unauthorised occupation of the public premises.

(2) Where any person is, or at any time being, in unauthorised occupation of any public premises, the prescribed authority may, having regard to such principles of assessment of damages as may be prescribed, assess the amount of damages on account of the use and occupation of such premises and may by order,

require that person to pay the amount within such time and in such instalments as may be specified in the order.

(3) No order under sub-section (1) or sub-section (2) shall be made against any person until after the issue of a notice in writing to the person calling upon him to show-cause within such time as may be specified in the notice, why such order should not be made, and until his objections, if any, and any evidence he may produce in support of the same have been considered by the prescribed authority.

8. Powers of prescribed authority--The prescribed authority and the appellate officer shall, for the purpose of holding any inquiry or hearing any appeal under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, when trying suit in respect of the following matters, namely--

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) any other matter which may be prescribed.

9. Appeals--(1) An appeal shall lie from every order of the prescribed authority made in respect of any public premises under Section 5 or Section 7 to an appellate officer who shall be the District Judge of the District in which the public premises are situate or such other Judicial Officer not below the rank of Civil Judge as the District Judge may designate in this behalf.

(2) An appeal under sub-section (1) shall be preferred--

(a) in the case of an appeal from an order under Section 2, within fifteen days from the date of the publication of the order under sub-section (1) of that section; and

(b) in the case of an appeal from an order under Section 7, within fifteen days from the date on which the order is communicated to the appellant:

Provided that that the appellate officer may entertain the appeal after the expiry of the said period of fifteen days, if he is satisfied that appellant was prevented by sufficient cause from filing the appeal in time.

(3) Where an appeal is preferred from an order of the prescribed authority, the appellate officer may stay the enforcement of that order for such period and on such conditions as he deems fit.

(4) Every appeal under this section shall be disposed of by the appellate officer as expeditiously as possible.

(5) The cost of any appeal under this section shall be in the discretion of the appellate officer.

(6) The District Judge may withdraw any appeal pending with any judicial officer referred to in sub-section (1) and either dispose of the same or transfer it to any other judicial officer referred to in that sub-section.

10. Finality of orders--Save as otherwise expressly provided in this Act, every order made by a prescribed authority or appellate officer under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

15. Bar of jurisdiction--No court shall have jurisdiction to entertain any suit or proceeding in respect of the eviction of any person who is in unauthorised occupation of any public premises or the recovery of the arrears of rent payable under sub-section (1) of Section 7 or the damages payable under sub-section (2) of that Section or the costs awarded to the State Government or the corporate authority under sub-section (5) of Section 9 or any portion of such rent, damages or costs."

8. It would also be relevant to take note of certain provisions under the Uttar Pradesh Public Premises (Eviction of Unauthorised Occupants) Rules, 19733. Rules 9, 10, 11, and

12 of the aforesaid Rules, 1973 are being reproduced below:

"**9. Procedure of appeals: Sections 9 and 18 (2) (f)--(**1) An appeal under Section 9 may be preferred by any person aggrieved by an order under Section 5 or Section 7.

(2) The appeal shall be preferred in the form of a memorandum signed by the appellant or his representative and be presented either in person or through such representative to the District Judge or to the munsarim of his court.

(3) Every such memorandum shall be accompanied by a copy of the order appealed against and shall set forth concisely and under district heads the grounds of objection and such grounds shall be numbered consecutively.

(4) On receipt of the appeal and after calling for and perusing the record of the proceedings before the prescribed authority, the appellate officer shall fix a date for the hearing of the appeal and shall give notice thereof to the prescribed authority against whose orders the appeal is preferred, as well as to the appellant.

10. Power under the Code of Civil Procedure 1908: Section 8 (c)--The prescribed authority or the appellate officer shall, for the purpose of holding an inquiry or hearing any appeal under the Act, shall have the same powers as are vested in the civil court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters, namely--

(a) the power to dismiss an application or appeal for default and to restore it for sufficient cause:

(b) the power to proceed ex parte and set aside, for sufficient cause an order passed ex parte;

(c) the power to order attachment before judgement;

(d) the power referrred to in Section 151 of the Code of Civil Procedure, 1908, to make any order for the ends of justice or to prevent the abuse of process of the authority concerned; and

(e) the power to accept affidavits in proceedings pending before him and to issue commissions in suitable cases.

11. Application for setting aside ex-parte orders and for restoration Section 18--The prescribed authority or the appellate officer, as the case may be, may for sufficient cause--

(a) set said an ex parte order made in proceedings under Section 5 or Section 7;

(b) restore an appeal arising out of the proceeding referred to in clause (a) where such appeal has been dismissed for default of appearance of the appellant or his counsel.

12. Limitation for application under Rule 10: Section 18--(1) An application under Rule 10 to set aside an order deciding an appeal or order or ex parte shall be made within thirty days from the date of such proceeding where the notice of such appeal or proceedings was not duly served, when the applicant or appellant, as the case may be, had knowledge of that order.

(2) An application under Rule 10 to restore and appeal or proceeding dismissed for default shall be made within thirty days from the date of such dismissal."

9. Section 8 of the UP PP Act which relates to powers of the prescribed authority provides that for the purpose of holding any enquiry or hearing in appeal under the Act, the prescribed authority and the appellate officer shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of certain specified matters.

10. Section 9 of the Act which relates to appeals mandates that an appeal shall lie from every order of the prescribed authority made in

respect of any public premises under Section 5 and 7 to an appellate officer who shall be the district judge of a district in which the public premises are situate or such other judicial officer not below the rank of a civil judge as the district judge may designate in this behalf. Sub-section (2) of Section 9 prescribes a time period of 15 days for filing the appeal and the proviso to the sub-section empowers the appellate officer to entertain the appeal after the expiry of the aforesaid period. In terms of sub-section (3), the appellate officer is empowered to grant stay of the enforcement of the order, subject to conditions as he may deem fit.

11. Section 10 provides for finality of orders and in terms thereof, every order made by a prescribed authority or appellate officer under the UP PP Act save as otherwise expressly provided for, shall be final and shall not be called in question in any original suit, application or execution proceeding and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power provided under the Act.

12. Section 15 creates a bar on jurisdiction and it provides that no court shall have jurisdiction to entertain any suit or proceedings in respect of eviction of any person who is in unauthorised occupation of any public premises or the recovery of arrears of rent or damages or costs awarded payable under the relevant provisions of the Act.

13. In terms of Rule 10 of the Rules 1973, the prescribed authority or the appellate officer shall for the purpose of holding an enquiry or hearing any appeal, are to have same powers as are vested in the civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of matters specified therein.

14. Having regard to the scheme of the Act, it would be necessary to determine as to whether the District Judge/Appellate Officer exercising powers under Section 9 acts as a persona designata or as a civil court. In this regard, it would be relevant to bear in mind that where the authority has been created by a statute and is identified by an official designation, the provisions of the statute would have to be looked into to determine whether the legislative intent was to identify him as a persona designata with his official designation being a mere description.

15. The question as to whether the judicial authority constituted by the State Government under Section 6-C of the Essential Commodities Act, 1955, to hear appeals against orders of confiscation that may be passed by the licensing authority under Section 6-A, is not an inferior criminal court subordinate to the High Court and amenable to revisional jurisdiction under Section 435 read with Section 439 of the Code of Criminal Procedure, came up for consideration in the decision in **Thakur Das Vs. State of M.P**.4 While examining the question the court was required to consider whether the judicial authority appointed under Section 6-C of the said Act would be a persona designata, despite the fact that the said authority happens to be the Sessions Judge. It was noticed that while conferring power on the State government to appoint the appellate forum, the Parliament clearly manifested its intention as to who should be such Appellate Authority and by using expression "judicial authority" it was clearly indicated that the appellate authority must be one such pre-existing authority who was exercising judicial authority of the State and accordingly it was held that since the Sessions Judge is a Judge presiding over the Sessions Court and that is the appointed appellate authority, the conclusion is inescapable that he was not *persona designata*. It was observed as follows :-

"7. If the Sessions Judge presiding over the Sessions Court is the judicial authority, the question is: would it be an inferior criminal court subordinate to the High Court for the

purposes of Sections 435 and 439 of the Criminal Procedure Code? At the one end of the spectrum the submission is that the judicial authority appointed under Section 6-C would be persona designata and that if by a fortuitous circumstance the appointed judicial authority happens to be the Sessions Judge, while entertaining and hearing an appeal under Section 6-C it would not be an inferior criminal court subordinate to the High Court and, therefore, no revision application can be entertained against his order by the High Court. While conferring power on the State Government to appoint appellate forum, the Parliament clearly manifested its intention as to who should be such Appellate Authority. The expression "judicial" qualifying the "authority" clearly indicates that that authority alone can be appointed to entertain and hear appeals under Section 6-C on which was conferred the judicial power of the State. The expression "judicial power of the State" has to be understood in contradistinction to executive power. The framers of the Constitution clearly envisaged courts to be the repository of the judicial power of the State. The Appellate Authority under Section 6-C must be a judicial authority. By using the expression "judicial authority" it was cleanly indicated that the Appellate Authority must be one such pre-existing authority which was exercising judicial power of the State. If any other authority as persona designata was to be constituted there was no purpose in qualifying the word "authority" by the specific adjective "judicial". A judicial authority exercising judicial power of the State is an authority having its own hierarchy of superior and inferior court, the law of procedure according to which it would dispose of matters coming before it depending upon the nature of jurisdiction exercised by it acting in judicial manner. In using the compact expression "judicial authority" the legislative intention is clearly manifested that from amongst several pre-existing authorities exercising judicial powers of the State and discharging judicial functions, one such may be appointed as would be competent to discharge the appellate functions as envisaged by Section 6-C. There is one in-built suggestion indicating who could be appointed. In the concept of appeal inheres hierarchy and the Appellate Authority broadly speaking would be higher than the authority against whose order the appeal can be entertained. Here the Appellate Authority would entertain appeal against the order of Collector, the highest revenue officer in a district. Sessions Judge is the highest judicial officer in the district and this situation would provide material for determining Appellate Authority. In this connection the legislative history may throw some light on what the legislature intended by using the expression "judicial authority". The Defence of India Rules, 1962, conferred power on certain authorities to seize essential commodities under certain circumstances. Against the seizure an appeal was provided to the State Government whose order was made final. By the Amending Act 25 of 1966 Sections 6-A to 6-D were introduced in the Act. This introduced a basic change in one respect, namely, that an order of confiscation being penal in character, the person on whom penalty is imposed is given an opportunity of approaching a judicial authority. Earlier appeal from executive officer would lie to another executive forum. The change is appeal to judicial authority. Therefore, the expression clearly envisages a pre-existing judicial authority has to be appointed Appellate Authority under Section 6-C. When the provision contained in Section 6-C is examined in the background of another provision made in the order itself it would become further distinctly clear that pre-existing judicial authority was to be designated as Appellate Authority under Section 6-C. A seizure of essential commodity on the allegation that the relevant licensing order is violated, would incur three penalties: (1) cancellation of licence; (2) forfeiture of security deposit; and (3)

confiscation of seized essential commodity, apart from any prosecution that may be launched under Section 7. In respect of the first two penalties an appeal lies to the State Government but in respect of the third though prior to the introduction of Section 6-C an appeal would lie to the State Government, a distinct departure is made in providing an appellate forum which must qualify for the description and satisfy the test of judicial authority. Therefore, when the Sessions Judge was appointed a judicial authority it could not be said that he was persona designata and was not functioning as a court.

8. Sections 7 and 9 of the Code of Criminal Procedure, 1898, envisage division of the State into various Sessions Divisions and setting up of Sessions Court for each such division, and further provides for appointment of a Judge to preside over that court. The Sessions Judge gets his designation as Sessions Judge as he presides over the Sessions Court and thereby enjoys the powers and discharges the functions conferred by the Code. Therefore, even if the judicial authority appointed under Section 6-C is the Sessions Judge it would only mean the Judge presiding over the Sessions Court and discharging the functions of that court. If by the Sessions Judge is meant the Judge presiding over the Sessions Court and that is the appointed Appellate Authority, the conclusion is inescapable that he was not persona designata which expression is understood to mean a person pointed out or described as an individual as opposed to a person ascertained as a member of a class or as filling a particular character (vide Central Talkies Ltd. v. Dwarka Prasad [AIR 1961 SC 606 : (1961) 3 SCR 495 : (1961) 1 Cri LJ 740] and Ram Chandra v. State of U.P. [AIR 1966 SC 1888 : 1966 Supp SCR 393 : 1966 Cri LJ 1514])."

16. Taking a similar view in the context of District Judges functioning as appellate authorities under the Kerala Rent Control Act, in **Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker**5, a view was taken that where District Judges are appointed as appellate authorities under the provisions of a statute they constitute a class and cannot be regarded as persona designata. The decisions in the case of **Central Talkies Ltd. Vs. Dwarka Prasad6 and Parthasaradhi Naidu v. Koteswara Rao**7 were referred, and it was observed as follows :-

"7. As noted earlier the appellate authority, namely the District Judge, Thallassery has taken the view that since he is a persona designata he cannot resort to Section 5 of the Limitation Act for condoning the delay in filing appeal before him. So far as this reasoning of the appellate authority is concerned Mr Nariman, learned counsel for respondent fairly stated that he does not support this reasoning and it is not his say that the appellate authority exercising powers under Section 18 of the Rent Act is a persona designata. In our view the said fair stand taken by learned counsel for respondent is fully justified. *It is now well settled that an authority can be styled to be persona designata if powers are conferred on a named person or authority and such powers cannot be exercised by anyone else. The scheme of the Act to which we have referred earlier contraindicates such appellate authority to be a persona designata. It is clear that the appellate authority constituted under Section 18(1) has to decide lis between parties in a judicial manner and subject to the revision of its order, the decision would remain final between the parties. Such an authority is constituted by designation as the District Judge of the district having jurisdiction over the area over which the said Act has been extended. It becomes obvious that even though the District Judge concerned might retire or get transferred or may otherwise cease to hold the office of the District Judge his successor-in-office can pick up the thread of the proceedings from the stage where it was left by his predecessor and can function as an appellate authority under Section 18. If the District Judge was constituted as an*

appellate authority being a persona designata or as a named person being the appellate authority as assumed in the present case, such a consequence, on the scheme of the Act would not follow. In this connection, it is useful to refer to a decision of this Court in the case of Central Talkies Ltd. v. Dwarka Prasad [AIR 1961 SC 606 : (1961) 1 Cri LJ 740]. In that case Hidayatullah, J. speaking for the Court had to consider whether Additional District Magistrate empowered under Section 10(2) of Criminal Procedure Code to exercise powers of District Magistrate was a persona designata. Repelling the contention that he was a persona designata the learned Judge made the following pertinent observations:

"9. A persona designata is "a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character'. (See Osborn's Concise Law Dictionary, 4th Edn., p. 253). In the words of Schwabe, C.J. in Parthasaradhi Naidu v. Koteswara Rao [ILR (1924) 47 Mad 369 : AIR 1924 Mad 561 (FB)] , personae designatae are "persons selected to act in their private capacity and not in their capacity as Judges'. The same consideration applies also to a well-known officer like the District Magistrate named by virtue of his office, and whose powers the Additional District Magistrate can also exercise and who can create other officers equal to himself for the purposes of the Eviction Act. The decision of Sapru, J. in the Allahabad case, with respect, was erroneous."

Applying the said test to the facts of the present case it becomes obvious that appellate authorities as constituted under Section 18 of the Rent Act being the District Judges they constituted a class and cannot be considered to be persona designata." (emphasis supplied)

17. The exposition of law, made as a consequence, in **Mukri Gopalan** case, was that once it is held that the appellate authority is not a persona designata, it becomes obvious that it functions as a court. Referring to an earlier decision in **Brajnandan Sinha Vs. Jyoti Narain**8, it was observed that the tests for determining whether an authority is functioning as a court, in the strict sense of the term, an essential condition is that the court should have, apart from trappings of a judicial tribunal, power to give a decision or a definitive judgment which has finality and authoritativeness. Further, placing reliance upon the decision in **Virindar Kumar Satyawadi Vs. State of Punjab**9, it was stated that what distinguishes a court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment. It was observed as follows : (**Mukri Gopalan** case, SCC pp. 14-15, para 8).

"8. Once it is held that the appellate authority functioning under Section 18 of the Rent Act is not a persona designata, it becomes obvious that it functions as a court. In the present case all the District Judges having jurisdiction over the areas within which the provisions of the Rent Act have been extended are constituted as appellate authorities under Section 18 by the Government notification noted earlier. These District Judges have been conferred the powers of the appellate authorities. It becomes therefore, obvious that while adjudicating upon the dispute between the landlord and tenant and while deciding the question whether the Rent Control Court's order is justified or not such appellate authorities would be functioning as courts. The test for determining whether the authority is functioning as a court or not has been laid down by a series of decisions of this Court. We may refer to one of them, in the case of Thakur Jugal Kishore Sinha v. Sitamarhi Central Coop. Bank Ltd. [(1967) 3 SCR 163 : AIR 1967 SC 1494] In that case this Court was concerned with the question whether the Assistant Registrar of Cooperative Societies functioning under Section 48 of the Bihar and Orissa Cooperative Societies Act,

1935 was a court subordinate to the High Court for the purpose of Contempt of Courts Act, 1952. While answering the question in the affirmative, a Division Bench of this Court speaking through Mitter, J. placed reliance amongst others on the observations found in the case of Brajnandan Sinha v. Jyoti Narain [(1955) 2 SCR 955 : AIR 1956 SC 66] wherein it was observed as under:

"It is clear, therefore, that in order to constitute a court in the strict sense of the term, an essential condition is that the court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgment which has finality and authoritativeness which are the essential tests of a judicial pronouncement."

Reliance was also placed on another decision of this court in the case of Virindar Kumar Satyawadi v. State of Punjab [(1955) 2 SCR 1013 : AIR 1956 SC 153]. Following observations found (at SCR p. 1018) therein were pressed in service:

"It may be stated broadly that what distinguishes a court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declares the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it. And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question therefore arises as to whether an authority created by an Act is a court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a court."

When the aforesaid well settled tests for deciding whether an authority is a court or not are applied to the powers and functions of the appellate authority constituted under Section 18 of the Rent Act, it becomes obvious that all the aforesaid essential trappings to constitute such an authority as a court are found to be present..."

18. A similar question with regard to the position of District Judge exercising powers under Section 32 of the State Financial Corporation, 1951 and as to whether the Act confers jurisdiction on the District Judge as persona designata was subject matter of consideration in **Asnew Drums Pvt. Ltd. Vs. Maharashtra State Finance Corporation**10, and it was opined that the legislative intent was clear that the District Judge was not a persona designata. It was stated thus :-

"9. The question which really arises is whether by using the words "in the manner provided in the Code of Civil Procedure" in Section 32(8) the legislature intended to include the provisions in the Code dealing with appeals. There is no doubt that under the Code of Civil Procedure an order setting aside or refusing to set aside a sale in execution of a decree is appealable under Order LXIII, Rule 1(j). It is difficult to understand why the scope of the language should be cut down by not including appeals provided under the Code of Civil Procedure within the ambit of the words "in the manner provided in the Code of Civil Procedure". "Manner" means method of procedure and to provide for an appeal is to provide for a mode of procedure. The State Financial Corporation lends huge amounts and we cannot for a moment imagine that it was the intention of the legislature to make the order of sale of property, passed by the District Judge, final and only subject to an appeal to the Supreme Court under Article 136 of the Constitution.

10. The learned counsel for the respondents contended that, wherever the legislature wanted to provide for an appeal to the High Court, it did so specifically. In this connection he pointed out that sub-section (9) of Section 32 provided that

"any party aggrieved by an order under sub-section (5) or sub-section (7) may, within thirty days from the date of the order, appeal to the High Court, and upon such appeal the High Court may, after hearing the parties, pass such orders thereon as it thinks proper". It is true that an appeal has been expressly provided in this case but the reason for this is that if there had been no specific provision in sub-section (9), no appeal would lie otherwise because it is not provided in sub-section (5) or sub-section (7) that the District Judge should proceed in the manner provided in the Code of Civil Procedure.

11. We are not impressed by the argument that the Act confers jurisdiction on the District Judge as persona designata because sub-section (11) of Section 32 provides that "the functions of a district judge under this section shall be exercisable (a) in a presidency town, where there is a city civil court having jurisdiction, by a judge of that Court and in the absence of such Court, by the High Court; and (b) elsewhere, also by an additional district judge". These provisions clearly show that the District Judge is not a persona designata."
(emphasis supplied)

19. The question as to whether the District Judge would be a persona designata in the context of the powers conferred under the State Financial Corporation Act, 1951, again came up for consideration in **Maharashtra State Financial Corporation Vs. Jaycee Drugs & Pharmaceuticals (P) Ltd.**11, and it was reiterated that where special statute confers jurisdiction on District Judge, the District Judge was not a persona designata but was a court of ordinary civil jurisdiction to which rules of procedure under the Code would apply. Referring to earlier decisions in **Central Talkies Ltd. Kanpur Vs. Dwarka Prasad6, National Sewing Thread Co. Ltd. Vs. James Chadwick & Bros. Ltd**.12 and the observations made by **Viscount Haldane L.C**. in **National Telephone Co. Ltd. Vs. Postmaster-General**13 and also the decisions in **Adaikappa Chettiar Vs. R. Chandrasekhara Thevar**14 and Secretary of State for India Vs. Chellikani Rama Rao15, it was observed as follows :-

"26. We may now state our reasons for holding that even if Section 46-B of the Act was not there the provisions of the Code for the execution of a decree against a surety who had given only personal guarantee would, in the absence of any provision to the contrary in the Act, be applicable. *In view of the decision of this Court in Central Talkies Ltd., Kanpur v. Dwarka Prasad [(1961) 3 SCR 495 : AIR 1961 SC 606] , where it was held that a persona designata is a person selected as an individual in his private capacity, and not in his capacity as filling a particular character or office, since the term used in Section 31(1) of the Act is "District Judge" it cannot be doubted that the District Judge is not a persona designata but a court of ordinary civil jurisdiction while exercising jurisdiction under Sections 31 and 32 of the Act. In National Sewing Thread Co. Ltd. v. James Chadwick & Bros. Ltd. [1953 SCR 1028 : AIR 1953 SC 357*] while repelling the objection that an appeal under the Letters Patent against the judgment of a Single Judge passed in an appeal against the decision of the Registrar under Section 76(1) of the Trade Marks Act, 1940 was not maintainable it was held at pages 1033-34 of the Report: (SCR pp. 1033-34)

"Obviously after the appeal had reached the High Court it has to be determined according to the rules of practice and procedure of that court and in accordance with the provisions of the charter under which that court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. The rule is well settled that when a statute directs that an appeal shall lie to a court already established, then that appeal must be regulated by the practice and procedure of that court. This rule was very succinctly stated by Viscount Haldane L.C. in National Telephone

Co. Ltd. v. Postmaster-General [1913 AC 546 : 82 LJKB 1197] , in these terms:--

"When a question is stated to be referred to an established court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that court are to attach, and also that any general right of appeal from its decision likewise attaches.'

The same view was expressed by their Lordships of the Privy Council in Adaikappa Chettiar v. R. Chandrasekhara Thevar [(1947) 74 IA 264 : AIR 1948 PC 12] , wherein it was said:

"Were a legal right is in dispute and the ordinary courts of the country are seized of such dispute the courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not, in terms confer a right of appeal.'

Again in Secretary of State for India v. Chellikani Rama Rao [AIR 1916 PC 21 : ILR (1916) 39 Mad 617] , when dealing with the case under the Madras Forest Act their Lordships observed as follows:

"It was contended on behalf of the appellant that all further proceedings in courts in India or by way of appeal were incompetent, these being excluded by the terms of the statute just quoted. In their Lordships' opinion this objection is not well founded. Their view is that when proceedings of this character reach the District Court, that court is appealed to as one of the ordinary courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply..." (emphasis supplied)

20. The distinction between a persona designata and a legal tribunal was considered in earlier decision in **Ram Chandra Aggarwal and another Vs. State of Uttar Pradesh and another**16, and referring to the observations made by **Lord Atkinson** and also the decision in **Central Talkies Ltd. Vs. Dwarika Prasad**6 and **Chatur Mohan Vs. Ram Behari Dixit**17, it was observed that where a special or local statute refers to a constituted court as a court and does not refer to the presiding officer of that court the reference cannot be said to be to a persona designata. The meaning given to the expression "persona designata" in **Osborn's Concise Law Dictionary**18 as "a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character" was also referred to. The relevant observations made in the judgment in this regard are as follows :-

"3. In Balakrishna Udayar v. Vasudeva Aiyar [44 IA 261] Lord Atkinson has, pointed out the difference between a persona designata and a legal tribunal. The difference is this that the "determination of a persona designata are not to be treated as judgments of a legal tribunal". In the Central Talkies Ltd. v. Dwarka Prasad [(1961) 3 SCR 495, at pp 500-501] this Court has accepted the meaning given to the expression persona designata in Osborn's Concise Law Dictionary, 4th Edn. p. 263 as "a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character". Section 146(1) CrPC empowers a Magistrate to refer the question as to whether any, and if so, which of the parties was in possession of the subject-matter of dispute as the relevant point of time to a civil court of competent jurisdiction. The power is not to refer the matter to the presiding Judge of a particular civil court but to a court. When a special or local law provides for an adjudication to be made by a constituted court -- that is, by a court not created by a special or local law but to an existing court -- it in fact enlarges the ordinary jurisdiction of such a court. Thus where a special or local statute refers to a constituted court as a court and does not refer to the presiding officer of that court the reference cannot be said to be to a

persona designata. This question is well settled. It is, therefore, unnecessary to say anything more on this part of the case except that cases dealing with the point have been well summarised in the recent decision in Chatur Mohan v. Ram Behari Dixit [1964 All LJ 256]." (emphasis supplied)

21. A question as to whether the order passed by the City Civil Court exercising powers under Section 9 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, as an Appellate Officer, is in the capacity of a civil court or persona designata was subject matter of consideration in **Life Insurance Corporation of India Vs. Nandini J.Shah and others**19, and upon an extensive consideration of a legal position, it was concluded that the Appellate Officer referred to in Section 9 of that Act, is not a persona designata but acts as a civil court, and against an order passed by the Appellate Officer the remedy under Article 227 of the Constitution of India can be availed. It was stated thus :-

"58. In other words, the Appellate Officer while exercising power under Section 9 of the 1971 Act, does not act as a persona designata but in his capacity as a pre-existing judicial authority in the district (being a District Judge or judicial officer possessing essential qualification designated by the District Judge). Being part of the district judiciary, the judge acts as a court and the order passed by him will be an order of the subordinate court against which remedy under Article 227 of the Constitution of India can be availed on the matters delineated for exercise of such jurisdiction."

22. Reverting to the facts of the present case, under the scheme of the UP PP Act the powers to be exercised by the Appellate Officer, for the purpose of holding an enquiry or hearing any appeal under the Act, as per Section 8, has been stated to be the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of certain specified matters.

23. Section 9 of the UP PP Act provides that an appeal shall lie from every order of the prescribed authority made in respect of any public premises under Section 5 and 7, to an Appellate Officer, who shall be the District Judge of a district in which the public premises are situate or such other judicial officer not below the rank of a civil judge as the District Judge may designate in this behalf. Thus, as the Act predicates the Appellate Officer is to be a District Judge or such other judicial officer not below the rank of a civil judge as the District Judge may designate in this behalf, it is clearly indicative of the fact that only a pre-existing authority exercising judicial power of the State can be designated as an Appellate Officer.

24. The constitution of Civil Courts, in the State of Uttar Pradesh, is provided for under Chapter II of the Bengal, Agra and Assam Civil Courts Act, 1887, and Section 3 thereof, as applicable in the State of U.P., which provides for the classes of civil courts, reads as follows :-

"**3. Classes of Courts**.- There shall be the following classes of Civil Courts under this Act, namely:

(1) The Court of the District Judge;
(2) The Court of the Additional Judge;
(3) The Court of the Civil Judge; and
(4) The Court of the Munsif"

25. For the purposes of the Civil Procedure Code, the subordination of Courts is provided under Section 3 of the Code and the same is as follows :-

"**3. Subordination of Courts**.--For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is

subordinate to the High Court and District Court."

26. It would be worthwhile to take note that the judicial power of the State is exercised by establishment of hierarchy of courts, to decide disputes between its subjects and the subjects and state. The powers, which these courts exercise, are judicial powers; the functions, which they discharge, are the judicial functions; and the decisions, which they reach and pronounce, are judicial decisions.

27. The District Judge having been constituted as a civil court, exercises judicial powers of the State and is an authority having its own hierarchy of superior and inferior courts, and the law of procedure according to which it is empowered to dispose of matters coming before it depending upon the nature of jurisdiction exercised by it, acting in judicial manner. The District Judge is the officer presiding over the court of the District Judge and derives his designation from the nomenclature of the Court. The District Judge or such other judicial officer not below the rank of a civil judge as the District Judge may designate in this behalf constitute a class and cannot be considered as persona designata.

28. The Appellate Officer is required to function as a court, and every order passed by the Appellate Officer has been accorded finality in terms of Section 10 of the UP PP Act. The legislative scheme of the Act and the intent behind providing a forum of appeal under Section 9 before the Appellate Officer, who is to be the District Judge of the District in which the public premises are situate or such other judicial officer not below the rank of civil judge, to be designated by the District Judge for that purpose, is clearly indicative of the legislative intent that the power to be exercised by the Appellate Officer is not as a persona designata but as a judicial officer of a pre-existing court. This leads to inference that the Appellate Officer, while deciding an appeal under Section 9, would exercise powers of a civil court.

29. The Appellate Officer, while exercising powers under Section 9 of the UP PP Act does not act as a persona designata but in his capacity as a pre-existing judicial authority in the district -- a District Judge or a judicial officer not below the rank of civil judge, as may be designated by the District Judge or the designated Civil Judge. Being part of the district judiciary, the judge acts as a court and the order which is to be passed, would be an order of the civil court.

30. The interplay of Section 9 of the UP PP Act in juxtaposition with the other provisions of the Act also makes it clear that the jurisdiction exercised by the Appellate Officer, namely the District Judge, or the judicial officer designated, as the case may be, is in his capacity as a civil court and not persona designata. The Appellate Officer is a creation of the statute and has been identified by an official designation as one of a class -- a pre-existing authority exercising judicial power of the State. It is an authority having its own hierarchy of superior and inferior court, the law of procedure according to which it would dispose of matters coming before it depending upon the nature of jurisdiction exercised by it acting in a judicial manner.

31. The Appellate Officer having been specified to be a District Judge of the district in which the public premises are situate or such other designated judicial officer, the conclusion is inescapable that he is not persona designata, which expression is understood to mean a person pointed out or described as an individual as opposed to a person ascertained as a member of a class or as filling a particular character. An authority can be styled to be persona designata if powers are conferred on a named person or authority and such powers cannot be exercised by anyone else. Personae designatae are persons

selected to act in their private capacity and not in their capacity as Judges.

32. In a situation where even though the authority constituted, retires or gets transferred or otherwise ceases to hold the office, his successor-in-office can pick up the thread of the proceedings from the stage where it was left by his predecessor and can function, the designated authority cannot be held to be a persona designata. A persona designata would therefore be a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character.

33. The test for determining whether the authority is functioning as a court or not, as per the settled legal position, would be that in order to constitute a court in the strict sense of the term, an essential condition is that the court should have, apart from trappings of a judicial tribunal, power to give a decision or a definitive judgment which has finality and authoritativeness, which are essentials of a judicial pronouncement. Broadly stated what distinguishes a court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and to declare the rights of parties in a definitive judgment.

34. Applying the aforestated tests, in the context of the provisions of the UP PP Act, it follows that the Appellate Officers described under Section 9, being District Judges or such other designated judicial officers, constitute a class and cannot be considered to be personae designatae.

35. Section 9 provides for a forum of appeal against every order of the prescribed authority, before the District Judge or such other designated judicial officer, who is a pre-existing authority within the hierarchy of courts, discharging judicial power of the State, and have been expressly conferred power to condone the delay in filing of the appeal and also to grant interim relief during the pendency of the appeal. The designation though having been made as an Appellate Officer, the District Judge, for the purposes of deciding of an appeal under Section 9, therefore is to be held to exercise powers of the civil court.

36. The question as to whether judicial orders of a civil court would be amenable to writ jurisdiction under Article 226 came up for consideration in the case of **Radhey Shyam vs. Chhabi Nath**2, upon a reference made by a two-Judge Bench of the Supreme Court in terms of an order dated April 15, 2009 in **Radhey Shyam and Another vs. Chhabi Nath and Others**20.

37. The two-Judge Bench in the case of **Radhey Shyam (supra)** took notice of an earlier Constitution Bench decision in the case of **Sohan Lal vs. Union of India**21, wherein it was held that a writ of mandamus or an order in the nature of mandamus is not to be made against a private individual and also a subsequent three-Judge Bench decision in **Mohd. Hanif vs. State of Assam**22, expressing the general principle that the jurisdiction of the High Court under Article 226 is extraordinary in nature and is not to be exercised for the purpose of declaring private rights of the parties. Reference was also made to the decision in **Hindustan Steel Ltd. vs. Kalyani Banerjee**23, wherein it was held that proceedings by way of writ were not appropriate in a case where the decision of the court would amount to a decree declaring a party's title and ordering restoration of possession.

38. The law laid down in the nine-Judge Constitution Bench in the case of **Naresh Shridhar Mirajkar vs. State of Maharashtra**24, was also referred, wherein after considering the history of writ of certiorari and various English and Indian decisions, a

conclusion was drawn that "*certiorari does not lie to quash the judgements of inferior courts of civil jurisdiction*". The decision in the case of **Naresh Shridhar Mirajkar** was also seen to have drawn a distinction between judicial orders of inferior courts of civil jurisdiction and orders of inferior tribunals or courts which are not civil courts and which cannot pass judicial orders.

39. Expressing inability to agree with the legal proposition laid down by a two-Judge Bench in the earlier decision in the case of **Surya Dev Rai vs. Ram Chander Rai**25, to the effect that judicial orders passed by civil courts can be examined and then corrected/reversed by the writ court under Article 226 in exercise of its power under a writ of certiorari, the two-Judge Bench in the case of **Radhey Shyam (supra)** made a reference by observing as follows:

"26. The two-Judge Bench in Surya Dev Rai did not, as obviously it could not overrule the ratio in Mirajkar, a Constitution Bench decision of a nine-Judge Bench. But the learned Judges justified their different view in Surya Dev Rai, inter alia on the ground that the law relating to certiorari changed both in England and in India. In support of that opinion, the learned Judges held that the statement of law in Halsbury, on which the ratio in Mirajkar is based, has been changed and in support of that quoted paras 103 and 109 from *Halsbury's* Laws of England, 4th Edn. (Reissue), Vol. 1(1). Those paras are set out below:

"103. The prerogative remedies of certiorari, prohibition and mandamus: historical development.--Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts; certiorari was issued to bring the record of an inferior court into the King's Bench for review or to remove indictments for trial in that court; mandamus was directed to inferior courts and tribunals, and to public officers and bodies, to order the performance of a public duty. All three were called prerogative writs;

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109. *The nature of certiorari and prohibition*.--Certiorari lies to bring decisions of an inferior court, tribunal, public authority or any other body of persons before the High Court for review so that the court may determine whether they should be quashed, or to quash such decisions. The order of prohibition is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority which forbids that court or tribunal or authority to act in excess of its jurisdiction or contrary to law. Both certiorari and prohibition are employed for the control of inferior courts, tribunals and public authorities."

The aforesaid paragraphs are based on general principles which are older than the time when Mirajkar was decided are still good. Those principles nowhere indicate that judgments of an inferior civil court of plenary jurisdiction are amenable to correction by a writ of certiorari. In any event, change of law in England cannot dilute the binding nature of the ratio in Mirajkar and which has not been overruled and is holding the field for decades.

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

30. ... this Court unfortunately is in disagreement with the view which has been expressed in Surya Dev Rai insofar as correction

of or any interference with judicial orders of civil court by a writ of certiorari is concerned.

31. Under Article 227 of the Constitution, the High Court does not issue a writ of certiorari. Article 227 of the Constitution vests the High Courts with a power of superintendence which is to be very sparingly exercised to keep tribunals and courts within the bounds of their authority. Under Article 227, orders of both civil and criminal courts can be examined only in very exceptional cases when manifest miscarriage of justice has been occasioned. Such power, however, is not to be exercised to correct a mistake of fact and of law.

32. The essential distinctions in the exercise of power between Articles 226 and 227 are well known and pointed out in Surya Dev Rai and with that we have no disagreement. But we are unable to agree with the legal proposition laid down in Surya Dev Rai that judicial orders passed by a civil court can be examined and then corrected/reversed by the writ court under Article 226 in exercise of its power under a writ of certiorari. We are of the view that the aforesaid proposition laid down in Surya Dev Rai, is contrary to the ratio in Mirajkar and the ratio in Mirajkar has not been overruled in *Rupa Ashok Hurra v. Ashok Hurra*26.

33. In view of our difference of opinion with the views expressed in Surya Dev Rai, matter may be placed before His Lordship the Hon'ble the Chief Justice of India for constituting a larger Bench, to consider the correctness or otherwise of the law laid down in Surya Dev Rai on the question discussed above."

40. Upon the reference having been made the question which was considered by the three-Judge Bench in the case of **Radhey Shyam vs. Chhabi Nath**2, was stated as follows :-

"5. Thus, the question to be decided is: whether the view taken in Surya Dev Rai, that a writ lies under Article 226 of the Constitution against the order of the civil court, which has been doubted in the reference order, is the correct view?"

41. The decision of the three-Judge Bench in the case of **Radhey Shyam (supra)** took notice of the nine-Judge Constitution Bench judgement in the case of **Naresh Shridhar Mirajkar,** wherein a judicial order of the High Court was challenged as being violative of fundamental rights and the court by majority held that a judicial order of a competent court could not violate a fundamental right, and even if, there was incidental violation it could not be held to be violative of the fundamental right. The following observations were made (**Mirajkar**24 case, AIR p. 11, para 38):

"38. The argument that the impugned order affects the fundamental rights of the petitioners under Article 19(1), is based on a complete misconception about the true nature and character of judicial process and of judicial decisions. When a Judge deals with matters brought before him for his adjudication, he first decides questions of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the appellate court. But it is singularly inappropriate to assume that a judicial decision pronounced by a Judge of competent jurisdiction in or in relation to a matter brought before him for adjudication can affect the fundamental rights of the citizens under Article 19(1). What the judicial decision purports to do is to decide the controversy between the parties brought before the court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by court in or in relation to a matter brought before it for its decision cannot

be said to affect the fundamental rights of citizens under Article 19(1)."

42. Referring to **Halsbury's Laws of England, 3rd Edition, Vol. 11**27 and also the observations made in **Kemp vs. Balne**28 and by Wrottesley, L.J. in **Rex vs. Chancellor of St. Edmundsbury and Ipswich Diocese, Ex Parte White**29, it was observed as follows (***Mirajkar case***24, AIR p.18-19, paras 63-64):

"63. Whilst we are dealing with this aspect of the matter, we may incidentally refer to the relevant observations made by Halsbury on this point. "In the case of judgments of inferior courts of civil jurisdiction", says Halsbury in the footnote,

"it has been suggested that certiorari might be granted to quash them for want of jurisdiction (Kemp v. Balne, Dow & L at p. 887), inasmuch as an error did not lie upon that ground. But there appears to be no reported case in which the judgment of an inferior Court of civil jurisdiction has been quashed on certiorari, either for want of jurisdiction or on any other ground".

The ultimate proposition is set out in the terms: "Certiorari does not lie to quash the judgments of inferior courts of civil jurisdiction". These observations would indicate that in England the judicial orders passed by civil courts of plenary jurisdiction in or in relation to matters brought before them are not held to be amenable to the jurisdiction to issue writs of certiorari.

64. In Rex v. Chancellor of St. Edmundsbury and Ipswich Diocese, Ex parte White, the question which arose was whether certiorari would lie from the Court of King's Bench to an ecclesiastical court; and the answer rendered by the court was that certiorari would not lie against the decision of an ecclesiastical court. In dealing with this question, Wrottesley, L.J. has elaborately considered the history of the writ jurisdiction and has dealt with the question about the meaning of the word "inferior' as applied to courts of law in England in discussing the problem as to the issue of the writ in regard to decisions of certain courts. "The more this matter was investigated", says Wrottesley, L.J.,

"the clearer it became that the word "inferior" as applied to

courts of law in England had been used with at least two very different meanings. If, as some assert, the question of inferiority is determined by ascertaining whether the court in question can be stopped from exceeding its jurisdiction by a writ of prohibition issuing from the King's Bench, then not only the ecclesiastical courts, but also palatine courts and admiralty courts are inferior courts. But there is another test, well recognised by lawyers, by which to distinguish a superior from an inferior court, namely, whether in its proceedings, and in particular in its judgments, it must appear that the court was acting within its jurisdiction. This is the characteristic of an inferior court, whereas in the proceedings of a superior court it will be presumed that it acted within its jurisdiction unless the contrary should appear either on the face of the proceedings or aliunde".

Mr Sen relied upon this decision to show that even the High Court of Bombay can be said to be an inferior court for the purpose of exercising jurisdiction by this Court under Article 32(2) to issue a writ of certiorari in respect of the impugned order passed by it. We are unable to see how this decision can support Mr Sen's contentions."

43. The three-Judge Bench in the case of **Radhey Shyam** (supra), extensively referring to the legal position on the scope of writ of certiorari concluded that orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts. It held that the expression "inferior court" is not referable to judicial courts and accordingly judicial orders of civil courts are not amenable to a writ of certiorari under

Article 226 and a writ of mandamus does not lie against a private person not discharging any public duty. It was also held that the scope of Article 227 is different from Article 226. It was observed as follows:

"25. ... Courts are set up under the Constitution or the laws. All the courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all the High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of tribunals or authorities or courts other than judicial courts. There are no precedents in India for the High Courts to issue writs to the subordinate courts. Control of working of the subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of the civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by the statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to the judicial courts, ...

27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

29. Accordingly, we answer the question referred as follows:

29.1. Judicial orders of the civil court are not amenable to writ jurisdiction under Article 226 of the Constitution.

29.2. Jurisdiction under Article 227 is distinct from jurisdiction under Article 226.

29.3. Contrary view in Surya Dev Rai, is overruled."

44. Having regard to the foregoing discussion the legal position which thus emerges is that judicial orders of civil court would not be amenable to writ jurisdiction under Article 226 and that challenge thereagainst can be raised under Article 227.

45. The aforestated legal position has been discussed in the context of the provisions under the Arbitration and Conciliation Act, 1996 with regard to enforcement of an arbitral award, in a recent decision of this Court in **M/S. Magma Leasing Ltd. Vs. Badri Vishal and others**.30

46. Having regard to the aforestated legal principles, it can be held that the Appellate Officer, exercising powers under Section 9 of the UP PP Act, does not act as a persona designata but in his capacity as a pre-existing judicial authority in the district -- being the District Judge of the district, or such other designated judicial officer. The judge, being part of the district judiciary, acts as a court and the order passed by him would be a judicial order passed by a civil court of plenary jurisdiction and therefore the same would not be amenable to a writ of certiorari under Article 226 of the Constitution of India. The remedy against such orders may be availed under Article 227 on the matters delineated for exercise of such jurisdiction.

47. Learned counsel appearing for the petitioner has not disputed the aforesaid legal position and seeks time to file an appropriate amendment application.

48. The matter shall stand over for a fortnight in order to enable the counsel for the petitioner to move an application seeking appropriate amendments.

(2021)12ILR A455
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ-C No. 11012 of 2021

State of U.P. ...Petitioner
Versus
Chief Controlling Revenue Auth. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Rajiv Kumar Shukla

Counsel for the Respondents:
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A. Constitution of India – Article 226 – Writ – Highly belated writ petition filed by the St. – Effect – Procedural delay, how far excusable – Held, the action on part of the St. authority is merely to obtain order of dismissal to save their skin – Supreme Court's decision to deprecate the practice of challenging order in higher court with delay relied upon – High Court refused to accept the explanation of procedural delay and issued the direction to take action against the persons responsible for delay. (Para 7, 13 and 15)

Writ petition dismissed. (E-1)

Cases relied on :-

1. St. of M.P. & ors. Vs Bherulal; 2020 (10) SCC 654

2. Government of Maharasthra (Water Resource Department Vs Borse Brothers Engineers & Contractors Pvt. Ltd.; 2021 SCC online SC 233

3. St. of Odisha Vs Sunanda Mahakud, 2021 SCC online SC 384

4. Special Leave Petition (Civil) Diary No(s). 19846/2020; U.O.I. Vs Central Tibetan Schools Admin decided on 04.02.2021

5. St. of U.P. Vs Khushnoor Khan; 2021 SCC Online All 164

6. St. of M.P. Vs Ramprakash Tyagi, MANU/MP/0566/2021

7. JK Economic Reconstruction Agency Vs Kamal Builders, MANU/JK/0252/2021

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard learned Standing Counsel for the petitioner.

2. This petition has been filed by the State of U.P. through Principal Secretary, Stamps and Registration challenging the order dated 5.7.2017 passed by respondent no. 1, Chief Controlling Revenue Authority, Allahabad.

3. A perusal of the order indicates that huge amount is involved in the present case. Impugned order is being challenged on several grounds.

4. Stamp reporter has reported the latches of 1267 days in filing the present petition.

5. Such huge lacthes have been explained in paragraph nos. 3 to 10 of the petition which reads as under:

"3. That since the impugned order under challenge has been passed by the respondent no. 1 dated 5.7.2017 and it has not been challenged by the petitioner well within time as the Commissioner Stamps at U.P. Allahabad after considering the impugned order dated 5.7.2017 forwarded a letter dated 17.7.2017 to A.I.G. Stamps, Etawah regarding filing the writ petition before this Hon'ble Court and in the aforesaid letter it has been stated that prima facie the learned Chief Controlling Revenue Authority has ignored and overlooked the confidential report, spot inspection, evidence and submission advanced by the State counsel thereafter A.I.G. Stamps at once take congnizance of the aforesaid matter and directed to the Sub Registrar, Etawah dated

22.7.2017 to proceed for filing writ petition before Hon'ble High Court at Allahabad. In this regard the copy of the letter dated 17.7.2017 forwarded by Commissioner to A.I.G. Stamps, Etawah is being filed herewith and marked as Annexure No. 1 to this writ petition.

4. That thereafter the Sub Registrar, Etawah send a requesting letter dated 4.9.2017 to A.D.G.C. District Etawah asking for his opinion and the learned A.D.G.C. District Etawah has given his opinion on 11.9.2017 to Sub Registrar Etawah to file writ petition before Hon'ble High Court Allahabad. In this regard the copy of the letter dated 11.9.2017 is being filed herewith and marked as Annexure No. 2 to this writ petition.

5. That after getting the opinion from A.D.G.C. District Etawah for filing the writ petition before Hon'ble High Court at Allahabad the District Magistrate, Etawah send a letter dated 26.9.2017 to the Commissioner Stamps, Board of Revenue at Allahabad for seeking permission from the Government/ Administration. In this regard the copy of the letter issued by the District Magistrate, Etawah seeking permission from State Authorities dated 26.9.2017 is being filed herewith and marked as Annexure No. 3 to this writ petition.

6. That the District Magistrate, Etawah again dispatched a letter dated 16.7.2020 to A.I.G. Stamps District Etawah as well as a reminder dated 20.7.2020 for filing the writ petition before Hon'ble High Court at Allahabad. In this regard the copy of the letter dated 16.7.2020 as well as reminder dated 20.7.2020 are being filed herewith and marked as Annexure No. 4 to this writ petition.

7. That the Special Secretary and Additional Law Advisor U.P. Government forwarded a letter to the Chief Standing counsel High Court Allahabad for filing writ petition before Hon'ble High Court Allahabad. In this regard the copy of the letter dated 26.10.2020 is being filed herewith and marked as Annexure No. 5 to this writ petition.

8. That thereafter a letter dated 2.11.2020 has been sent to Commissioner Stamps U.P. Prayagraj by Special Secretary U.P. Admin in regard with sanction of U.P. Administration for filing writ petition before Hon'ble High Court Allahabad vide letter dated 1.12.2020 directing A.I.G. Stamps District Etawah to proceed for filing writ petition before Hon'ble High Court Allahabad. In this regard the copy of the letter dated 2.11.2020 and 1.12.2020 are being filed herewith and marked as Annexure No. 6 to this writ petition.

9. That thereafter A.I.G. Stamps District Etawah send a letter dated 17.2.2021 to Chief Standing Counsel High Court Allahabad for filing writ petition in the aforesaid matter. In this regard the copy of the letter dated 17.2.2021 forwarded by A.I.G. Stamps District Etawah to Chief Standing Counsel of this Hon'ble Court for filing writ petition is being filed herewith and marked as Annexure No. 7 to this writ petition.

10. That in view of the aforesaid facts, the delay in filing the writ petition is not deliberate and intentional but is procedural and as such is deserves to be condoned by this Hon'ble Court and the writ petition is also deserves to be heard on merits so that justice may be done otherwise the petitioner shall suffer irreparable loss and injury."

(emphasis supplied)

6. It is, thus, submitted that there was no deliberate delay on part of the authority concerned and that the delay was purely procedural in nature.

7. This practice of challenging order in higher court with delay has been deprecated by Apex Court in the case of **State of Madhya Pradesh and other vs. Bherulal, 2020 (10) SCC 654** wherein the Apex Court refused to condone the delay of 663 days and held that such action on part of the State authority is merely to obtain order of dismissal to save their skin. The Apex Court has further held as under :

3. No doubt, some leeway is given for the Government inefficiencies but the sad part is that the authorities keep on relying on judicial pronouncements for a period of time when technology had not advanced and a greater leeway was given to the Government (Collector, Land Acquisition, Anantnag & Anr vs. Mst. Katiji & Ors. (1987) 2 SCC 107). This position is more than elucidated by the judgment of this Court in Office of the Chief Post Master General & Ors. v. Living Media India Ltd. & Anr. (2012) 3 SCC 563 where the Court observed as under:

"12) It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

13) In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red- tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay." Eight years hence the judgment is still unheeded!

6. We are also of the view that the aforesaid approach is being adopted in what we have categorized earlier as "certificate cases". The object appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say that nothing could be done because the highest Court has dismissed the appeal. It is to complete this formality and save the skin of officers who may be at default that such a process is followed. We have on earlier occasions also strongly deprecated such a practice and process. There seems to be no improvement. The purpose of coming to this Court is not to obtain such certificates and if the Government suffers losses, it is time when the concerned officer responsible for the same bears the consequences. The irony is that in none of the cases any action is taken against the officers, who sit on the files and do nothing. It is presumed that this Court will condone the delay and even in making submissions, straight away counsels appear to address on merits without referring even to the aspect of limitation as happened in this case till

we pointed out to the counsel that he must first address us on the question of limitation.

7. We are thus, constrained to send a signal and we propose to do in all matters today, where there are such inordinate delays that the Government or State authorities coming before us must pay for wastage of judicial time which has its own value. Such costs can be recovered from the officers responsible.

8. Looking to the period of delay and the casual manner in which the application has been worded, we consider appropriate to impose costs on the petitioner- State of Rs.25,000/- (Rupees twenty five thousand) to be deposited with the Mediation and Conciliation Project Committee. The amount be deposited in four weeks. The amount be recovered from the officers responsible for the delay in filing the special leave petition and a certificate of recovery of the said amount be also filed in this Court within the said period of time.

(emphasis supplied)

8. The same view has been taken in a very recent judgment of Apex Court in the case of **Government of Maharasthra (Water Resource Department vs. Borse Brothers Engineers & Contractors Pvt. Ltd., 2021 SCC online SC 233**, where in paragraph nos. 57, 58, 59, 60 and 61, the Apex Court has held as under:

57. Given the object sought to be achieved under both the Arbitration Act and the Commercial Courts Act, that is, the speedy resolution of disputes, the expression "sufficient cause" is not elastic enough to cover long delays beyond the period provided by the appeal provision itself. Besides, the expression "sufficient cause" is not itself a loose panacea for the ill of pressing negligent and stale claims. This Court, in Basawaraj v. Land Acquisition Officer, (2013) 14 SCC 81, has held:

"9. Sufficient cause is the cause for which the defendant could not be blamed for his absence. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude, which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case, duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the court should not allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose. (See Manindra Land and Building Corpn. Ltd. v. Bhutnath Banerjee [AIR 1964 SC 1336] , Mata Din v. A. Narayanan [(1969) 2 SCC 770 : AIR 1970 SC 1953] , Parimal v. Veena [(2011) 3 SCC 545 : (2011) 2 SCC (Civ) 1 : AIR 2011 SC 1150] and Maniben Devraj Shah v. Municipal Corpn. of Brihan Mumbai [(2012) 5 SCC 157 : (2012) 3 SCC (Civ) 24 : AIR 2012 SC 1629] .)

10. In Arjun Singh v. Mohindra Kumar [AIR 1964 SC 993] this Court explained the difference between a "good cause" and a "sufficient cause" and observed that every "sufficient cause" is a good cause and vice versa. However, if any difference exists it can only be that the requirement of good cause is complied with on a lesser degree of proof than that of "sufficient cause".

11. The expression "sufficient cause" should be given a liberal interpretation to ensure

that substantial justice is done, but only so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned, whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. (Vide Madanlal v. Shyamlal [(2002) 1 SCC 535 : AIR 2002 SC 100] and Ram Nath Sao v. Gobardhan Sao [(2002) 3 SCC 195 : AIR 2002 SC 1201] .)

12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim dura lex sed lex which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

13. The statute of limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale. According to Halsbury's Laws of England, Vol. 28, p. 266:

"605. Policy of the Limitation Acts.--The courts have expressed at least three differing reasons supporting the existence of statutes of limitations namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence." An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches.

(See Popat and Kotecha Property v. SBI Staff Assn. [(2005) 7 SCC 510] , Rajender Singh v. Santa Singh [(1973) 2 SCC 705 : AIR 1973 SC 2537] and Pundlik Jalam Patil v. Jalgaon Medium Project [(2008) 17 SCC 448 : (2009) 5 SCC (Civ) 907] .)

14. In P. Ramachandra Rao v. State of Karnataka [(2002) 4 SCC 578 : 2002 SCC (Cri) 830 : AIR 2002 SC 1856] this Court held that judicially engrafting principles of limitation amounts to legislating and would fly in the face of law laid down by the Constitution Bench in Abdul Rehman Antulay v. R.S. Nayak [(1992) 1 SCC 225 : 1992 SCC (Cri) 93 : AIR 1992 SC 1701] .

15. The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature."

58. Likewise, merely because the government is involved, a different yardstick for condonation of delay cannot be laid down. This was felicitously stated in Postmaster General v. Living Media India Ltd., (2012) 3 SCC 563 ["Postmaster General"], as follows:

"27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.

29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few."

59. The decision in Postmaster General (supra) has been followed in the following subsequent judgments of this Court:

i) State of Rajasthan v. Bal Kishan Mathur, (2014) 1 SCC 592 at paragraphs 8-8.2;

ii) State of U.P. v. Amar Nath Yadav, (2014) 2 SCC 422 at paragraphs 2-3;

iii) State of T.N. v. N. Suresh Rajan, (2014) 11 SCC 709 at paragraphs 11-13; and

iv) State of M.P. v. Bherulal, (2020) 10 SCC 654 at paragraphs 3-4.

60. In a recent judgment, namely, State of M.P. v. Chaitram Maywade, (2020) 10 SCC 667, this Court referred to Postmaster General (supra), and held as follows:

"1. The State of Madhya Pradesh continues to do the same thing again and again and the conduct seems to be incorrigible. The special leave petition has been filed after a delay of 588 days. We had an occasion to deal with such inordinately delayed filing of the appeal by the State of Madhya Pradesh in State of M.P. v. Bherulal [State of M.P. v. Bherulal, (2020) 10 SCC 654] in terms of our order dated 15-10-2020.

2. We have penned down a detailed order in that case and we see no purpose in repeating the same reasoning again except to record what are stated to be the facts on which the delay is sought to be condoned. On 5-1-2019, it is stated that the Government Advocate was approached in respect of the judgment delivered on 13-11-2018 [Chaitram Maywade v. State of M.P., 2018 SCC OnLine HP 1632] and the Law Department permitted filing of the SLP against the impugned order on 26-5-2020. Thus, the Law Department took almost about 17

months' time to decide whether the SLP had to be filed or not. What greater certificate of incompetence would there be for the Legal Department!

3. We consider it appropriate to direct the Chief Secretary of the State of Madhya Pradesh to look into the aspect of revamping the Legal Department as it appears that the Department is unable to file appeals within any reasonable period of time much less within limitation. These kinds of excuses, as already recorded in the aforesaid order, are no more admissible in view of the judgment in Postmaster General v. Living Medi
a (India) Ltd. [Postmaster General v.

Living Media (India) Ltd., (2012) 3 SCC 563 : (2012) 2 SCC (Civ) 327 : (2012) 2 SCC (Cri) 580 : (2012) 1 SCC (L&S) 649]

4. We have also expressed our concern that these kinds of the cases are only "certificate cases" to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue. The object is to save the skin of officers who may be in default. We have also recorded the irony of the situation where no action is taken against the officers who sit on these files and do nothing.

5. Looking to the period of delay and the casual manner in which the application has been worded, the wastage of judicial time involved, we impose costs on the petitioner State of Rs 35,000 to be deposited with the Mediation and Conciliation Project Committee. The amount be deposited within four weeks. The amount be recovered from the officer(s) responsible for the delay in filing and sitting on the files and certificate of recovery of the said amount be also filed in this Court within the said period of time. We have put to Deputy Advocate General to caution that for any successive matters of this kind the costs will keep on going up."

61. Also, it must be remembered that merely because sufficient cause has been made out in the facts of a given case, there is no right in the appellant to have delay condoned. This was felicitously put in Ramlal v. Rewa Coalfields Ltd., (1962) 2 SCR 762 as follows:

"It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by s. 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the Court may regard as relevant. It cannot justify an enquiry as to why the party was sitting idle during all the time available to it. In this connection we may point out that considerations of bona fides or due diligence are always material and relevant when the Court is dealing with applications made under s. 14 of the Limitation Act. In dealing with such applications the Court is called upon to consider the effect of the combined provisions of ss. 5 and 14. Therefore, in our opinion, considerations which have been expressly made material and relevant by the provisions of s. 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only under s. 5 without reference to s. 14."

(emphasis supplied)

9. A reference may also be made to judgment of the Apex Court rendered in the case of **State of Odisha vs. Sunanda Mahakud,**

2021 SCC online SC 384, wherein the Apex Court has held has under:

3. "There is no doubt that these are cases including the present one where the Government machinery has acted in a inefficient manner or it is a deliberate endeavour. In either of the two situations, this court ought not to come to the rescue of the petitioner. No doubt, some leeway is given for Government inefficiency but with the technological advancement now the judicial view prevalent earlier when such facilities were not available has been over taken by the elucidation of the legal principles in the judgment of this Court in the Office of the Chief Post Master General & Ors. v. Living Media India Ltd. & Anr. - (2012) 3 SCC 563. We have discussed these aspects in SLP [C] Diary No.9217/2020, State of Madhya Pradesh v. Bheru Lal decided on 15.10.2020 and thus, see no reason to repeat the same again.

4. In the present case, the State Government has not even taken the trouble of citing any reason or excuse nor any dates given in respect of the period for which condonation is sought. The objective of such an exercise has also been elucidated by us in the aforesaid judgment where we have categorized such cases as "certificate cases".

5. The object of such cases appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say nothing could done because the highest Court has dismissed the appeal. It is mere completion of formality to give a quietus to the litigation and save the skin of the officers who may be at fault by not taking action in prescribed time. If the state government feels that they have suffered losses, then it must fix responsibility on concerned officers for their inaction but that ironically never happens. These matters are preferred on a presumption as if this Court will condone the delay in every case, if the State Government is able to say something on merits. Looking to the period of delay and the casual manner in which the application has been worded, we consider appropriate impose costs of Rs.25,000/- to be deposited with the Supreme Court Advocates On Record Welfare Fund. The amount be deposited in four weeks. The amount be recovered from the officers responsible for the delay in filing both the Writ Appeal and the Special Leave Petition and a certificate of recovery be also filed in this Court within the same period of time.

6. The Special Leave Petition(s) is/are dismissed as time barred in terms aforesaid"

(emphasis supplied)

10. Regard may also be made to a recent judgment of the Apex Court dated 04.02.2021, whereby the Apex Court has dismissed the **Special Leave Petition (Civil) Diary No(s). 19846/2020, Union of India v. Central Tibetan Schools Admin**, which was preferred with the delay of 532 days from the date of rejection of restoration application and 6616 days from the date of original order.

11. Reference may be made to a division bench judgment of this Court rendered in the case of **State of U.P. v. Khushnoor Khan, 2021 SCC Online All 164**, wherein this Court in paragraph nos. 12, 13, 14, 17 and 20 held has under :

12. Hon'ble Supreme Court time and again has not only expressed words of caution in respect of casual manner in which the State Authorities approach the Courts without any plausible ground for condonation of delay but has even counselled the State Authorities in this regard. Regard may be had at this juncture to the latest pronouncement made by Hon'ble Supreme Court on 04.02.2021 while dismissing the Special Leave Petition (Civil) Diary No(s). 19846/2020, Union of India v. Central Tibetan Schools Admin. The Hon'ble Supreme Court

dismissed the Special Leave Petition, which was preferred with the delay of 532 days from the date of rejection of restoration application and 6616 days from the date of original order and made certain observations are quoted below:

"We have heard learned Additional Solicitor General for some time and must note that the only error which seems to have occurred in the impugned order is of noticing that it is not an illiterate litigant because the manner in which the Government is prosecuting its appeal reflects nothing better! The mighty Government of India is manned with large legal department having numerous officers and Advocates. The excuse given for the delay is, to say the least, preposterous. We have repeatedly being counselling through our orders various Government departments, State Governments and other public authorities that they must learn to file appeals in time and set their house in order so far as the legal department is concerned, more so as technology assists them. This appears to be falling on deaf ears despite costs having been imposed in number of matters with the direction to recover it from the officers responsible for the delay as we are of the view that these officers must be made accountable. It has not had any salutary effect and that the present matter should have been brought up, really takes the cake!"

13. In the case of Central Tibetan Schools Admin (supra) while observing that the appellant therein had approached the Court in casual manner without any cogent ground for condonation of delay, Hon'ble Supreme Court has referred to the cases of Office of the Chief Post Master General v. Living Media India Ltd., reported in [(2012) 3 SCC 563] and also the case of Balwant Singh (Dead) v. Jagdish Singh, reported in [(2010) 8 SCC 685 : AIR 2010 SC 3043]. Relevant extract of the said judgment in the case of Central Tibetan Schools Admin (supra) runs as under:

"In this behalf, suffice to refer to our judgment in the State of Madhya Pradesh v. Bheru Lal [SLP [C] Diary No. 9217/2020 decided on 15.10.2020] and The State of Odisha v. Sunanda Mahakuda [SLP [C] Diary No. 22605/2020 decided on 11.01.2021]. The leeway which was given to the Government/public authorities on account of innate inefficiencies was the result of certain orders of this Court which came at a time when technology had not advanced and thus, greater indulgence was shown. This position is no more prevalent and the current legal position has been elucidated by the judgment of this Court in Office of the Chief Post Master General v. Living Media India Ltd. - (2012) 3 SCC 563. Despite this, there seems to be a little change in the approach of the Government and public authorities.

14. In the case of Living Media India Ltd. (supra) Hon'ble Supreme Court noticed the advancement in modern technology and observed that the claim of seeking condonation of delay on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. In the said case, it was further observed by Hon'ble Apex Court that all the government bodies, their agencies and instrumentalities need to be informed that unless they have reasonable and acceptable explanation for delay, there is no need to accept usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process.

17. When we examine the explanation of delay of 1730 days in filing the review petition from the date of judgment dated 19.04.2016 which has been sought to be reviewed and delay of 1335 days from the date of dismissal of Special Leave Petition on 05.07.2017, what we find is that the State has once again sought shelter in usual slow pace of State machinery in preparation of office notes, movement of files, non-availability of certain necessary information, non-availability of concerned

officials/officers etc. The said explanation cannot be said to be sufficient in view of the law laid down by Hon'ble Apex Court in the case of Living Media India Ltd. (supra). The State while seeking condonation of delay in this case has gone even to the extent of taking ground of certain "unavoidable" and "unspoken" circumstances. In our considered opinion such "unavoidable" and "unspoken" circumstances cannot be taken shelter of to claim condonation of delay in approaching the Courts. In fact the course adopted by the State in preferring the review petition reflects gross negligence and inaction which in our considered opinion cannot be said to be bona fide. We are aware that a liberal view needs to be adopted by the Courts to advance substantial justice. However, in the facts and circumstances of this case, what we find is that the approach of the State all along has been casual and that of manifest negligence. As observed by Hon'ble Apex Court in the case of Living Media India Ltd. (supra), law of limitation binds every one including the Government.

20. In the light of the discussions made above, the review petition fails and is hereby dismissed on the ground of delay."

(emphasis supplied)

12. It may further be mentioned that High Court of Madhya Pradesh in the case of **State of M.P. v. Ramprakash Tyagi**, MANU/MP/0566/2021 while relying upon the judgment of the Apex Court in Bheru Lal (supra) refused to condone the delay of 967 days. Same view was taken by High Court of Jammu & Kashmir in the case of **JK Economic Reconstruction Agency v. Kamal Builders**, MANU/JK/0252/2021.

13. Coming back to the explanation submitted for such huge latches, a perusal of the quoted paragraphs of the petition clearly indicate that apart from whatever has been stated, annexure no. 3 to the petition is a letter dated 26.9.2017 written by the District Magistrate Etawah to the State authority. Next letters are dated 16.7.2020 reminder written by District Magistrate, Etawah to Assistant Commissioner, Stamps, Etawah and letter dated 20.7.2020 written by Assistant Commissioner, Stamp to Commissioner, Stamp, U.P. (annexure no. 4 to the petition). It is, therefore, clear that for almost two years and ten months the matter was not at all pursued, even if, for the sake of arguments, the other explanation regarding so called 'procedural delay' is accepted, the explanation so submitted before this Court to explain such huge lathces, is not acceptable.

14. In view of the discussion made herein above, I find that the latches have not been sufficiently explained. The writ petition accordingly stands dismissed on the ground of latches.

15. Registrar General of this Court as well as learned Standing Counsel are directed to send a copy of the order to the Chief Secretary, Government of Uttar Pradesh for necessary action against the persons responsible for such delay and for issuing a word of caution to the authority concerned to remain cautious in future.

(2021)12ILR A464
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 16753 of 2010

M/s Magma Leasing Ltd. ...Petitioner
Versus
Badri Vishal & Ors. ...Respondents

Counsel for the Petitioner:
Sri C.K. Parekh, Sri Kumar Ankit Srivastava

Counsel for the Respondents:
S.C., Sri Prakash Dwivedi

A. Constitution of India – Article 226 & 227 – Writ – Maintainability – Certiorari – Scope – Order passed during the course of enforcement of arbitral award under Arbitration and Conciliation Act, 1996 – Nature – Proper remedy against it – Held, the expression 'inferior court' is not referable to judicial courts and accordingly judicial orders of civil courts are not amenable to a writ of certiorari under Article 226 and a writ of mandamus does not lie against a private person not discharging any public duty – Judicial orders of civil court would not be amenable to writ jurisdiction under Article 226 and that challenge thereagainst can be raised under Article 227. (Para 24 and 25)

B. Civil Law - Civil Procedure Code – Order XXI – Arbitration and Conciliation Act, 1996 – S. 36 – Enforcement of an award passed u/s 36 of the Act, 1996 – Nature – Held, the enforcement of an award having been provided for as per terms of Section 36 to be in the same manner, as if, it were a decree of the court, the provisions of the CPC would be applicable to execution proceedings – The court enforcing the award would be a civil court exercising judicial powers and the orders to be passed in these proceedings would be judicial orders. (Para 16)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Leela Hotels Ltd. Vs Housing and Urban Development Corporation Limited; (2012) 1 SCC 302

2. Paramjeet Singh Patheja Vs ICDS Ltd.; (2006) 13 SCC 322

3. Radhey Shyam Vs Chhabi Nath; (2015) 5 SCC 423

4. Radhey Shyam & anr. Vs Chhabi Nath & ors.; (2009) 5 SCC 616

5. Sohan Lal Vs U.O.I.; AIR 1957 SC 529

6. Mohd. Hanif Vs St. of Assam; (1969) 2 SCC 782

7. Hindustan Steel Ltd. Vs Kalyani Banerjee; (1973) 1 SCC 273

8. Naresh Shridhar Mirajkar Vs St. of Mah.; AIR 1967 SC 1

9. Surya Dev Rai Vs Ram Chander Rai; (2003) 6 SCC 675

10. Kemp Vs Balne; (1844) 1 Dow & L 885

11. Rex Vs Chancellor of St. Edmundsbury & Ipswich Diocese, Ex Parte White; (1948) 1 KB 195

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

1. Heard Sri C.K. Parekh, learned Senior Counsel assisted by Sri Kumar Ankit Srivastava, learned counsel for the petitioner, and Sri Amit Manohar, learned Additional Chief Standing Counsel.

2. The present petition filed under Article 226 of the Constitution of India principally seeks a writ of certiorari for quashing of the order dated 01.02.2010 passed by the Special Judge, SC/ST Act, Mirzapur in Misc. Case No. 103 of 2008 arising out of Execution Case No. 02 of 2006 (M/s Magma Leasing Limited Vs. Badri Vishal and others.

3. Pleadings of the case indicate that an award dated 30.12.2005 was passed in favour of the petitioner and for enforcement of the said award, an application under Section 36 of the Arbitration and Conciliation Act, 1996 was moved. The aforesaid application came to be dismissed by the Special Judge, SC/ST Act, Mirzapur on 23.02.2008 due to non-appearance on behalf of the applicant. An application for restoration was moved which was also rejected on 01.02.2010 on the ground of being barred by limitation. It is at this stage that the present writ petition was filed.

4. A point at issue, raised at the threshold, is as to whether an order passed by the executing court during the course of enforcement of an arbitral award would be amenable to a writ of

certiorari under Article 226 of the Constitution of India.

5. In order to appreciate the controversy, the relevant provisions under the Arbitration and Conciliation Act, 19961, would be required to be adverted to.

6. The Act, 1996 (Act 26 of 1996) was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation. The Act which is based on the UNCITRAL Model Law on International Commercial Arbitration, as adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL) applies to both international as well as to domestic arbitration.

7. The procedure for enforcement of arbitral awards under the Act, 1996 is provided for under Chapter VIII of the said Act. The relevant provisions for the purpose, as contained under Section 36 of the Act, 1996 are as follows:

"36. Enforcement.--(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908)."

8. In terms of sub-section (1) of Section 36 where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

9. It may be worthwhile to notice that under the preceding Act of 1940 (Arbitration Act, 1940), an award had to be filed in the court for making it rule of the court. Objections from the parties were invited, and only when no objection was filed or was sustainable could the court pass a judgement in terms of the award and it was then converted into a decree for enforcement.

10. Under the Act 1996, the aforesaid procedure has been substituted by a simpler procedure of giving affect to the award as a decree. In terms of Section 36 of the Act, 1996, when the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), the award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 19082, in the same manner as if it were a decree of the court.

11. It would, therefore, be seen that the enforcement of an arbitral award under the 1996

Act, is to be made as per the terms of Section 36 and, unlike the 1940 Act, there is no requirement of filing an application to make the award a rule of the court. Under the scheme of the 1996 Act, it would not be possible to resist the enforcement of an award by contending that the award has not been converted into a decree for the reason that the award has now to be enforced as per the procedure under the CPC in the same manner as if it were a court decree.

12. The question as to whether the award of the arbitrator under the 1996 Act tantamounts to a decree or not was considered in **Leela Hotels Limited vs. Housing and Urban Development Corporation Limited**3, and it was held that the language used in Section 36 makes it clear that such an award has to be enforced under the CPC, in the same manner as if it were a decree of the court. It was observed that the language of the section leaves no room for doubt as to the manner in which the award of the arbitrator was to be accepted.

13. Section 36 of the 1996 Act makes the arbitral award capable of being enforced in a like manner as a decree without any further judicial intervention. The words "as if" occurring in sub-section (1) has been held to create legal fiction for the purpose of enforcement of the award treating the same to be a decree of the court. The aforesaid view was taken in **Paramjeet Singh Patheja Vs. ICDS Ltd.4.**

14. The provision for enforcement of an award, as per terms of Section 36, having been provided for in the same manner as if it were a decree of the court, it would follow that the court enforcing the award would exercise powers under the CPC which are available to a court executing a decree. This power would not be limited or trammelled by any other provision of the Act, 1996.

15. It would be relevant to notice that the CPC contains elaborate and exhaustive provisions for dealing with the execution of a decree in all its aspects. The numerous rules under Order 21 of the CPC take care of different situations providing effective remedies not only to judgement-debtors and decree-holders but also to claimant-objectors, as the case may be. As per the settled legal position, all questions relating to execution of a decree are to be determined only by the executing court. Section 47 of the CPC mandates that it is the executing court alone which is to determine all questions relating to execution, discharge or satisfaction of the decree - exclusive jurisdiction having been conferred on the executing court in respect of all such matters.

16. Execution is the enforcement of a decree by a judicial process which enables the decree-holder to realise the fruits of the decree in his favour. The enforcement of an award having been provided for as per terms of Section 36 to be in the same manner, as if, it were a decree of the court, the provisions of the CPC would be applicable to execution proceedings. The court enforcing the award would be a civil court exercising judicial powers and the orders to be passed in these proceedings would be judicial orders.

17. The question as to whether judicial orders of a civil court would be amenable to writ jurisdiction under Article 226 came up for consideration in the case of **Radhey Shyam vs. Chhabi Nath**5, upon a reference made by a two-Judge Bench of the Supreme Court in terms of an order dated April 15, 2009 in **Radhey Shyam and Another vs. Chhabi Nath and Others**6.

18. The two-Judge Bench in the case of **Radhey Shyam (supra)** took notice of an earlier Constitution Bench decision in the case of Sohan Lal vs. Union of India7, wherein it was held that a writ of mandamus or an order in the nature of mandamus is not to be made against a private individual and also a subsequent three-Judge Bench decision in **Mohd. Hanif vs. State of**

Assam8, expressing the general principle that the jurisdiction of the High Court under Article 226 is extraordinary in nature and is not to be exercised for the purpose of declaring private rights of the parties. Reference was also made to the decision in Hindustan Steel Ltd. vs. Kalyani Banerjee9, wherein it was held that proceedings by way of writ were not appropriate in a case where the decision of the court would amount to a decree declaring a party's title and ordering restoration of possession.

19. The law laid down in the nine-Judge Constitution Bench in the case of **Naresh Shridhar Mirajkar vs. State of Maharashtra**10, was also referred, wherein after considering the history of writ of certiorari and various English and Indian decisions, a conclusion was drawn that "certiorari does not lie to quash the judgements of inferior courts of civil jurisdiction". The decision in the case of Naresh Shridhar Mirajkar was also seen to have drawn a distinction between judicial orders of inferior courts of civil jurisdiction and orders of inferior tribunals or courts which are not civil courts and which cannot pass judicial orders.

20. Expressing inability to agree with the legal proposition laid down by a two-Judge Bench in the earlier decision in the case of **Surya Dev Rai vs. Ram Chander Rai**11, to the effect that judicial orders passed by civil courts can be examined and then corrected/reversed by the writ court under Article 226 in exercise of its power under a writ of certiorari, the two-Judge Bench in the case of **Radhey Shyam (supra)** made a reference by observing as follows:

"26. The two-Judge Bench in Surya Dev Rai did not, as obviously it could not overrule the ratio in Mirajkar, a Constitution Bench decision of a nine-Judge Bench. But the learned Judges justified their different view in Surya Dev Rai, inter alia on the ground that the law relating to certiorari changed both in England and in India. In support of that opinion, the learned Judges held that the statement of law in Halsbury, on which the ratio in Mirajkar is based, has been changed and in support of that quoted paras 103 and 109 from Halsbury's Laws of England, 4th Edn. (Reissue), Vol. 1(1). Those paras are set out below:

"103. The prerogative remedies of certiorari, prohibition and mandamus: historical development.--Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts; certiorari was issued to bring the record of an inferior court into the King's Bench for review or to remove indictments for trial in that court; mandamus was directed to inferior courts and tribunals, and to public officers and bodies, to order the performance of a public duty. All three were called prerogative writs; ...

* * *

109. The nature of certiorari and prohibition.--Certiorari lies to bring decisions of an inferior court, tribunal, public authority or any other body of persons before the High Court for review so that the court may determine whether they should be quashed, or to quash such decisions. The order of prohibition is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority which forbids that court or tribunal or authority to act in excess of its jurisdiction or contrary to law. Both certiorari and prohibition are employed for the control of inferior courts, tribunals and public authorities."

The aforesaid paragraphs are based on general principles which are older than the time when Mirajkar was decided are still good. Those principles nowhere indicate that judgments of an inferior civil court of plenary jurisdiction are amenable to correction by a writ of certiorari. In any event, change of law in England cannot dilute the binding nature of the ratio in Mirajkar

and which has not been overruled and is holding the field for decades.

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

30. ... this Court unfortunately is in disagreement with the view which has been expressed in Surya Dev Rai insofar as correction of or any interference with judicial orders of civil court by a writ of certiorari is concerned.

31. Under Article 227 of the Constitution, the High Court does not issue a writ of certiorari. Article 227 of the Constitution vests the High Courts with a power of superintendence which is to be very sparingly exercised to keep tribunals and courts within the bounds of their authority. Under Article 227, orders of both civil and criminal courts can be examined only in very exceptional cases when manifest miscarriage of justice has been occasioned. Such power, however, is not to be exercised to correct a mistake of fact and of law.

32. The essential distinctions in the exercise of power between Articles 226 and 227 are well known and pointed out in Surya Dev Rai and with that we have no disagreement. But we are unable to agree with the legal proposition laid down in Surya Dev Rai that judicial orders passed by a civil court can be examined and then corrected/reversed by the writ court under Article 226 in exercise of its power under a writ of certiorari. We are of the view that the aforesaid proposition laid down in Surya Dev Rai, is contrary to the ratio in Mirajkar and the ratio in Mirajkar has not been overruled in Rupa Ashok Hurra v. Ashok Hurra12.

33. In view of our difference of opinion with the views expressed in Surya Dev Rai, matter may be placed before His Lordship the Hon'ble the Chief Justice of India for constituting a larger Bench, to consider the correctness or otherwise of the law laid down in Surya Dev Rai on the question discussed above."

21. Upon the reference having been made the question which was considered by the three-Judge Bench in the case of **Radhey Shyam vs. Chhabi Nath**5, was stated as follows :-

"**5**. Thus, the question to be decided is: whether the view taken in Surya Dev Rai, that a writ lies under Article 226 of the Constitution against the order of the civil court, which has been doubted in the reference order, is the correct view?"

22. The decision of the three-Judge Bench in the case of **Radhey Shyam (supra)** took notice of the nine-Judge Constitution Bench judgement in the case of **Naresh Shridhar Mirajkar**, wherein a judicial order of the High Court was challenged as being violative of fundamental rights and the court by majority held that a judicial order of a competent court could not violate a fundamental right, and even if, there was incidental violation it could not be held to be violative of the fundamental right. The following observations were made (Mirajkar case10, AIR p. 11, para 38):

"38. The argument that the impugned order affects the fundamental rights of the petitioners under Article 19(1), is based on a complete misconception about the true nature and character of judicial process and of judicial decisions. When a Judge deals with matters brought before him for his adjudication, he first decides questions of fact on which the parties are at issue, and then applies the relevant law to

the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the appellate court. But it is singularly inappropriate to assume that a judicial decision pronounced by a Judge of competent jurisdiction in or in relation to a matter brought before him for adjudication can affect the fundamental rights of the citizens under Article 19(1). What the judicial decision purports to do is to decide the controversy between the parties brought before the court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by court in or in relation to a matter brought before it for its decision cannot be said to affect the fundamental rights of citizens under Article 19(1)."

23. Referring to **Halsbury's Laws of England, 3rd Edition, Vol. 11** and also the observations made in **Kemp vs. Balne**13 and by Wrottesley, L.J. in **Rex vs. Chancellor of St. Edmundsbury and Ipswich Diocese, Ex Parte White**14, it was observed as follows (***Mirajkar*** case10, AIR p.18-19, paras 63-64):

"63. Whilst we are dealing with this aspect of the matter, we may incidentally refer to the relevant observations made by Halsbury on this point. "In the case of judgments of inferior courts of civil jurisdiction", says Halsbury in the footnote,

"it has been suggested that certiorari might be granted to quash them for want of jurisdiction (Kemp v. Balne, Dow & L at p. 887), inasmuch as an error did not lie upon that ground. But there appears to be no reported case in which the judgment of an inferior Court of civil jurisdiction has been quashed on certiorari, either for want of jurisdiction or on any other ground"15.

The ultimate proposition is set out in the terms: "Certiorari does not lie to quash the judgments of inferior courts of civil jurisdiction". These observations would indicate that in England the judicial orders passed by civil courts of plenary jurisdiction in or in relation to matters brought before them are not held to be amenable to the jurisdiction to issue writs of certiorari.

64. In Rex v. Chancellor of St. Edmundsbury and Ipswich Diocese, Ex parte White, the question which arose was whether certiorari would lie from the Court of King's Bench to an ecclesiastical court; and the answer rendered by the court was that certiorari would not lie against the decision of an ecclesiastical court. In dealing with this question, Wrottesley, L.J. has elaborately considered the history of the writ jurisdiction and has dealt with the question about the meaning of the word "inferior' as applied to courts of law in England in discussing the problem as to the issue of the writ in regard to decisions of certain courts. "The more this matter was investigated", says Wrottesley, L.J.,

"the clearer it became that the word "inferior" as applied to courts of law in England had been used with at least two very different meanings. If, as some assert, the question of inferiority is determined by ascertaining whether the court in question can be stopped from exceeding its jurisdiction by a writ of prohibition issuing from the King's Bench, then not only the ecclesiastical courts, but also palatine courts and admiralty courts are inferior courts. But there is another test, well recognised by lawyers, by which to distinguish a superior from an inferior court, namely, whether in its proceedings, and in particular in its judgments, it must appear that the court was acting within its jurisdiction. This is the characteristic of an inferior court, whereas in the proceedings of a superior court it will be presumed that it acted within its jurisdiction unless the contrary should appear either on the face of the proceedings or aliunde".

Mr Sen relied upon this decision to show that even the High Court of Bombay can be said to be an inferior court for the purpose of exercising jurisdiction by this Court under Article 32(2) to issue a writ of certiorari in respect of the impugned order passed by it. We are unable to see how this decision can support Mr Sen's contentions."

24. The three-Judge Bench in the case of **Radhey Shyam (supra)**, extensively referring to the legal position on the scope of writ of certiorari concluded that orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts. It held that the expression "inferior court" is not referable to judicial courts and accordingly judicial orders of civil courts are not amenable to a writ of certiorari under Article 226 and a writ of mandamus does not lie against a private person not discharging any public duty. It was also held that the scope of Article 227 is different from Article 226. It was observed as follows:

"25. ... Courts are set up under the Constitution or the laws. All the courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all the High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of tribunals or authorities or courts other than judicial courts. There are no precedents in India for the High Courts to issue writs to the subordinate courts. Control of working of the subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of the civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by the statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to the judicial courts, ...

27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

29. Accordingly, we answer the question referred as follows:

29.1. Judicial orders of the civil court are not amenable to writ jurisdiction under Article 226 of the Constitution.

29.2. Jurisdiction under Article 227 is distinct from jurisdiction under Article 226.

29.3. Contrary view in Surya Dev Rai, is overruled."

25. Having regard to the foregoing discussion the legal position which thus emerges is that judicial orders of civil court would not be amenable to writ jurisdiction under Article 226 and that challenge thereagainst can be raised under Article 227.

26. Applying the aforestated legal principles to the facts of the present case, an order passed by the executing court in proceedings for enforcement of an arbitral award under Section 36 of the Act 1996, being a judicial order passed by a civil court of plenary jurisdiction, the same would not be amenable to a writ of certiorari under Article 226 of the Constitution of India.

26. Learned Senior Counsel appearing for the petitioner has not disputed the aforesaid legal position.

27. The petition thus fails the test of being amenable to the writ jurisdiction under Article

226 of the Constitution of India. It stands **dismissed** accordingly.

(2021)12ILR A472
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2021

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-C No. 18519 of 2021

Pushpa Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Pandey

Counsel for the Respondents:
C.S.C., Sri Bhupendra Kumar Tripathi

A. Fair price shop – Allotment – Widowed daughter-in-law – Entitlement – GO dated 05.08.2019 excluded daughter-in-law, widowed or not, from the definition of 'family' – Validity challenged – Word 'family' defined – Held, daughter-in-law, widowed or not, is having better right than daughter, who is included in the definition of 'family' in Paragraph IV(10) of the Government Order dated 05.08.2019 – High Court modified the GO dated 05.08.2019 to the extent to include daughter-in-law, widowed or not, within the definition of 'family' and issued writ of mandamus for issuance of fresh GO at the earlieSt. (Para 10, 11, 12 and 13)

Writ petition allowed. (E-1)

Cases relied on :-

1. U.P. Power Corporation Ltd. Vs Smt. Urmila Devi; 2011(3) ADJ 432 (FB).

2. Smt. Sudha Jain Vs St. of U.P. & ors.; 2011(5) ADJ 730

3. Smt. Geeta Srivastava Vs St. of U.P. & ors.; 2012(9) ADJ 1

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

1. Heard learned counsel for the petitioner, Sri D.K. Tiwari, learned Additional Chief Standing Counsel for the State-respondents.

2. By way of present petition, petitioner is challenging the order dated 17.06.2021 passed by respondent no. 3 contained as Annexure no. 1 to the writ petition, rejecting the application of the petitioner for allotment of fair price shop and also Government Order dated 05.08.2019 issued by the Special Secretary, Government of U.P., Lucknow contained as Annexure no. 8 to the writ petition.

3. Learned counsel for the petitioner submitted that petitioner is widowed daughter-in-law of late Mahadei Devi, who was earlier allotted fair price shop. He further submitted that husband of the petitioner namely Bablu died in a road accident leaving behind the petitioner as well as two daughters aged about 11 years and 6 years. Petitioner and her daughters are fully dependent upon late Mahadei Devi, earlier fair price shop holder, who died on 11.04.2021. Succession certificate was also issued by Gram Pradhan on 30.06.2021 mentioning therein that petitioner is legal heir of late Mahadei Devi wife of late Killu Yadav. She is Intermediate passed and is eligible for allotment of fair price shop. He next submitted that after death of mother-in-law, there is no other male or female member for compassionate allotment under succession. Therefore, being legal heir (daughter-in-law, widowed), petitioner submitted an application dated 06.05.2021 for allotment of fair price shop in place of late Mahadei Devi. The said application of the petitioner was rejected by respondent no. 3 vide order dated 17.06.2021 only on the ground that widowed daughter-in-law does not come within the purview of 'family' as defined in Paragraph IV(10) of the Government Order dated 05.08.2019. He next submitted that Paragraph IV(10) of the said

Government Order includes unmarried, legally separated and widowed daughter, but excludes daughter-in-law, widowed or not, without any reason.

4. In support of his contention, learned counsel for the petitioner has placed reliance upon a Full Bench judgment of this Court in the case of ***U.P. Power Corporation Ltd. Vs. Smt. Urmila Devi*** passed in ***Special Appeal No. 1026 of 2003 decided on 27.01.2011*** reported as ***2011(3) ADJ 432 (FB).*** In case of appointment under the Dying in harness, matter with regard to consideration of widowed daughter-in-law has been referred before the Full Bench in which, it has been held that widowed daughter-in-law is having better right than daughter. Ratio of law given in this case shall also be applicable in the present case, where widowed daughter-in-law has been excluded for consideration as it was not defined within 'family' in the Government Order dated 05.08.2019. He next submitted that under such facts of the case and law laid down by this Court in the aforesaid judgment, paragraph IV (10) of Government Order dated 05.08.2019 may be modified by including daughter-in-law, widowed or not, within the definition of 'family'.

5. He further submitted that following the Full Bench judgment in the case of ***U.P. Power Corporation Ltd. (supra),*** this Court in the matters of ***Smt. Sudha Jain Vs. State of U.P. and others, 2011(5) ADJ 730 and Smt. Geeta Srivastava Vs. State of U.P. and others, 2012(9) ADJ 1*** has taken same view and direction has been issued to include daughter-in-law within the definition of 'family' for the purpose of appointment.

6. Dr. D. K. Tiwari, learned Additional Chief Standing Counsel opposed the submissions made by learned counsel for the petitioner and submitted that in light of the Government Order dated 05.08.2019, application of the petitioner has rightly been rejected, but could not dispute the factual and legal submissions made by learned counsel for the petitioner and law laid down by Full Bench of this Court in the matter of appointment of widowed daughter-in-law on compassionate ground.

7. I have considered the rival submissions made by learned counsel for the parties, perused the record and judgments relied upon by the counsel for petitioner. The facts of the case are undisputed. The licence of fair price shop of the petitioner was rejected only on the ground that widowed daughter-in-law does not come within the purview of 'family' as defined in paragraph IV(10) of the Government Order dated 05.08.2019. Except this, no other ground has been taken. Paragraph IV(10) of the said Government Order is quoted below:-

"(IV) ग्रामीण क्षेत्र में राशन की दुकानों के चयन हेतु अनिवार्य अर्हताएं एवं शर्तेः-

(1) अभ्यर्थी के खाते में कम से कम रू० 40000/- उपलब्ध हों, ताकि वह अपनी दुकान हेतु आवंटित एक माह की सामग्री का एक बार में उठान करने के लिए आर्थिक रूप से सक्षम हो।

(2) अभ्यर्थी द्वारा अपने आवेदन के साथ जिलाधिकारी द्वारा निर्गत चरित्र प्रमाण पत्र भी प्रस्तुत किया जायेगा।

(3) उसकी शैक्षिक योग्यता कम से कम हाई स्कूल अथवा उसके समकक्ष परीक्षा उत्तीर्ण हो।

(4) अभ्यर्थी की आयु 21 वर्ष से अधिक हो और परिवार में किसी अन्य सदस्य के नाम कोई उचित दर दुकान आवंटित न हो।

(5) अभ्यर्थी स्थानीय निवासी हो।

(6) अभ्यर्थी द्वारा रूपये 1000/- की अर्नेस्ट मनी का बैंक ड्राफ्ट जिला पूर्ति अधिकारी के पक्ष में जमा किया जायेगा। उक्त अर्नेस्ट मनी उचित दर दुकान के आवंटन की स्थिति में प्रतिभूति राशि में समायोजित कर ली जायेगी।

(7) उचित दर दुकान की नियुक्ति की स्थिति में अभ्यर्थी को रूपये 10,000/- की प्रतिभूति जमा करनी होगी तथा रूपये 100/- का नान-जूडिशियल स्टाम्प पेपर लगाना होगा। यह प्रतिभूति नये नियुक्त होने वाले दुकान के अभ्यर्थियों से ली जायेगी, जिनकी दुकान पूर्व से ही नियुक्त

है और संचालित है, उनसे नये दर पर प्रतिभूति जमा करवायी जायेगी।

(8) अभ्यर्थी के विरुध्द कोई भी आपराधिक मामले पंजीकृत न हो औ न ही वह किसी आपराधिक मामले में दण्डित किया गया हो।

(9) अभ्यर्थी अथवा उसके परिवार के किसी सदस्य के नाम पूर्व में आवंटित उचित दर दुकान अनियमितता के कारण निरस्त न हुई हो और उसके विरुध्द आवश्यक वस्तु अधिनियम-1955 की धारा 3/7 के अन्तर्गत अथवा आपराधिक दण्ड संहिता के अन्तर्गत कारित किसी जघन्य अपराध में विधिक कार्यवाही न हुई हो।

(10) ग्राम प्रधान के परिवार के सदस्यों के पक्ष में उचित दर की दुकान के आवंटन का प्रस्ताव नहीं किया जायेगा । परिवार की परिभाषा, जैसा कि उ०प्र० आवश्यक वस्तु (वितरण के विनियमन का नियंत्रण) आदेश 2016 में दी गई है, निम्नानुसार होगीः-

परिवार का मुखिया

पति/पत्नी विधिक रूप से अपनाये गये दत्तक सन्तान सहित।

सन्तान जो परिवार के मुखिया पर पूर्ण रूप से आश्रित हो।

अविवाहित, विधिक रूप से पृथक और विधवा बेटी, और

परिवार के मुखिया पर पूर्ण रूप से आश्रित माता/पिता"

8. The issue of consideration for appointment of widowed dauther-in-law was before Full Bench of this Court in the case of ***U.P. Power Corporation Ltd. (supra),*** which clearly states that widowed daughter-in-law is having better right than the daughters as included in Government Order dated 05.08.2019. Relevant paragraph of the said judgment is quoted below:-

"We must, however, note one feature of the definition of the word 'family' as generally contained in most Rules. The definition of 'family' includes wife or husband; sons; unmarried and widowed daughters; and if the deceased was an unmarried government servant, the brother, unmarried sister and widowed mother dependant on the deceased government servant. It is, therefore, clear that a widowed daughter in the house of her parents is entitled for consideration on compassionate appointment. However, a widowed daughter-in-law in the house where she is married, is not entitled for compassionate appointment as she is not included in the definition of 'family'. It is not possible to understand how a widowed daughter in her father's house has a better right to claim appointment on compassionate basis than a widowed daughter-in-law in her father-in-law's house. The very nature of compassionate appointment is the financial need or necessity of the family. The daughter-in-law on the death of her husband does not cease to be a part of the family. The concept that such daughter-in-law must go back and stay with her parents is abhorrent to our civilized society. Such daughter-in-law must, therefore, have also right to be considered for compassionate appointment as she is part of the family where she is married and if staying with her husband's family. In this context, in our opinion, arbitrariness, as presently existing, can be avoided by including the daughter-in-law in the definition of 'family'. Otherwise, the definition to that extent, prima facie, would be irrational and arbitrary. The State, therefore, to consider this aspect and take appropriate steps so that a widowed daughter-in-law like a widowed daughter, is also entitled for consideration by way of compassionate appointment, if other criteria is satisfied.

Learned Chief Standing Counsel to forward a copy of this order to the Secretary of the concerned Department in the State Government for appropriate consideration."

9. This ratio of law has been followed by this Court in the cases of ***Smt. Sudha Jain and Smt. Geeta Srivastava (supra).***

10. In the present case, after death of late Mahadei Devi, out of three family members, who are dependants (widowed daughter-in-law and two minor daughters), only petitioner is

major in the age to submit application for allotment of fair price shop under succession after death of her mother-in-law. She had applied for the same, but rejected only on the ground that widowed daughter-in-law is not covered within the 'family'. Ratio of law given in Full Bench in the case of appointment is fully applicable in the present case also and daughter-in-law, widowed or not, is having better right than daughter, who is included in the definition of 'family' in Paragraph IV(10) of the Government Order dated 05.08.2019.

11. Therefore, under such facts of the case and legal proposition, I find no good reason to sustain the impugned order dated 17.06.2021 as well as Paragraph IV(10) of Government Order dated 05.08.2019 so far as it excludes daughter-in-law, widowed or not, within the definition of 'family'.

12. Accordingly, the writ petition is **allowed.** Let a writ of certiorari be issued quashing the impugned order dated 17.06.2021 passed by respondent no. 3 and modifying the Paragraph IV(10) of the Govrnment Order dated 05.08.2019 to the extent to include daughter-in-law, widowed or not, within the definition of 'family'. A writ of mandamus be issued directing the respondent no. 1 Secretary, Food and Civil Supplies, Government of U.P., Lucknow to issue fresh Government Order or modification in Government Order dated 05.08.2019 including daughter-in-law, widowed or not, within the definition of 'family' .

13. Learned Chief Standing Counsel is directed to send a copy of this order to respondent no. 1 Secretary, Food and Civil Supplies, Government of U.P., Lucknow for issuance of fresh/modified Government Order at the earliest, maximum within a period of four weeks from the date of receiving of copy of this order. In case Department of Food and Civil Supplies is having posting of Additional Chief Secretary or Principal Secretary, they are responsible to ensure the compliance of this order for issuance of fresh Government Order or modification in the Government Order dated 05.08.2019.

14. Petitioner is also given liberty to serve the certified copy of this order before the respondent no. 1, Secretary, Food and Civil Supplies, Government of U.P., Lucknow for compliance.

15. Thereafrter, the respondent no. 3 is directed to reconsider the application of the petitioner afresh and pass appropriate order in accordance with fresh/modified Government Order within two weeks thereafter.

(2021)12ILR A475
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 22746 of 2021

Shiva Kant ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ram Awtar, Mahabir Yadav

Counsel for the Respondents:
C.S.C., Azad Rai

A. UP Zamindari Abolition & Land Reform Act, 1950 – Section 161 – UPZA & LR Rules, 1952 – Rules 144 &146 – Exchange of private land with land of Gaon Sabha – Permissibility – No notice of any resolution of Gaon Sabha in the impugned order – Effect – Held, experience shows that Section 161 of the U.P.Z.A. & L.R. Act are often prone to abuse, lands are often exchanged under political considerations much to the detriment of the Gaon Sabha and public

interests at large – An exchange without noticing the resolution of the Gaon Sabha regarding full consent and the rational of such exchange cannot be countenanced in law – High Court issued direction to make St. of UP through District Magistrate necessary party in all disputes pertaining to the Gaon Sabha's lands. (Para 6, 10 and 22)

B. Constitution of India – Article 226 – Writ of mandamus – Scope – Mandamus is a discretionary remedy under Article 226 of the Constitution of India. Before exercising the discretion in favour of any petitioner the court may examine whether an illegal order is sought to be implemented by mandamus, or advantage is being taken of callous attitude of the land management committees or apathy of officials or collection of parties to the detriment of the St. and larger public interests in a manner contrary to law – A mandamus cannot be issued to enforce an illegal order or for an unlawful purpose. (Para 16)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Shiv Murat Vs Board of Revenue, U.P. at Allahabad; 2017 (7)ADJ 252

2. Rambali & ors. Vs St. of U.P. & ors.; (2013) 118 RD 451

3. Smt. Badi Dulaiya Vs Gaon Sabha; 1987 RD 246

4. Narain Singh Vs Gaon Sabha; 1975 ALJ(Revenue) 73

5. Gulshan Rai Vs Mitra Sen; 1994 RD 125

6. Harihar Prasad Vs Jagdish; 2001 RD 163

7. Mansukhlal Vithaldas Chauhan Vs St. of Guj.; 1997 (7) SCC 622

8. Chandrika Prasad & ors. Vs Settlement Officer Consolidation & ors.; 2009 (8) ADJ 1619

(Delivered by Hon'ble Ajay Bhanot, J.)

1. By means of this writ petition, a direction has been sought upon the respondent no.2-District Magistrate, Prayagraj, respondent No. 3-Sub-Divisional Magistrate, Tehsil Handia, District Prayagraj and respondent No. 4 Tehsildar, Tehsil Handia District Prayagraj to implement the order dated 26.06.2008 as well as order dated 16.06.2021 under Section 161 of the U.P.Z.A.&LR.Act1.

2. The writ petition out of proceedings for exchange of private land with land of Gaon Sabha taken out under Section 161 of the U.P.Z.A.&L.R. Act. The provision is extracted hereinunder:

"161. Exchange. - [(1) A bhumidhar [* * *] may exchange with-

(a) any other bhumidhar [* * *] land held by him; or

(b) any [Gaon Sabha] or local authority, lands for the time being vested in it under Section 117 [* * *] :

Provided that no exchange shall be made except with the permission of an Assistant Collector who shall refuse permission if the difference between the rental value of land given in exchange and of land received in exchange calculated at hereditary rates is more than 10 per cent of the lower rental value.

(1-A) Where the Assistant Collector permits exchange he shall also order the relevant annual registers to be corrected accordingly.

(2) On exchange made in accordance with sub-section (1) they shall have the same rights in the land so received in exchange as they had in the land given exchange."

3. The provision has to be read with Rules 144 to 146 of the U.P.Z.A.&LR. Rules, 19522 to understand its working. The Rules are extracted hereinbelow:

"**144**. An application [for permission to make an]exchange shall contain the following particulars and be accompanied by the following documents:-

(1) The khasra number of the plots-

(a) [* * *] which the applicant wishes to receive and of the plots which he offers in exchange of,

(b) [* * *]

(2) certified copies of the khataunis relating'to the khatas in which all such plots are included;

(3) [* * *]

(4) a statement showing the details of any valid deeds mortgage or other encumbrances with which the lands to be exchanged may be burdened, together with the names and addresses of lessees, mortgagees or holders of other encumbrances.

145. On receipt of an application for [permission to make an]exchange of land the Assistant Collector [shall cause to be calculated the rental value of the land proposed to be given in exchange and of the land proposed to be received in exchange at hereditary rates and] if he is satisfied that the exchange is not invalid according to the proviso to sub-section (1) of Section 161, call upon the parties, the lessees, mortgagees or holders of other encumbrances, if any, to show cause why the exchange should not be made. Every such notice shall be accompanied by a copy of the application which shall be supplied by the applicant.

146. The Assistant Collector shall thereupon decide the objections, if any, and pass suitable orders. If he decides that the exchange should be allowed, he shall also make an order for the delivery of possession, if necessary, and for the correction of papers."

4. Section 161 of the U.P.Z.A. & L.R. Act, 1950 read with Rules 144, 145 and 146 of the U.P.Z.A. & L.R. Rules, 1952 together comprise the legislative scheme for exchange of private lands with Gaon Sabha.

5. While interpreting the aforesaid provision, a learned Single Judge of this Court in **Shiv Murat Vs. Board of Revenue, U.P. at Allahabad**3, held as under:

"8. Section 161 of the Act provides for exchange. A bhumidhar may exchange with (a) any other bhumidhar land held by him or (b) land vesting in any Gaon Sabha or local authority under Section 117. The proviso to Section 161 requires prior permission of the Assistant Collector upon being satisfied that conditions of rental value of the respective land calculated at hereditary rates is not more than 10 percent of the lower rental value. On exchange being made in accordance with sub-section (1) shall confer same rights in the land received in exchange as the bhumidhar had in the land given in exchange.

9. Rule 144 requires that an application for permission to make an exchange shall contain the detail of khasra number of the plots which the applicant wishes to receive and of the plots which he offers in exchange.

Upon receiving such an application, Rule 145 requires that the Assistant Collector shall cause calculation of the rental value of the land proposed to be given in exchange and the land proposed to be received in exchange at hereditary rates and if he is satisfied that the exchange is not invalid according to the proviso to sub-section (1) of Section 161 the Assistant Collector shall call upon the parties, if any, to show-cause why the exchange should not be made. Every such notice shall be accompanied by a copy of the application. If the Assistant Collector decides that the exchange should be allowed, he shall also make an order for delivery of possession, if necessary, and for the correction of papers.

11. On plain reading of Sub-clause (i) of Section 161 and Rule 145, it is apparent that the Assistant Collector upon being satisfied with the conditions of exchange, as a consequence of the Rule he is required to call upon the parties to show-cause why the exchange should not be made and thereafter under Rule 146 the Assistant Collector is to decide the objections, if any, and pass suitable orders. It is, therefore, clear that without notice to the Gaon Sabha and

in absence of a resolution recording consent of the Land Management Committee the permission to make an exchange suo moto by the Assistant Collector on a report of the Halka Lekhpal would be void not being mandated under Section 161 of the Act.

14. Section 28B enumerates the functions of the Land Management Committee which, amongest other, is charged with the general management, preservation and control of all property referred to in Section 28-A which includes settling and management of land but does not include transfer of any property for the time being, vested in the Gram Panchayat under Section 117 of the U.P.Z.A. & L.R. Act or under any other provisions of the Act.

15. On a plain reading of the provisions of the U.P. Panchayat Raj Act, it is clear that the report or consent of the Secretary of Land Management Committee (Lekhpal) is certainly not the consent of the Gram Panchayat which is conferred the right and duty to the protection and supervision of management and up-keep of the property belonging to or vesting or held by the Gram Panchayat. Lekhpal in the capacity of a revenue officer submitting a report sought by the Assistant Collector would not reflect the consent of the Land Management Committee for the reason that the Lekhpal performs his duty in two different capacity: (i) Secretary of Land Management Committee and (ii) Officer of the revenue, therefore, the plea of the learned counsel for the petitioner that the consent of the Lekhpal would be the consent of the Gram Panchayat cannot be accepted.

16. From the conjoint reading of Section 161, as well as, the Rules relating thereto, it transpires that the legislature has extended facility upon a bhumidhar to exchange his bhumidhari land from land of another bhumidhar for their convenience upon satisfying the conditions for exchange. Such exchange cannot be valid unless permission of the Assistant Collector has been obtained. An exchange involves the transfer of property by one person to another and reciprocally the transfer of property by that other to the first person. There must be a mutual transfer of ownership of one thing for the ownership of another.

17. On the bare reading of the meaning of the word "exchange" it would transpire that it is not unilateral transaction and is mutual one and it depends on the readiness and willingness of both the parties, i.e., the party which wants to exchange and the party which accepts the exchange proposed by the other party. Therefore, I am of the considered opinion that unless both the parties agree for exchange, the Assistant Collector cannot accord permission merely at the instance of an individual seeking exchange of his land with another individual unless he is willing to exchange. The willingness of the parties to exchange their respective land is condition precedent under Section 161 of the Act. The exchange of the land is not unilateral transaction of a willing party to exchange, there must be consent of the person with whom exchange has been sought and unless there is agreement of exchange between the parties, there is no such power vested with the Assistant Collector under the statute to compel the bhumidhar to exchange land with another bhumidhar/Gaon Sabha against its will."

6. Experience shows that Section 161 of the U.P.Z.A.&L.R. Act are often prone to abuse, lands are often exchanged under political considerations much to the detriment of the Gaon Sabha and public interests at large.

7. In ***Rambali and others v. State of U.P. and others***4, this Court declined to mandamus the Assistant Collector to decide the application under Section 161 without finding due compliance of all relevant provisions comprising the scheme of exchange by holding as under:

"12....As I have noticed that the exchange of land belonging to a bhumidhar to another

bhumidhar is not unilateral transaction by a willing party to exchange, there must be consent of the person with whom exchange has been sought and unless there is an agreement of exchange between the parties, there is no such power, vested with the Assistant Collector, under the statute, to compel a bhumidhar for exchange of his land with another bhumidhar against his will. I am of the view that conferment of right of exchange of the land under Section 161 of the Act read with relevant rules as detailed is subject to convenience of both the parties to the exchange and in the eventuality the willingness of both the sides to exchange, the Section 161 imposes duty upon the Assistant Collector either to grant permission or to refuse the same if the same is not inconformity with the Section 161 of the Act and the rules 144 to 147 of the Rules."

8. Adherence to the procedure under Rules 144 to 146 of the U.P.Z.A.&L.R.Rules,1952, were held to be mandatory in **Smt. Badi Dulaiya v. Gaon Sabha**5.

9. It is noteworthy that the importance of adherence to Rule 144 to 146 was also emphasized in **Shiv Murat (supra)** by setting forth as under:

"23. Before disposing of the application for exchange, a duty is cast upon the Assistant Collector to ensure that the provisions of Rule 144 to 146 are literally followed. (Refer-Ashok Kumar v. Mahavir Singh, 1994 RD 136; State of U.P. v. M/s Techno Tower Ltd., 1986 RD 397). The proceedings for exchange are judicial proceeding and therefore, the Assistant Collector should pass complete and self contained order. Where the Assistant Collector finds that parties involved in the exchange have not consented, therefor, or if any of them has withdrawn such consent, he has no option but to reject the application. (Fakir Chand v. Naib Johra Zaidi, 1995 RD 405)." (Emphasis supplied)

10. An exchange without noticing the resolution of the Gaon Sabha regarding full consent and the rational of such exchange cannot be countenanced in law. Reference may be had in this regard to the law laid down in **Narain Singh v. Gaon Sabha**6, and **Gulshan Rai v. Mitra Sen**7.

11. The importance of a proper resolution of the Gaon Sabha and not a personal consent of the Lekhpal or Pradhan for purposes of such exchange was stated in **Harihar Prasad v. Jagdish**8.

12. The manner of application of mind by the Assistant Collector in proceedings under Section 161 U.P.Z.A.&L.R. Act was discussed by this Court in **Shiv Murat (supra**) :

"26. The disputed land of the Gaon Sabha is recorded as manure pit being a public utility land and covered under Section 132 of the Act, no right or interest of a bhumidhar can be acquired in respect thereof, in view of sub-section C (vi) of Section 132. On fulfilling the conditions of exchange the Assistant Collector is not required to mechanically recommend exchange on mere asking of the parties, in particular, Gram Panchayat Land. The Assistant Collector is duty bound to consider whether the land sought for in exchange is a public utility land; or whether the land is being exchanged for a Gram Panchayat land which is situated on the proposed four lane road, thus, having commercial value, etc."

13. In summation an order under Section 161 of the U.P.Z.A. & L.R. Act, 1950 has to be self contained and should duly reflect compliance with all relevant provisions of law as stated in judicial authorities in point discussed above.

14. In the case at hand the order dated 26.06.2008 has been passed by Sub Divisional

Officer, Handia, Allahabad approving the exchange of land in purported exercise of powers under Section 161 of the U.P.Z.A.&L.R. Act, 1950. The said order dated 26.06.2008 does not record compliance of Rules 144 to 146 of the U.P.Z.A.&L.R. Rules, 1952. Further rental value of the lands which are sought to be exchanged and the basis of calculation of such rental value has not been disclosed in the order approving the exchange. This is an imperative requirement of law. Resolution of Gaon Sabha and contents thereof have also not been noticed. The order dated 26.06.2008 is also silent on the nature and utility of lands to be exchanged. These infirmities vitiate the order dated 26.06.2008.

15. The order dated 26.06.2008 fails to carry out the mandate of Section 161 of the U.P.Z.A. & L.R. Act read with Rules 141 to 146 of the U.P.Z.A. & L.R. Rules, 1952 and contrary to the law laid down by this Court in the body of judicial precedents discussed earlier.

16. Mandamus is a discretionary remedy under Article 226 of the Constitution of India (**Ref:Mansukhlal Vithaldas Chauhan Vs State of Gujrat, 1997 (7) SCC 622)**. Before exercising the discretion in favour of any petitioner the court may examine whether an illegal order is sought to be implemented by mandamus, or advantage is being taken of callous attitude of the land management committees or apathy of officials or collection of parties to the detriment of the State and larger public interests in a manner contrary to law. A mandamus cannot be issued to enforce an illegal order or for an unlawful purpose. (Ref: **Chandrika Prasad and others Vs Settlement Officer Consolidation and others, 2009 (8) ADJ 1619**). The court in such matters can mould the relief and pass appropriate orders to ensure faithful implementation of the law and to serve the interests of justice.

17. In fact this Court does not have any hesitation to hold that the aforesaid order dated 26.06.2008 is contrary to law and cannot be executed. Though the order dated 26.06.2008 is not under challenge, the rights conferred by such order are subject matter of this writ petition. In this wake no rights flow to the petitioner from the order dated 26.06.2008. A mandamus cannot be issued to compel the implementation of the order dated 26.06.2008.

18. The preceding findings have been made on the footing of the recitals contained in the order dated 26.06.2008. No affidavit can improve the content of the order dated 26.06.2008. The order has to stand the test of legality on the basis of the recitals contained therein. The recitals in the order could not be disputed by the learned counsel for the petitioner nor by the learned Standing Counsel.

19. It is, however, open to the petitioner to seek fresh proceedings for exchange of land as per law.

20. While sitting in this jurisdiction I have noticed the callous attitude of the land management committees towards litigation in regard to the Gaon Sabha lands. In a sense Gaon Sabha lands are ultimately State lands. The State Government entrusts such lands to the Gaon Sabha. The State Government by adopting the procedure prescribed by law can also resume such lands. Higher public interest demands that the State Government should exercise vigilance over exchange of such lands by the Gaon Sabha with private lands.

21. These observations do not dilute the rights of the Gaon Sabha accruing from entrustment made by the State Government to the Gaon Sabha.

22. Considering the fact that in a large number of cases under Section 161 of the U.P.Z.A.&L.R. Act, the interests of the Gaon Sabha and the State lands are compromised, it is

directed that the State of U.P. through the District Magistrate shall be made necessary parties in all disputes pertaining to the Gaon Sabha's lands and in particular in proceedings under Section 161. It shall be mandatory for the State through the District Magistrate to file their affidavits in all such disputes.

23. In light of the of preceding discussions the writ petition is devoid of merit and is liable to be dismissed and is dismissed.

Copy of this order shall be communicated by the Chief Standing Counsel to:

(1) Principal Secretary Panchayat Raj, Government of U.P., Lucknow.
(2) Commissioner Prayagraj Division, Prayagraj.
(3) District Magistrate, Prayagraj.
(4) Sub Divisional Magistrate, Handia, Prayagraj.

(2021)12ILR A481
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2021

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ-C No. 24767 of 2018

C/M Sri Satya Narain Junior High School & Anr. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shivendu Ojha, Sri Radha Kant Ojha (Sr. Adv.)

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

A. Junior High School – Grant-in-aid – Entitlement of being enlisted – Application made in the year 2006 – GO dated 13.07.2017 issued with new policy restricting the institution from being enlisted in grant-in-aid list – Applicability – Prospectively or retrospectively – Held, any policy decision taken by the St. Government or any Government Order issued by the St. Government is given effect prospectively and not retrospectively. Any government decision or order will have prospective effect and not retrospective effect. The same will have effect with effect from its date of enforcement/issuance not before the said date. (Para 8 and 13)

B. Jurisprudence – Substantial justice – Procedural technicalities – It's extent – Held, all Courts of law are established for furtherance of interest of substantial justice and not to obstruct the same on technicalities – No procedure in a Court of law should be allowed to defeat the cause of substantial justice on some technicalities. (Para 18)

Writ petition allowed. (E-1)

Cases relied on :-

1. U.O.I. & ors. Vs G.S. Chatha Rice Mills & anr.; (2021) 2 SCC 209,

2. Jai Jai Ram Manohar Lal Vs National Building Material Supply; AIR 1969 SC 1267

3. Ghanshyam Dass & ors. Vs Dominion of India & ors; (1984) 3 SCC 46)

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Nobody is present on behalf of respondent nos. 4 and 5 even in the revised reading of the list.

2. Heard Mr. R.K. Ojha, learned Senior Advocate assisted by Mr. Shivendu Ojha, learned counsel for the petitioners and Dr. Amar Nath Singh, learned Standing Counsel for the State-respondents.

3. Since the pleadings have been exchanged between the learned counsel for the petitioners and the learned Standing Counsel for the State-respondents, who are the contesting

respondents, both the parties agree that the present writ petition may be decided at this stage without calling for any further affidavits, specifically in view of the order proposed to be passed today.

4. By means of the present writ petition, the petitioners have prayed for quashing the impugned order dated 23/24th May, 2018 (Annexure-16 to the writ petition) passed by the Director of Education (Basic), U.P. Lucknow i.e. respondent no.4 herein. They have further prayed for a mandamus commanding the respondents to consider the case of the petitioners for taking the institution into grant-in-aid list since December, 2006 by ignoring the Government Order dated 13th July, 2017 and also to make payment of salary to the teachers and other employees working in the institution under the U.P. Junior High School (Payment of Salaries of the Teachers and Other Employees) Act, 1978 including the arrears of salary since 2006 as well as current salary as and when it comes due.

5. The factual matrix of the case is as follows:

The petitioner-institution is a recognized Junior High School and pursuant to government policy embodied in the Government Order dated 07.09.2006, it applied for the benefit of grant-in-aid from the State Exchequer. The cases of all the applicants were to be considered as per the prescriptions available in the said Government Order dated 07.09.2006 and final list of the institutions brought under grant-in-aid list was published on 02.12.2006. The petitioner-institution was, however, denied the said benefit and its name did not figure in the said list finalized by the State Government on 02.12.2006, which led the petitioner-institution to institute a writ petition, which was dismissed by the Hon'ble Single Judge on 02.02.2009. Challenging the said order dated 02.02.2009, the petitioner filed a Special Appeal which was disposed of by the Division Bench of this Court, vide its judgment and order dated 17.03.2009 permitting the petitioner-institution to file an appropriate application before the State Level Committee and it was further directed that in case such an application is filed, the appropriate authority shall pass appropriate order after examining the facts of the case and after giving opportunity of hearing to the parties concerned. It is in compliance of this order dated 17.03.2009, passed by the Division Bench of this Court that the impugned order dated 05.07.2009 has been passed by the Director of Basic Education, U.P., Lucknow.

For the purposes of bringing 1000 unaided Junior High Schools having permanent recognition on the grant-in-aid list of the State Government, a Government Order was issued on 07.09.2006, a copy of which has been annexed as Annexure No.2 to the writ petition. In the said Government Order dated 07.09.2006, a detailed procedure was prescribed for the purpose of consideration of the cases of the Junior High Schools for giving them the benefit of grant-in-aid. The conditions mentioned in the said Government Order for Junior High Schools seeking the benefit of grant-in-aid were that the institution concerned should have permanent recognition, the Society running the institution should be registered, whose registration should be renewed and the institution should have student strength in Classes 6, 7 and 8 in last three years, as on 30.09.2006, not less than 105. Certain other conditions were also prescribed in the said Government Order and the conditions were that the finances of the institution should be managed as per rules, that institution should have the building of its own, that management of the institution should pass a resolution that in case the institution is taken on grant-in-aid list, it shall abide by the terms and conditions of the grant, that there should not be any dispute in the management and that in case the institution is brought in grant-in-aid list such institution shall

be required to fulfill the aforesaid eligibility conditions even in future.

Three committees were also constituted for the purposes of processing the applications for grant of benefit of grant-in-aid. The first such Committee was constituted at the directorate level comprising of various members and the Director of Basic Education/Chairman, Basic Shiksha Parishad was to be its chairperson. The second Committee constituted was a Committee at the Regional Level to be chaired by the Assistant Regional Director of Basic Education. The said Regional Level Committee also comprised of various officers and was headed by the Assistant Regional Director of Basic Education. The third Committee was headed by the District Basic Education Officer which was known as District Level Committee.

The Government Order dated 07.09.2006 further provided a schedule/time table for the purpose of making selection of the institutions for being extended the benefit of grant-in-aid, according to which, Directorate of Basic Education was required to publish a Notification and advertisement till 10.09.2006. The last date for making applications before the District Basic Education Officer was 03.10.2006. By 20.10.2006, an inspection team consisting of District Basic Education Officer, Deputy Basic Education Officer and two senior-most Assistant Basic Education Officers was required to conduct the spot inspection and accordingly thereafter the proposals were to be submitted for scrutiny before the Regional Level Committee. The Regional Level Committee was required to scrutinize the proposals till 01.11.2006. The Regional Level Committee was also required to intimate the deficiencies found while examining the proposals received from the institutions. The institutions in whose cases deficiencies were intimated, were required to make their representation by 10.11.2006 removing the deficiencies and thereafter Regional Level Committee was required to finalize the list and send the same to the Directorate Level Committee by 15.11.2006. The Directorate Level Committee was to consider all the proposals received by it in the meeting to be convened on 20.11.2006 and thereafter the matter was to be referred for final decision to the State Government.

The petitioner-institution submitted its application in terms of the Government Order dated 07.09.2006 for consideration of its case for being brought on grant-in-aid list. However, it appears that a letter dated 01.11.2006, on consideration of the proposal by the Regional Level Committee, was written by the Assistant Regional Director of Basic Education, Allahabad pointing out certain deficiencies in the proposal of the petitioner-institution including the deficiency that there is some dispute in the management of the institution. In response to the said letter dated 01.11.2006, a reply dated 10.11.2006 is said to have been submitted by the petitioner-institution on 13.11.2006, though the last date for receipt of the representation from the applicants-institutions for removal of the deficiencies was 10.11.2006 as prescribed in the Government Order dated 07.09.2006. However, when final list of the institution brought on grant-in-aid list was published on 07.12.2006 and the petitioner-institution did not figure in the said list, the petitioner-institution filed a writ petition before this Court which was dismissed on 02.09.2009 by Hon'ble Single Judge and thereafter in the Special Appeal preferred by the petitioner-institution, namely, Special Appeal No. 352 of 2009, certain directions were issued permitting the petitioner-institution to file appropriate application before the State Level Committee which was to be examined and decided by the competent authority.

Pursuant to the aforesaid order, on 2nd April, 2009, the petitioners have made representation before the competent authority i.e. Director of Education (Basic), U.P. at Lucknow. However, the Director of Education (Basic) has rejected the claim of the petitioners vide order dated 5th July, 2009, nearly on the same grounds.

Perusal of the order dated 5th July, 2009 reveals that the first ground, which had been mentioned by the Director of Education (Basic) for rejecting the claim of the petitioner, was that the last date for submission of the application form provided under Government order dated 7th September, 2006 before the District Basic Education Officer, Kaushambi was 3rd October, 2006 and on which date, there was a dispute between two groups of management of the petitioners' institution and both these rival groups had submitted two different management returns. Second ground mentioned in the order dated 5th July, 2009 was that the petitioners' institution was required to remove the deficiencies by 10th November, 2006. However, by the last date, the petitioners' institution failed to submit their representation intimating the removal of deficiencies, which were pointed out by the Regional Level Committee in its communication letter dated 1st November, 2006, when as a matter of fact the representation in that regard was made on 13th November, 2006. The other ground mentioned in the order dated 5th July, 2009 for rejecting the claim of the petitioner was that on the last date of submission of the application form to be precise on 3rd October, 2006, the registration of the society of the petitioners' institution was not renewed.

6. Feeling aggrieved, the petitioners have approached this Court by means of Writ-C No. 44345 of 2009 (C/M Sri Satya Narain Junior High School & Another Vs. State of U.P. & Others) and a Coordinate Bench of this Court vide judgment and order dated 11th October, 20017, while allowing the said writ petitioner, quashed the order dated 5th July, 2009 and remitted the matter back before the Director of Education (Basic) to consider and decide claim of the petitioners' institution afresh in light of the observations made in the judgment and order dated 11th October, 2017 itself. However, the Coordinate Bench while passing the judgment and order dated 11th October, 2017, has given liberty to the Director of Education (Basic) to call for reports, material and other documents as may be necessary from the District Level Education Authorities, while considering the claim of the petitioner.

7. Thereafter the petitioners' institution have made a representation dated 24th October, 2017 before respondent no.2 i.e. Director of Education (Basic) along with a copy of the judgment and order dated 11th October, 2017 for taking appropriate decision.

8. Respondent no.2-Director of Education (Basic), has again rejected the claim of the petitioner vide order dated 23/24th May, 2018 on the ground that under the Government Order 30th July, 2017, the State Government has taken a new policy decision and in view of the said policy decision, the petitioners' institution cannot be recommended to the State Government for taking the same into grant-in-aid list. It is against this order dated 23/24th May, 2018 that the present writ petition has been filed.

9. In the order impugned dated 23/24th May, 2018, the other grounds mentioned for rejecting the claim of the petitioners' institution, are the same, as were mentioned in the judgment and order of the Coordinate Bench dated 11th October, 2017 passed in Writ-C No. 44345 of 2009.

10. Challenging the impugned order dated 23/24th May, 2018, following arguments have been advanced by Mr. Radha Kant Ojha, learned Senior Advocate appearing on behalf of the petitioners:

i). The order dated 23/24th May, 2018 is patently erroneous, illegal and arbitrary;

ii). The Policy Decision taken by the State Government under the Government Order dated 13th July, 2017 is not applicable to the case of

the petitioners' institution, as the petitioners' institution had applied for taking the institution into grant-in-aid list from the very beginning i.e. in the year 2006 itself and aforesaid policy decision was taken in the year 2017, therefore, any policy decision taken by the State Government or any Government Order issued by the State Government is given effect prospectively and not retrospectively;

iii). Two different Coordinate Benches of this Court vide judgment and orders dated 27th September, 2019 and 23rd May, 2019 passed in Writ-C No. 4735 of 2017 (Committee of Management of Ram Daun Ram Raj Pre-Secondary School & Another VS. State of U.P. & 2 Others) and Writ-C No. 38992 of 2017 (Writ-A No. 38992 of 2017 (Jai Ram Singh & 11 Others Vs. State of U.P. & 3 Others) along with connected petitions respectively, have set aside the Government Order dated 13th July, 2017, therefore, the same has no relevance at present;

iv) The petitioners' institution initially granted temporary recognition and thereafter after completing the requisite formalities, the institution has been granted permanent recognition in the year 1986, furthermore, in pursuance of the Government Order dated 7th September, 2006, the petitioners' institution has fulfilled all requirements and also they are pursuing their claim since 2006 for taking the petitioners' institution into grant-in-aid list. Initially, the petitioners have approached this Court earlier by means of a writ petition, which was dismissed and against the order of dismissal, the petitioners have preferred Special Appeal before the appellate court. In the said Special Appeal, the appellate court has directed that claim of the petitioners be considered by a State Level Committee. In pursuance of the aforesaid, the petitioners have represented their claim and on the same ground, the Director of Education (Basic) U.P. Lucknow has rejected their claim vide order dated 5.7.2009 against which the petitioners have approached the Writ Court again by filing Writ-C No. 44345 of 2009, wherein the order of the Director of Education (Basic) U.P. Lucknow was set aside and matter was remitted back before him to decide the same afresh. However, the Director of Education (Basic) U.P. Lucknow has passed impugned order dated 23/24.5.2018 by recording that now the State Government has taken a policy decision vide Government Order dated 13.7.2017 and against the said policy decision institution in question cannot be recommended to the State Government for putting the same into grant-in aid list, therefore, order impugned passed by the Respondent no. 2 is without the application of mind and also not sustainable in the eyes of law;

v). On the similar facts and circumstances, a writ petition bearing Writ-C No. 17883 of 2008 (Committee of Management Mohan Lal Adarsh Purva M.V. Salempur Vs. State of U.P. and others), was also filed before a Writ Court, in which the Writ Court was pleased to pass judgment and order dated 3.11.2017 and in pursuance of the aforesaid order, now as per information of the petitioners, the Authority concerned has passed order dated 6.6.2018 taking the aforesaid petitioners' institution into grant-in-aid list. Therefore, when the case of the petitioners' institution is similar to that of the said institution, the order impugned rejecting claim of the Petitioners is not sustainable in the eyes of law and also discriminatory in nature;

vi). From perusal of the impugned order, it is apparently clear that the petitioners have submitted requisite forms on a prescribed format by means of the letter dated 3.10.2006, whereas, another person, namely, Shashi Bhushan Dwivedi has also submitted the form before the District Basic Education Officer, Kaushambi, therefore, there is no question that form has not been submitted within time, though, it was submitted by two persons claiming to be rival Committee of Management;

vii) The dispute of the Committee of Management of the petitioners' institution has already been decided by the Assistant Registrar,

Firms, Societies and Chits, Allahabad vide order dated 4.11.2006 and it was decided in favour of the Petitioners' side. The Writ Court in its judgment and order dated 11th October, 2017 referred to above, while setting aside the earlier order of the Director of Education (Basic) dated 5th July, 2009, has opined that on passing of the order of the Assistant Registrar, Firms, Societies and Chits, Allahabad dated 4th November, 2006, there is no difficulty for conclusively holding that as on 10th November, 2006, there was no dispute in respect of the Committee of Management. Along with aforesaid order as well as certificate of renewal of the Committee of Management, the Petitioners have submitted a detailed reply to the District Basic Education Officer, Kaushambi on 10.11.2006, who inturn has assured that he will give receiving on the same date but by 4 o'clock, he has refused to receive the documents and also said that he will not provide receiving of the same. Therefore, there is no fault on the part of the petitioners to submit necessary reply in the office of District Basic Education Officer, Kaushambi, as required in the objections;

viii). Just after 4 o'clock, on 10th November, 2006, Mr. Ambika Prasad Tripathi, being Manager of the Committee of Management, reached the office of Assistant Director of Education (Basic), IVth Regional, Allahabad at 5.30 p.m. from the office of the District Basic Education Officer, Kaushambi but the said office was closed and on the next day i.e. 11th November, 2006, there was holiday due to Second Saturday and again on the next day i.e. 12.11.2006, there was holiday due to Sunday, thereafter the petitioners have served all documents, as per the objection, in the office of the Assistant Director of Education (Basic) 4th Region, Allahabad on 13.11.2006;

ix). From perusal of the Government Order dated 7.9.2006, it is clear that the objection has to be decided by a Committee headed by the Assistant Director of Education (Basic) 4th Region, Allahabad at the Regional Level on 15th November, 2006, therefore, in all probability, the objection has strictly been placed in the office of Assistant Director of Education (Basic) 4th Region, Allahabad on 13.11.2006, which has been admitted by the Director of Education (Basic) himself, therefore, all formalities, as required in the objection, have been completed by the petitioners and objections have already been removed on or before 15th November, 2006;

x). Since the then District Basic Education Officer, Kaushambi, namely, Ashok Nath Tiwari, was under pressure of Mr. Shashi Bhushan Dwivedi, who has highly political relations, as one of his brothers is a Member and Vice President of All India Congress Committee, U.P., therefore, he has not received the application forms of the petitioners' institution along with other documents removing the deficiencies pointed out in the objection, on 10.11.2006 by 4 o'clock. Therefore, the petitioner had no fault in submitting the aforesaid document by 10th November, 2006;

xi). The Director of Education (Basic) U.P. Lucknow has passed the impugned order dated 23/24th May, 2018 almost on the same lines and grounds, as on the basis of which earlier order dated 5th July, 2009 was passed and the Writ Court, while setting aside the order dated 5th July, 2009, has directed the Director of Education (Basic) to reconsider the claim of the petitioners' institution afresh in light of the observations made in the said judgment, as several institutions, which have been recognized later on, have been taken into grant-in-aid list, therefore, not taking the petitioners' institution into grant-in-aid list, is absolutely arbitrary and in violation of the Article 14 of the Constitution of India.

On the cumulative strength of the aforesaid submissions, learned counsel for the petitioners submits that the order impugned dated 23/24th May, 2018 be set aside and the Director of Education (Basic) be directed to consider the claim of the petitioners afresh for taking the

petitioners' institution in the grant-in-aid list within stipulated period fixed by this Court.

11. On the other hand, the learned Standing Counsel makes following submissions:

(a) The order impugned is legal and valid, therefore, no interference is warranted by this Court while exercising its powers under Article 226 of the Constitution of India;

(b) It is not in dispute that the petitioners' society, namely, Sri Satya Narain Junior High School Marhi, Post Office-Dhuksha, Allahabad is a registered society under the Societies Registration Act, 1860. The said society was renewed on 3rd November, 2005 for a period of five years and thereafter it could not be renewed. On 4th March, 2006, the renewal fees had been deposited in the office of the Assistant Registrar, Firms Societies and Chits, Allahapur, Allahabad. In the meantime, by showing the resignation of Ambika Prasad Tripathi, Shashibhushan Dwivedi had deposited the fees for renewal of the said society in the office of Assistant Registrar, Firms, Societies and Chits due to which a dispute was arisen after which Ambika Prasad Tripathi, for his renewal of the society, filed Writ Petition No. 54919 of 20016 before the Writ Court and the Writ Court vide order dated 1st October, 2006 directed to Assistant Registrar, Firms Societies and Chits to decide the matter. The Assistant Registrar passed an order dated 4th November, 2006 in favour of Ambika Prasad Tripathi. Against the order dated 4th November, 2006, Shashibhushan Dwivedi filed Writ Petition No. 64232 of 2006, which was dismissed in default vide order dated 26th February, 2013;

(c) The State Government issued a Government Order dated 7th September, 2006 for taking the non-Government permanent aided institutions into grant-in-aid list. In the said Government Order, procedure as well as terms and conditions have also been determined;

(d) The Committee of Management of the said society made available two Manager Returns (M.R.) applications on 3rd October, 2006, on one application, Ambika Prasad Tripathi has put his signature under the capacity of Manager, whereas on the second application, Shahshibhuhsan Dwivedi has put in signatures under the capacity of Manager of the "Committee of Management of the said society. Since the entries on both the manager returns were different, the Committee of Management of the said society was disputed;

(e) Apart from the above, on the application submitted by the Committee of Management of the said society for taking the petitioners' institution in grant-in-aid list, the Divisional Director of Education (Basic), Allahabad vide his letter dated 1st November, 2006 informed the Manager and Principal of the petitioners' institution that for taking the institution in grant-in-aid list, following conditions have not been fulfilled:

(I) There is management dispute in the institution;

(II) The teaching rooms of the said institution were less than that prescribed under the norms;

(III) The necessary information/records about of the students and the account of the institution were not enclosed.

In the said letter dated 1st November, 2006, it has also been directed that the Manager and the Principal of the institution shall also ensure that a representation along with the copies of relevant records of removing the aforesaid deficiencies is made available in the office of the Divisional Director of Education (Basic), Allahabad by 10th November, 2006 through the office of the District Basic Education Officer. By the said letter it has also been informed that upto 10th November, 2006, if the representation is not received, then it may be presumed that they did not want to say anything in that regard and further proceedings may be ensured in the concerned matter. As per the said letter, the petitioner upto said fixed date, had not made

available the representation along with the necessary documents qua removal the deficiencies in the office of the District Basic Education Officer, Kaushambi nor he could submit any document on the basis of which it could be said that he had removed the deficiencies as pointed in the letter of the Divisional Director;

(f) As per the Government Order dated 7th September, 2006, the papers/documents must be received in the office of District Basic Education Officer upto 10th November, 2006 but the petitioner did not submit his representation after removing deficiencies to the District Basic Education Officer, Kaushambi upto 10th November, 2006. It was not required to sent the papers directly to the office of Director of Education (Basic);

(g) Against the order dated 4th November, 2006 passed by the Assistant Registrar, Firms Societies and Chits directing renewal of the Committee of Management headed by Ambika Prasad Tripathi, Shashi Bhushan Dwivedi filed Writ Petition No. 64232 of 2006 and the same was dismissed in default on 26th February, 2013 from which it is clear that the dispute of the Committee of Management of the petitioners' society was pending upto 26th February, 2013;

(h) Along with the application for taking the petitioners' institution in the grant-in-aid list, they have not disclosed about the roofs of the teaching rooms of the institution as to which have been constructed by Tinshed or cemented linter and because of the same, the Division Assistant Director of Education (Basic) has raised objection in his letter dated 1st November, 2006 addressed to the Manager and Principal of the petitioners' institution;

(i) Since the institution had not fulfilled the terms and conditions of Government Order dated 7th September, 2006 as well as there was managerial dispute in the committee of management, the institution was not taken in the grant-in-aid list and information in that regard has already been issued to the petitioners by the Divisional Assistant Director of Education (Basic) vide letter dated 8th January, 2007;

(j) In compliance of the judgment and order of the Writ Court dated 11th October, 2017 the Director of Education (Basic), U.P. at Lucknow by his order dated 24th May, 2018 had afforded opportunity of hearing to the parties concerned and decided the matter in accordance with law while passing the order impugned.

On the cumulative strength of the aforesaid, learned Standing Counsel submits that all the submissions made by the learned counsel for the petitioners are incorrect and not tenable in the eyes of law, petitioner is not entitled to get any relief from this Court under Article 226 of the Constitution of India. Hence the present writ petition is liable to be rejected.

12. I have considered the submissions made by the learned counsel for the parties and have examined the entire records available before this Court.

13. This Court finds substance in the submission made by the learned counsel for the petitioner that the policy decision taken by the State Government under the Government Order dated 13th July, 2017 is not applicable to the case of the petitioners' institution, as the petitioners' institution had applied for taking the institution into grant-in-aid list from the very beginning i.e. in the year 2006 itself and the aforesaid policy decision was taken in the year 2017, therefore, any policy decision taken by the State Government or any Government Order issued by the State Government is given effect prospectively and not retrospectively. Any government decision or order will have prospective effect and not retrospective effect. The same will have effect with effect from its date of enforcement/issuance not before the said date.

14. The Apex Court in its latest judgment in the case of **Union of India & Others Vs.**

G.S. Chatha Rice Mills & Another reported in (2021) 2 SCC 209, has opined that a rule framed by the delegate of the legislature does not have retrospective effect unless the statutory provision, under which it is framed, allows it so, either by the use of specific words to that effect or by necessary implication. The Apex Court has further opined that the Central Government or the State Government (for any other authority) cannot make a subordinate legislation having retrospective effect unless the parent statute, expressly or by necessary implications, authorities it do so. For ready reference, paragraph nos. 104 & 106 of the aforesaid judmgent read as follows:

"104. A rule framed by the delegate of the legislature does not have retrospective effect unless the statutory provision under which it is framed allows retrospectivity either by the use of specific words to that effect or by necessary implication. In Hukum Chand vs. Union of India32, a three judge Bench of this Court held that:

"8...The extent and amplitude of the rule-making power would depend upon and be governed by the language of the section. If a particular rule were not to fall within the ambit and purview of the section, the Central Government in such an event would have no power to make that rule. Likewise, if there was nothing in the language of Section 40 to empower the Central Government either expressly or by necessary implication, to make a rule retroactively, the Central Government would be acting in excess of its power if it gave retrospective effect to any rule. The underlying principle is that unlike Sovereign Legislature which has power to enact laws with retrospective operation, authority vested with the power of making subordinate legislation has to act within the limits of its power and cannot transgress the same. The initial difference between subordinate legislation and the statute laws lies in the fact that a subordinate law-making body is bound by the terms of its delegated or derived authority and that Court of law, as a general rule, will not give effect to the rules, thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled."

(emphasis supplied)

106. In Federation of Indian Minerals Industries vs. Union of India34, a three judge Bench of this Court formulated the principles on the subject. Justice Madan B. Lokur observed that the power to frame subordinate legislation is not retrospective unless it is authorized expressly or by necessary implication by the parent statute. The Court observed:

"26...The relevant principles are:

(i) The Central Government or the State Government (or any other authority) cannot make a subordinate legislation having retrospective effect unless the parent statute, expressly or by necessary implication, authorises it to do so. [Hukam Chand v. Union of India [Hukam Chand v. Union of India, (1972) 2 SCC 601] and Mahabir Vegetable Oils (P) Ltd. v. State of Haryana [Mahabir Vegetable Oils (P) Ltd. v. State of Haryana, (2006) 3 SCC 620]].

(ii) Delegated legislation is ordinarily prospective in nature and a right or a liability created for the first time cannot be given retrospective effect. (Panchi Devi v. State of Rajasthan [Panchi Devi v. State of Rajasthan, (2009) 2 SCC 589 : (2009) 1 SCC (L&S) 408])

(iii) As regards a subordinate legislation concerning a fiscal statute, it would not be proper to hold that in the absence of an express provision a delegated authority can impose a tax or a fee. There is no scope or any room for intendment in respect of a compulsory exaction from a citizen. [Ahmedabad Urban Dev. Authority v. Sharadkumar Jayantikumar Pasawalla [Ahmedabad Urban Dev. Authority v. Sharadkumar Jayantikumar Pasawalla, (1992) 3 SCC 285] and State of Rajasthan v. Basant Agrotech (India) Ltd. [State of Rajasthan v. Basant Agrotech (India) Ltd., (2013) 15 SCC 1]"

The judgment of Justice Dipak Misra (as he then was) speaking for a two judge Bench decision in State of Rajasthan vs. Basant Agrotech (India) Ltd35 adopts the same position."

15. This Court also finds substance in the submission made by the learned counsel for the petitioner that on the date, when the petitioners' institution have made application for taking the institution in the grant-in-aid list as per the Government Order dated 7th September, 2006 between September, 2006 to November, 2006 and thereafter, there is no managerial dispute in the Committee of Management of the petitioners' institution as is evident from the observations made by the Writ Court in its judgment and order dated 11th October, 2017 passed in Writ-C No. 44345 of 2009. For ready reference, the said observations made by the Writ Court read as follows:

"So far as the facts of this case are concerned, there is no dispute that the shadow of doubt in relation to there being any dispute in management was cleared only on 04.11.2006 when the Assistant Registrar, Firms, Societies and Chits, Allahabad passed an order for renewal of the registration of the Society on the basis of the papers presented by late Ambika Prasad Tripathi. ***However, on passing of the aforesaid order on 04.11.2006, there is no difficulty for conclusively holding that as on 10.11.2006, there was no dispute in respect of the management."***

16. The submission made by the learned Standing Counsel for the State-respondents that against the order dated 4th November, 2006 passed by the Assistant Registrar, Firms Socialites and Chits directing renewal of the Committee of Management headed by Ambika Prasad Tripathi, Shashi Bhushan Dwivedi filed Writ Petition No. 64232 of 2006 and the same was dismissed in default on 26th February, 2013 from which it is clear that the dispute of the Committee of Management of the petitioners' society is pending upto 26th February, 2013 cannot be accepted by this Court on the ground that an interim order staying the effect and operation of the order dated 4th November, 2006 was passed in Writ Petition No. 64323 of 2006 and the same was in operation till 26th February, 2013 i.e. dismissal of the said writ petition in default, has not been brought on record nor the same has been shown to this Court.

17. This Court is disgruntled with the submission of the learned Standing Counsel for the State-respondents that since the petitioners' institution had made their representation along with the documents removing the deficiencies as pointed out by the Divisional Assistant Director of Education (Basic), Allahabad in his letter dated 1st November, 2006, before the Divisional Assistant Director of Education (Basic), Allahabad/Director of Education (Basic), U.P. at Lucknow directly and not through the office of District Basic Education Officer, Kaushambi, as is required under the Government Order dated 7th September, 2006, the claim of the petitioners' institution for taking the institution in grant-in-aid list could not be granted, is too technical in nature. For furtherance of interest of substantial justice, the representation along with the documents removing the deficiencies, made by the petitioners' institution for taking the institution in grant-in-aid list should have been considered.

18. It is settled law that all Courts of law are established for furtherance of interest of substantial justice and not to obstruct the same on technicalities. In the case of **Jai Jai Ram Manohar Lal vs. National Building Material Supply** reported in **AIR 1969 SC 1267**, wherein it has been held that if substantial justice and technicalities are pitted against each other, the cause of substantial justice should not be defeated on technicalities.

No procedure in a Court of law should be allowed to defeat the cause of substantial justice on some technicalities (Reference-**Ghanshyam Dass & Ors. vs. Dominion of India & Ors;** reported in (1984) 3 SCC 46).

19. This Court may also record that if the submission of the learned counsel for the petitioners

that on the similar facts and circumstances, in compliance of the order of a Writ Court dated 3rd November, 2017 passed in Writ-C No. 17883 of 2008 (Committee of Management Mohan Lal Adarsh Purva M.V. Salempur Vs. State of U.P. and others), the authority concerned has passed order dated 6.6.2018 taking the aforesaid petitioners' institution into grant-in-aid list, is correct, why the petitioners' institution could not be taken in the grant in-aid list by the respondents herein.

20. However, with respect to other deficiencies like teaching rooms and records of students, the same has been pointed out for the first time by means of the counter affidavit and find no mention in the order impugned, hence the same cannot be pressed for justifying the impugned order.

21. However, it is made clear that the petitioners' institution cannot claim the right on the basis of other institutions, which have been included in the grant-in-aid list, if by 13th November, 2006 (as directed by Writ Court vide order dated 11th October, 2017), institution does not have infrastructure and students, as required by Government Order dated 3rd September, 2006. The Writ Court had relaxed the last date of submission of application form and also recorded that no managerial dispute existed, as on date of consideration, hence the order impugned is not justified on said grounds.

22. In view of the aforesaid facts and circumstances of the case, the observations made by this Court herein above as well as the observations made by the Writ Court vide order dated 11th October, 2017 referred to above, this Court finds that there is clear infirmity in the order impugned passed by the Director of Basic Education dated 23/24th May, 2018 rejecting the claim of the petitioners' institution for taking the institution grant-in-aid list.

23. Consequently, the present writ petition is allowed. The order impugned passed by the Director of Education (Basic), U.P. at Lucknow is, hereby quashed. The Director of Basic Education, U.P., Lucknow is directed to consider and decide the claim of the petitioner-institution afresh taking into consideration the observations made by this Court herein above, the observations made by the Writ Court vide order dated 11th October, 2017 in Writ Petition No. 44345 of 2009 and Government Order dated 7th September, 2006. While considering the claim of the petitioners' institution afresh, Director of Basic Education (Basic), U.P. at Lucknow, if he so desires and finds necessary, shall call for reports, records, material and any other documents from the district level education authorities as well as from management of the institution. It shall be open to the Director of Education (Basic), U.P. at Lucknow to see as to whether all conditions, as required under the Government Order dated 3rd September, 2006, have been fulfilled in the documents submitted on 13th November, 2006 (the date which have been relaxed by the Writ Court vide judgment and order dated 11th October, 2017). He shall pass a reasoned and speaking order expeditiously, preferably within a period of three months from the date of production of a certified copy of this order.

24. There shall be no order as to costs.

(2021)12ILR A491
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ-C No. 24821 of 2012

General Manager, N.C.R. & Anr. **...Petitioners**

Versus

Sri Jagrup & Anr. **...Respondents**

Counsel for the Petitioners:
Sri A.K. Singh, Sri A.K. Gaur, Sri Vimlesh Kumar Rai

Counsel for the Respondents:
Sri L.M. Singh, Sri Ajai Kumar, Sri Phool Singh Yadav, S.C.

A. Labour Law – Industrial Tribunal Act, 1947 – Termination – Award – Reinstatement – Workmen worked continuously for a period of eight years – Held, the actions of the employer which stood established before the court below were not only arbitrary but exploitative – The railways are model employers and the Court cannot countenance such unfair trade practices or exploitative actions against a helpless workman – High Court found no infirmity in award. (Para 15 and 17)

B. Labour Law – Industrial Tribunal Act, 1947 – Aims and objects – Solemn purpose of the Industrial Disputes Act is to prevent exploitation of workmen – Nomenclature of the post is not conclusive of the nature of the work being done by workman. (Para 13)

Writ petition dismissed. (E-1)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. By the impugned award dated 06.05.2011 the labour court has directed the petitioner employer to reinstate the respondent workman in service. The respondent workman has also been allowed 50% of the backwages since 24.10.1993 and "All benefits which were available to him when he was in service".

2. The only submission of Sri Vimlesh Kumar Rai, learned counsel for the petitioner is that the respondents do not have the right to continue on the post since he was a temporary workman.

3. Learned counsel for the respondent workman Sri Phool Singh Yadav has taken the Court through various finding returned by the labour court to contend that the petitioner had been in continuous service from eight years and his services were arbitrarily terminated. The award of the labour court was lawful and just.

4. Heard learned counsel for the parties.

5. The reference made before the labour court as recited in the impugned award is reproduced below:

"2. Whether the action of the management of Nothern Railway Allahabad in not allowing duties to Sri Jagrup with effect from 24.10.93 is justified? If not what relief the workman is entitled for?"

6. The following facts were established by pleadings and evidence before the labour court. The petitioner had worked continuously for more than eight 24821years as a gang man from 1984-1993. He was working in the scale of Rs. 775-1025 with effect from 1988. The petitioner was directed to join his new place of posting at Ludhiana in pursuance of the order dated 16.10.1993. The respondent workman presented himself before the authorities at Ludhiana and made over the transfer order to them. Ludhiana authorities directed him to Jammu Tawi. However both the railway authorities at Ludhiana and Jammu Tawi declined to permit him to join duties as his name was not in the transfer list. Thereafter the petitioner ran from pillar to post but was not allowed to join duties and effectively stood terminated.

7. The petitioner employer could not dispute the duty pass issued to the petitioner for the month of December, 1993. The petitioner/ employer defended its action on the foot that the petitioner "had surrendered his services in the year 1992" which was disbelieved by the labour court.

8. Petitioner employer before the labour court asserted that the respondent workman ought to have raised objections before the superior rail authorities when he was not permitted to join duties at his place of posting.

9. The labour court found that aforesaid contradictory stands made by the petitioner-employer, discredited its defence.

10. The respondent workman appeared before the labour court and deposed that he had taken the transfer letter and presented himself before the railways authorities at Ludhiana. The railway authorities at Ludhiana declined to admit him to duties on the pretext that his name was not in the transfer list and forwarded the letter to the railways authority at Jammu. The petitioner went to report to the railways authorities at Jammu but to no avail.

11. The labour court which had the opportunity to observe the demeanour of the respondent workman found him to be a credible witness. The credibility of the respondent workman could not be impeached by the employer. The deposition of the respondent workman was consistent with the duly proved documents in the records.

12. On the foot of the aforesaid narrative, the labour court found that the action of the petitioner employer in not providing work to the respondent workman with effect from 24.10.1993 was unlawful. The termination of his services was in the likeness of "removal of service by oral order". The action of the employer was found to be vitiated. The petitioner was liable to be reinstated in service. A direction was issued directing the petitioner to reinstate the respondent workman in service.

13. The submission of the learned counsel for Railways that the workman is a casual labour and not entitled to any relief is misconceived to say the least. The solemn purpose of the Industrial Disputes Act is to prevent exploitation of workmen. Nomenclature of the post is not conclusive of the nature of the work being done by workman. It was established by applicable standards of evidence before the labour court that the respondent workmen had worked continuously for a period of eight years prior to arbitrary and illegal termination of his services. The defence of the petitioner was rightly found to be contradictory and evidences were not found to be worthy of credit.

14. This Court is always reluctant to substitute findings of fact made upon appraisal of evidence made the trial court with its own findings while exercising writ jurisdiction. In this case the findings of the labour court are impeccable. The defence of the petitioner/ employer was found to be contradictory and rightly disbelieved.

15. The actions of the petitioner employer which stood established before the court below were not only arbitrary but exploitative. The railways are model employers and the Court cannot countenance such unfair trade practices or exploitative actions against a helpless workman.

16. The actions of the employer were most arbitrary and it showed utmost apathy to the plight of the workman of the lowest class.

16. In the writ petition the petitioners have asserted that the respondent No. 1 has pleaded that he was not gainfully employed during the intervening period. The pleading has been denied by the workman in the counter affidavit. It could not be stated on behalf of the petitioner that this plea was taken before the court below. The petitioner has failed to bring relevant pleadings and documents in the record of the court below in regard to the respondent being gainfully employed. The pleadings of the employer are disbelieved.

17. There is no infirmity in the award passed by the labour court. However in view of findings made in the preceding part of the narrative that the action of the employer was exploitative, this Court holds that the respondent workman is entitled to 70% of the backwages in the interest of justice. Subject to this modification the labour court award is upheld.

19. The writ petition is dismissed.

(2021)12ILR A494
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2021

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ-C No. 25643 of 2021

C/M Rampur Ucchhtar Madhyamik Viddyalaya & Anr. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri P.K. Upadhyay

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Article 14 and 21 – Committee of management – Single operation of bank account – Administrative order – Principle of natural justice – Applicability – No opportunity of hearing was given – Failure in recording the reason – Effect – Held, even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order – Any order which has been passed without affording any opportunity of hearing to the aggrieved person, is clearly in violation of principle of natural justice, which is the requirement of Articles 14 and 21 of the Constitution of India. (Para 12 and 18)

Writ petition allowed. (E-1)

Cases relied on :-

1. Kumari Shrilekha Vidyarthi & ors. Vs St. of U.P. & ors.; AIR 1991

SC 537

2. L.I.C. Vs Consumer Education and Research Centre; (1995) 2 SCC 480

3. Mahesh Chandra Vs Regional Manager, U.P. Financial Corporation & Ors.; AIR 1993 SC 935

4. U.O.I. Vs M.L. Capoor; AIR 1974 SC 87

5. St. of W.B. Vs Atul Krishna Shaw & anr.; 1991 (Suppl.) 1 SCC 414

6. S.N. Mukherjee Vs U.O.I.; AIR 1990 SC 1984

7. Krishna Swami Vs U.O.I. & ors.; AIR 1993 SC 1407

8. Institute of Chartered Accountants of India Vs L.K. Ratna & ors.; (1986) 4 SCC 537

9. Board of Trustees of the Port of Bombay Vs Dilipkumar Raghavendranath Nadkarni & ors.; AIR 1983 SC 109

10. Rameshwari Devi Vs St. of Raj. & ors.; AIR 1999 Raj. 47

11. Vasant D. Bhavsar Vs Bar Council of India & ors.; (1999) 1 SCC 45

12. M/s. Indian Charge Chrome Ltd. & anr. Vs U.O.I. & ors; 2003 AIR SCW 440

13. Secretary, Ministry of Chemicals & Fertilizers, Govt.of India Vs CIPLA Ltd. & ors.; (2003) 7 SCC 1

14.U.O.I. & anr. Vs International Trading Co. & Anr.; (2003) 5 SCC 437

15. Raj Kishore Jha Vs St. of Bihar & ors.; (2003) 11 SCC 519

16. St. of Uttranchal Vs Sunil Kumar Negi; 2008 (4) ALJ. 226

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. This writ petition has been filed by the petitioner for quashing the impugned order dated 31.07.2021 passed by respondent no.3, which has been communicated to the petitioners' institution under the letter of the Finance and Accounts Officer of the Office of District Basic Education Officer, Mirzapur dated 31st July, 2021, whereby he has directed the single operation of bank accounts of the petitioners' institution. He has also prayed for a mandamus directing the respondents to consider the application dated 18.08.2021 made by the petitioner and not to interfere in the peaceful

functioning of the petitioners' institution in accordance with law.

2. On 11th December, 2021, on the submission made by the learned counsel for the petitioner that the order impugned 31st July, 2021 has been without jurisdiction as the Finance and Accounts Officer of the Office of District Basic Education Officer, Mirzapur has no power to pass such order, this Bench passed following order:

"Heard Sri P.K. Upadhyay, learned counsel for the petitioners and learned Standing Counsel for the State.

Learned counsel for the petitioners submits that the impugned order dated 31.07.2021 has been passed by respondent no.4-Finance and Account Officer (Basic), Mirzapur, which is without jurisdiction. He further submits that on communication letter dated 31.07.2021 sent by the District Basic Education Officer, Mirzapur, the order impugned has been passed by the Finance and Account Officer, Basic Education, Mirzapur on the same day, i.e. 31.07.2021.

With respect to the aforesaid facts, twice time was granted to the learned Standing Counsel to obtain instructions in the matter. However, inspite of letters being sent by the Office of the Chief Standing Counsel, no one has turned up.

In such circumstances, this Court has no other option but to direct the respondent no.3-District Basic Shiksha Adhikari, Mirzapur to remain present before this Court on the next date fixed, i.e. 18.11.2021.

Put up this case on 18.11.2021 as fresh, on which date the respondent no.3 shall remain present before this Court alongwith all the relevant records. "

3. In compliance of the aforesaid order, today, Mr. Gautam Prasad, District Basic Education Officer, Mirzapur (respondent no.3 herein) is present in the Court today along with exemption application. The exemption application is taken on record.

4. On the pointed query being made by the Court as to under which authority of law, the Finance and Accounts Officer of the Office of District Basic Education Officer, Mirzapur has passed the order dated 31st July, 2021 directing single operation of accounts of the petitioners' institution, Mr. Shailendra Singh, learned Standing Counsel submits that the document dated 31st July, 2021, which has been signed by the Finance and Accounts Officer of the Office of District Basic Education Officer, Mirzapur is only a communication letter, which has been issued to the petitioners' institution under the order of the District Basic Education Officer, Mirzapur dated 31st July, 2021, wherein he has directed single operation of accounts of the petitioners' institution, a copy of which has been brought on record at page-22 of the exemption application filed today.

5. In view of the averments made in the affidavit accompanied the exemption application, the future presence of Mr. Gautam Prasad is exempted unless directed otherwise.

6. Mr. P.K. Upadhyay, learned counsel for the petitioner and Mr. Shailendra Singh, the learned Standing Counsel for the State-respondents agree that the present writ petition may be decided at this stage, without calling for any further affidavits specifically in view of the order proposed to be passed.

7. Learned counsel for the petitioner submits that the order passed by the District Basic Education Officer, Mirzapur dated 31st July, 2021 directing single operation of bank accounts of the petitioners' institution is in violation of principal of natural justice, as there is no whisper as on which date the petitioner has been afforded opportunity of hearing to the petitioner. In support of the aforesaid

submission, the learned counsel for the petitioner has placed reliance upon a judgment of this Court in the case of Committee of Management, Raja Tej Singh Vidyalaya Aurandh, Mainpuri-Appellant Vs. District Inspector of Schools, Mainpuri-Respondents reported in 2000 0 Supreme (All) 32, wherein it has been held as follows:

"29.....no order for single operation of accounts can be passed without reasonable opportunity to the Committee of Management....."

8. Apart from the above, learned counsel for the petitioner further submits that the order impugned directing single operation of the bank accounts of the petitioners' institution contains no reason. He, therefore, submits that the order impugned is illegal, hence the same is liable to be quashed.

9. Learned Standing Counsel has not satisfactorily controverted or rebutted the aforesaid submissions made by the learned counsel for the petitioner.

10. Having heard the learned counsel for the parties, considered their submissions and gone through the order impugned, this Court finds substance in the submissions made by the learned counsel for the petitioner.

11. From bare reading of the order passed by the District Basic Education Officer, Mirzapur dated 31st July, 2021 and the communication letter issued by the Finance and Accounts Officer of the Office of District Basic Education Officer, Mirzapur dated 31st July, 2021, it has apparently clear that the petitioner has not been afforded any opportunity of hearing before the passing of the impugned order, as there is no whisper in both order and letter as to on which date the petitioner has been called upon to set up his case with regard to any complaint made against him. Perusal of the both the order and letter also indicate that the same does not contain any reason.

12. So far as the second submission made by the learned counsel for the petitioner is concerned, this Court may record that it is settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order. In **Kumari Shrilekha Vidyarthi & Ors. Vs. State of U.P. & Ors.**, reported in AIR 1991 SC 537, the Apex Court has observed as under:-

"Every such action may be informed by reason and if follows that an act un-informed by reason is arbitrary, the rule of law contemplates governance by law and not by humour, whim or caprice of the men to whom the governance is entrusted for the time being. It is the trite law that "be you ever so high, the laws are above you." This is what a man in power must remember always."

13. In **Life Insurance Corporation of India Vs. Consumer Education and Research Centre**, reported in (1995) 2 SCC 480, the Apex Court observed that the State or its instrumentality must not take any irrelevant or irrational factor into consideration or appear arbitrary in its decision. "*Duty to act fairly*" is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty must be received and guided by the public interest. Same view has been reiterated by the Apex Court in **Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation & Ors**., reported in *AIR 1993 SC 935*; and **Union of India Versus M.L. Capoor**, reported in AIR 1974 SC 87.

14. In **State of West Bengal Vs. Atul Krishna Shaw & Anr.**, 1991 reported in (Suppl.) 1 SCC 414, the Apex Court observed

that "*giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review."*

15. In **S.N. Mukherjee Vs. Union of India**, reported in *AIR 1990 SC 1984*, it has been held that the object underlying the rules of natural justice is to prevent mis-carriage of justice and secure fair play in action. The expanding horizon of the principles of natural justice provides for requirement to record reasons as it is now regarded as one of the principles of natural justice, and it was held in the above case that except in cases where the requirement to record reasons is expressly or by necessary implication dispensed with, the authority must record reasons for its decision.

16. In **Krishna Swami Vs. Union of India & Ors**., reported in *AIR 1993 SC 1407*, the Apex Court observed that the rule of law requires that any action or decision of a statutory or public authority must be founded on the reason stated in the order or borne-out from the record. The Court further observed that "reasons are the links between the material, the foundation for these erection and the actual conclusions. They would also administer how the mind of the maker was activated and actuated and there rational nexus and syntheses with the facts considered and the conclusion reached. Lest it may not be arbitrary, unfair and unjust, violate Article 14 or unfair procedure offending Article 21."

17. Similar view has been taken by the Apex Court in **Institute of Chartered Accountants of India Vs. L.K. Ratna & Ors., (1986) 4 SCC 537; Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni & Ors., AIR 1983 SC 109. In Rameshwari Devi Vs. State of Rajasthan & Ors., AIR 1999 Raj. 47. In Vasant D. Bhavsar Vs. Bar Council of India & Ors., (1999) 1 SCC 45**, the Apex Court held that an authority must pass a speaking and reasoned order indicating the material on which its conclusions are based. Similar view has been reiterated in **M/s. Indian Charge Chrome Ltd. & Anr. Vs. Union of India & Ors, 2003 AIR SCW 440; Secretary, Ministry of Chemicals & Fertilizers, Government of India Vs. CIPLA Ltd. & Ors., (2003) 7 SCC 1; and Union of India & Anr. Vs. International Trading Co. & Anr., (2003) 5 SCC 437.**

17. The Apex Court in the case of in **Raj Kishore Jha vs. State of Bihar and Ors.** *Reported in (2003) 11 SCC 519* and in the case of **State of Uttranchal Vs. Sunil** Kumar Negi reported in *2008 (4) ALJ. 226*, has held that reason is the heartbeat of every conclusion and without the same, it becomes lifeless.

18. So far as the first submission made by the learned counsel for the petitioner is concerned, this Court may record that any order which has been passed without affording any opportunity of hearing to the aggrieved person, is clearly in violation of principle of natural justice, which is the requirement of Articles 14 and 21 of the Constitution of India.

19. in such circumstances, the order dated 31st July, 2021 passed by the District Basic Education Officer, Mirzapur directing single operation of bank accounts of the petitioners' institution is set aside and the matter is remitted back to the District Basic Education Officer, Mirzapur for decision afresh. While considering the matter afresh, the District Basic Education Officer, Mirzapur shall call for the reply and other document from the petitioner regarding any complaint made against him, within two weeks from date of production of certified copy of this order. On such letter being received, the petitioner shall file his reply supported by such documents, as he may be advised within two weeks thereafter. In case such reply is filed

within the aforesaid time, the District Basic Education Officer, Mirzapur shall consider and decide the same, strictly in accordance with law, by means of a reasoned and speaking order preferably within two weeks thereafter.

22. The present writ petition is allowed subject to the observations made above.

(2021)12ILR A498
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.11.2021

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ-C No. 25840 of 2021

C/M Sri Mahanth Ramashray Das Snakottar Mahavidyalaya & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vinod Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Ram Vijay Singh, Ms. Pooja Agarwal, Sri Shailendra Singh

A. Constitution of India – Article 226 – Writ – Maintainability – Alternative remedy – Order passed by the Vice-chancellor to extend the term of committee of management – Statutory remedy of reference before the Chancellor was available u/s 68 of the U.P. St. Universities Act – Maintainability of writ challenged – Held, writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out – High Court issued direction to avail alternative remedy. (Para 33)

Writ petition disposed. (E-1)

<u>Cases relied on</u> :-

1. K.S. Rashid & Son Vs Income Tax Investigation Commission & ors.; AIR 1954 SC 207

2. Sangram Singh Vs Election Tribunal, Kotah & anr.; AIR 1955 SC 425

3. U.O.I. Vs T.R. Varma; AIR 1957 SC 882

4. St. of U.P. Vs Mohammed Nooh; AIR 1958 SC 86

5. N.T. Veluswami Thevar Vs G. Raja Nainar & ors.; AIR 1959 SC 422

6. St. of M.P. & anr. Vs Bhailal Bhai etc. etc.; AIR 1964 SC 1006

7. Municipal Council, Khurai & anr. Vs Kamal Kumar & anr.; AIR 1965 SC 1321

8. Siliguri Municipality & ors. Vs Amalendu Das & ors.; AIR 1984 SC 653

9. S.T. Muthusami Vs K. Natarajan & ors.; AIR 1988 SC 616

10. Kerala St. Electricity Board & anr. Vs Kurien E. Kalathil & ors.; (2000) 6 SCC 293

11. A. Venkatasubbiah Naidu Vs S. Chellappan & ors.; (2000) 7 SCC 695

12. Rajasthan St. Road Transport Corporation & anr. Vs Krishna Kant & Ors.; (1995) 5 SCC 75

13. L.L. Sudhakar Reddy & Ors. Vs St. of A.P. & ors.; (2001) 6 SCC 634

14. Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha & anr. Vs St. of Mah. & Ors.; (2001) 8 SCC 509

15. G K N Driveshafts (India) Ltd. Vs Income Tax Officer & Ors.; (2003) 1 SCC 72

16. Pratap Singh & anr. Vs St. of Har.; (2002) 7 SCC 484

17. Harbanslal Sahnia & anr. Vs Indian Oil Corporation Ltd. & ors.; (2003) 2 SCC 107

18. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai & ors.; (1998) 8 SCC 1

19. G. Veerappa Pillai Vs Raman & Raman Ltd. & ors.; AIR 1952 SC 192

20. Assistant Collector of Central Exicse, Chandan Nagar, West Bengal Vs Dunlop India Ltd. & ors.; AIR 1985 SC 330

21. Ramendra Kishore Biswas Vs St. of Tripura & ors.; (1999) 1 SCC 472

22. Shivgonda Anna Patil & ors. Vs St. of Mah. & ors.; (1999) 3 SCC 5

23. C.A. Ibraham Vs Income-tax Officer, Kottayam & anr.; AIR 1961 SC 609

24. H.B. Gandhi, Excise & Taxation Officer-cum-Assessing Authority, Karnal & ors. Vs M/s Gopinath & Sons & ors.; 1992 (Suppl.) 2 SCC 312

25. M/s. K.S. Venkataraman & Co.(P) Ltd. Vs St. of Madras; AIR 1966 SC 1089

26. Raleigh Investment Co. Ltd. Vs The Governor-General in Council; AIR 1947 PC 78

27. Titaghur Paper Mills Co. Ltd. & anr. Vs St. of Orissa & anr.; AIR 1983 SC 603

28. St. of U.P. Vs Mohammad Noor; AIR 1958 SC 86

29. Tin Plate Co. of India Ltd. Vs St. of Bihar & ors.; AIR 1999 SC 74

30. Sheela Devi Vs Jaspal Singh; (1999) 1 SCC 209

31. P.N.B. Vs O. C. Krishnan & ors.; AIR 2001 SCW 2993

32. St. of H.P. Vs Raja Mahendra Pal & ors.; AIR 1999 SC 1786

33. Govt. of A.P. & ors. Vs J. Sridevi & ors.; AIR 2002 SC 1801

34. St. of Bihar & ors Vs Jain Plastics & Chemicals Ltd.; AIR 2002 SC 206

35. Champalal Binani Vs The Commissioner of Income-tax, W.B. & ors.; AIR 1970 SC 645

36. U.P. St. Bridge Corporation Ltd. & ors. Vs U.P. Rajya Setu Nigam S. Karmchari Sangh; (2004) 4 SCC 268

37. Bharat Petroleum Corpn. Ltd. & Anr. Vs N.R. Vairamani & Anr.; (2004) 8 SCC 579

38. Tirupati Balaji Developers (P) Ltd. & Ors. Vs St. of Bihar & ors.; (2004) 5 SCC 1

39. U.P. St. Spinning Co. Ltd. Vs R.S. Pandey & anr.; (2005) 8 SCC 264

40 R Vs London Borough of Hillington, Council; (1974) 2 All ER 643

41. Seth Chand Ratan Vs Pandit Durga Prasad & ors; 2003 AIR SCW 3078.

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Vinod Kumar Singh, learned counsel for the petitioners, Mr. Ran Vijay Singh, learned counsel for the respondent-University, Ms. Pooja Agarwal, learned counsel for respondent no.4 and Mr. Shailendra Singh, learned Standing Counsel for the State-respondents.

2. This writ petition has been filed by the petitioners for the following relief:

"I. a writ, order or direction, in the nature of certiorari, quashing the impugned order dated 27.08.2021 passed by the Registrar, Veer Bahadur Singh Purvanchal University, Jaunpur ***(Annexure No. 3 to this Writ Petition)****.*

II. a writ, order or direction, in the nature of certiorari, calling for the records and quash the impugned order dated 26.08.2021 passed by the Vice-Chancellor, Veer Bahadur Singh Purvanchal University, Jaunpur (if any).

III. a writ, order or direction, in the nature of mandamus, restraining the respondent no.4 from working as Manager of Sri Mahanth Ramashray Das Sankottar Mahavidyalaya, Bhudkuda, Ghazipur.

IV. any other suitable, writ, order or direction, as this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case.

..... "

3. On 7th October, 2021, the Court passed following order:

"The respondent nos. 2 and 3 are represented by Sri Ran Vijay Singh, Advocate. He may take instructions as to whether when

there was no resolution for the extension of the term how the term had been extended.

Place this petition as fresh on 8.11.2021."

4. Learned counsel for the petitioner submits that without any resolution having been passed by the members of the committee of management as provided under para 11.1 of the registered bye-laws of the society, the Vice-Chancellor I.e. respondent no.3, only on a letter of the manager of the Committee of Management, has extended the term of the committee of management for a further period of one year, while passing the impugned order dated 28th August, 2021, which is per se illegal. He, therefore, submits that order impugned is liable to be quashed.

5. In reply, learned counsel for the respondent-University submits that pursuant to the order of the Court dated 7th October, 2021, he has received instruction and as per the said instruction, the impugned order has been passed on the resolution of the Committee of Management, which has been passed by the eight members (out of 11 members) of the committee of management for extending the term of the committee of management for a further period of one year. He also placed a photo copy of the said resolution before the Court today, which is taken on record. Apart from the above, the learned counsel for the respondents submits that against the order impugned, the petitioner has an efficacious statutory alternative remedy by way of reference before the Chancellor of the respondent-University under Section 68 of the U.P. State Universities Act. He, therefore, submits that this petition be dismissed on the ground of the aforesaid statutory alternative remedy.

6. I have considered the submissions made by the learned counsel for the parties and have examined the records of the present writ petition.

7. The issue of exhausting statutory remedy has been considered time and again by the Apex Court.

8. A Constitution Bench of the Apex Court, in **K.S. Rashid & Son Vs. Income Tax Investigation Commission & Ors**., reported in AIR 1954 SC 207, held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. The said power is limited. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party **can have an adequate or suitable relief elsewhere**. Similar view has been reiterated by the Apex Court in **Sangram Singh Vs. Election Tribunal, Kotah & anr.,** reported in AIR 1955 SC 425, holding that the power of issuing writs are purely discretionary and no limit can be placed upon that discretion. However, the power can be exercised alone with recognised line and not arbitrarily and the Court must keep in mind that the power shall not be exercised unless substantial injustice has ensued or is likely to ensue and in other cases the parties must be relegated to the courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense.

9. Again a Constitution Bench of the Apex Court, in **Union of India Vs. T.R. Varma,** reported in AIR 1957 SC 882, held that it is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. The Apex Court held that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ; but the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and where such remedy exist, it will be a sound exercise of

discretion to refuse to interfere in a petition under Article 226 of the Constitution, unless there are good grounds therefor.

10. Yet another Constitution Bench of the Apex Court, in **State of U.P. Vs. Mohammed Nooh**, reported in AIR 1958 SC 86, considered the scope of exercise of writ jurisdiction when remedy of appeal was there and held that writ would lie provided there is no other equally efficacious remedy. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of fundamental principles of justice. Therefore, in a proper case, powers of writ can be exercised, but should not be exercised generally where other adequate legal remedy is available though it may not be, per se, a bar to issue a writ of prerogative. The Apex Court held that the remedy, being discretionary, cannot be asked as a matter of right, even if the order is a nullity, on the ground that it was passed by disregarding the rules of natural justice. The Court held as under:-

"..... save in exceptional cases, the courts will not interfere under Article 226 until all normal remedies available to a petitioner have been exhausted. The normal remedies in a case of this kind are appeal or revision. It is true that on a matter of jurisdiction or on a question that goes to the root of the case, the High Courts can entertain a petition at an early stage but they are not bound to do so and a petition would not be thrown out because the petitioner had done that which the Courts usually ask him to do, namely, to exhaust his normal remedies before invoking an extraordinary jurisdiction..... The petitioner would have been expected to persue the remedies of appeal or revision and could not have come to the High Court in the ordinary way until he had exhausted them."

11. In **N.T. Veluswami Thevar Vs. G. Raja Nainar & ors**., reported in AIR 1959 SC 422, the Apex Court held that the jurisdiction of the High Court to issue writs against the orders of the Tribunal is undoubted; but then, it is well settled that where there is another remedy provided, the Court must properly exercise its discretion in declining to interfere under Article 226 of the Constitution.

12. Another Constitution Bench of the Apex Court, **in State of Madhya Pradesh & anr. Vs. Bhailal Bhai etc. etc**., reported in AIR 1964 SC 1006, held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in **Municipal Council, Khurai & anr. Vs. Kamal Kumar & anr.**, reported in AIR 1965 SC 1321.

13. In Siliguri Municipality & ors. Vs. Amalendu Das & ors., reported in AIR 1984 SC 653, the Apex Court held that the High court must exercise its power under Article 226 with circumspection and while considering the matter of recovery of tax etc., it should not interfere save under very exceptional circumstances.

14. In **S.T. Muthusami Vs. K. Natarajan & ors**., reported in AIR 1988 SC 616, the Apex Court held that the High Court cannot be justified to exercise the power in writ jurisdiction if an effective alternative remedy is available to the party.

15. In **Kerala State Electricity Board & Anr. Vs. Kurien E. Kalathil & ors.,** reported in (2000) 6 SCC 293, while dealing with a similar issue, the Apx Court held that the writ petition should not be entertained unless the party

exhausted the alternative/statutory efficacious remedy.

16. In **A. Venkatasubbiah Naidu Vs. S. Chellappan & ors**., reported in (2000) 7 SCC 695, the Apex Court deprecated the practice of exercising the writ jurisdiction when efficacious alternative remedy is available. The Court observed as under:-

"Though no hurdle can be put against the exercise of Constitutional powers of the High Court, it is a well recognised principle which gives judicial recognition that the High Court should direct the party to avail himself of such remedy, one or other, before he resorts to a Constitutional remedy."

17. Similar view has been reiterated in **Rajasthan State Road Transport Corporation & Anr. Vs. Krishna Kant & Ors.,** reported in (1995) 5 SCC 75; **L.L. Sudhakar Reddy & Ors. Vs. State of A.P. & Ors**., reported in (2001) 6 SCC 634; **Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha & Anr. Vs. State of Maharashtra & Ors**., reported in (2001) 8 SCC 509; **G K N Driveshafts (India) Ltd. Vs. Income Tax Officer & Ors.,** reproted in (2003) 1 SCC 72; and **Pratap Singh & Anr. Vs. State of Haryana,** reported in (2002) 7 SCC 484.

18. In **Harbanslal Sahnia & anr. Vs. Indian Oil Corporation Ltd. & ors**., reported in (2003) 2 SCC 107, the Apex Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the writ seeks enforcement of any of the fundamental rights; where there is failure of principle of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. While deciding the said case, the Apex Court placed reliance upon its earlier judgment in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & ors., reported in (1998) 8 SCC 1.

19. A Constitution Bench of the Apex Court, in **G. Veerappa Pillai Vs. Raman & Raman Ltd. & ors.,** reported in AIR 1952 SC 192, held that as the Motor Vehicles Act is a self contained code and itself provides for appealable/ revisable forum, the writ jurisdiction should not be invoked **generally** in matters relating to its provision.

20. Similar view has been reiterated in **Assistant Collector of Central Exicse, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. & ors**., reported in AIR 1985 SC 330; **Ramendra Kishore Biswas Vs. State of Tripura & ors**., reported in (1999) 1 SCC 472; and **Shivgonda Anna Patil & Ors. Vs. State of Maharashtra & ors**., (1999) 3 SCC 5.

21. In **C.A. Ibraham Vs. Income-tax Officer, Kottayam & Anr.,** reported in AIR 1961 SC 609 and **H.B. Gandhi, Excise & Taxation Officer-cum-Assessing Authority, Karnal & ors. Vs. M/s Gopinath & Sons & ors**., reported in 1992 (Suppl.) 2 SCC 312, the Apex court held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction.

22. The Constitution Bench of the Apex Court, in **M/s. K.S. Venkataraman & Co.(P) Ltd. Vs. State of Madras**, reported in AIR 1966 SC 1089, considered the Privy Council judgment in **Raleigh Investment Co. Ltd. Vs. The Governor-General in Council,** reported in AIR 1947 PC 78 and held that the writ court can entertain the petition provided the order is alleged to be without jurisdiction or has been

passed in flagrant violation of the principles of natural justice, or the provisions of the Act/ Rules is under challenge.

23. In **Titaghur Paper Mills Co. Ltd. & anr. Vs. State of Orissa & Anr**., reported in AIR 1983 SC 603, the Apex Court refused to extend the ratio of its earlier judgment in **State of U.P. Vs. Mohammad Noor,** reported in AIR 1958 SC 86, wherein the Court had held that prerogative writ can be issued to correct the error of the Court or Tribunal below even if an appeal is provided under the statute under certain circumstances, i.e. the order is without jurisdiction, or principles of natural justice have not been followed, and held that in case of assessment under the Taxing Statute, the principle laid down by the Privy Council in **Raleigh Investment Co. Ltd. (supra)** would be applicable for the reason that "*the use of the machinery provided by the Act, not the result of that use, is the test.*"

24. In **Whirlpool Corporation (Supra) and Tin Plate Co. of India Ltd. Vs. State of Bihar & ors.,** reported in AIR 1999 SC 74 the Apex Court came to the conclusion that writ should not generally be entertained if statute provide for remedy of appeal and even if it has been admitted, parties should be relegated to the appellate forum.

25. In **Sheela Devi Vs. Jaspal Singh**, reported in (1999) 1 SCC 209, the Apex Court has held that if the statute itself provides for a remedy of revision, writ jurisdiction cannot be invoked.

26. In **Punjab National Bank Vs. O. C. Krishnan and others**, reported in AIR 2001 SCW 2993, the Apex Court, while considering the issue of alternative remedy observed as under:-

"The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal under S.20 and this fast track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Arts. 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Arts. 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Art. 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

27. In **State of Himachal Pradesh Vs. Raja Mahendra Pal & ors**., reported in AIR 1999 SC 1786 while dealing with a similar issue the Apex Court has held as under:-

*"It is true that the powers conferred upon the High Court under Article 226 of the Constitution are discretionary in nature and can be invoked for the enforcement of any fundamental right or legal right-------. The constitutional Court should insist upon the party (to avail of the efficacious alternative remedy) instead of invoking the extraordinary writ jurisdiction of the Court. This does not however debar the court from granting the appropriate relief to a citizen **in peculiar and special facts** notwithstanding the existence of alternative efficacious remedy. The existence of **special circumstances** are required to be noticed before issuance of the direction by the High Court while invoking the jurisdiction under the said Article."*

28. In **Govt. of A.P. & ors. Vs. J. Sridevi & ors**., reported in AIR 2002 SC 1801, the Apex Court held that where a authority is competent to determine the issue, "the High Court in a writ

jurisdiction should have directed the authority only to take an appropriate decision". When the statutory authority is vested with the power to determine the question as to the applicability of the provisions of the Act, it is ordinarily desirable to leave the question to be decided by such authority. The aggrieved party can file appeal against the decision within the framework provided under the statute and the ultimate decision also could be challenged under judicial review, if permitted in law

29. In the **State of Bihar & ors Vs. Jain Plastics & Chemicals Ltd**., reported in AIR 2002 SC 206, the Apex Court held that existence of alternative remedy does not affect the jurisdiction of the writ court but it could be a good ground for not entertaining the petition.

30. In **Champalal Binani Vs. The Commissioner of Income-tax, West Bengal & ors.**, reported in AIR 1970 SC 645, the Court observed as under:-

"Before parting with the case we deem it necessary once more to emphasize that the Income-tax Act provides a complete and self-contained machinery for obtaining relief against improper action taken by the departmental authorities, and normally the party feeling himself aggrieved by such action cannot be permitted to refuse to have recourse to that machinery and to approach the High Court directly against the action. The assessee had an adequate remedy under the Income-tax Act which he could have availed of. He however, did not move the Income-tax Appellate Tribunal which was competent to decide all questions of fact and law which the assessee could have raised in the appeal including the grievance that he had not adequate opportunity of making his representation and invoked the extraordinary jurisdiction of the High Court. In our judgment, no adequate ground was made out for entertaining the petition. A writ of certiorari is discretionary; it is not used merely because it is lawful to do so. Where the party feeling aggrieved by an order of an Authority under the Income-tax Act has an adequate alternative remedy which he may resort to against the improper action of the authority and he does not avail himself of that remedy the High Court will require a strong case to be made out for entertaining a petition for a writ. Where the aggrieved party has an alternative remedy, the High Court would be slow to entertain a petition challenging an order of a taxing authority which is ex facie with jurisdiction. A petition for a writ of certiorari may lie to the High Court, where the order is on the face of it erroneous or raises question of jurisdiction or of infringement of fundamental rights of the petitioner. The present case was one in which the jurisdiction of the High Court could not be invoked."

31. Similar view has been reiterated in **U.P. State Bridge Corporation Ltd. & Ors. Vs. U.P. Rajya Setu Nigam S. Karmchari Sangh**, reported in (2004) 4 SCC 268; **Bharat Petroleum Corpn. Ltd. & Anr. Vs. N.R. Vairamani & Anr**., reported in (2004) 8 SCC 579; **Tirupati Balaji Developers (P) Ltd. & Ors. Vs. State of Bihar & Ors.,** reported in (2004) 5 SCC 1.

32. In **U.P. State Spinning Co. Ltd. Vs. R.S. Pandey & Anr**., reported in (2005) 8 SCC 264, the Apex Court re-considered almost all of its earlier judgments on the issue.

33. In a catena of decisions it has been held that writ petition under Article 226 of the Constitution **should not be entertained** when the statutory remedy is available under the Act, unless exceptional circumstances are made out. By deciding the said case, the Apex Court placed reliance upon the judgment in **R Vs. London Borough of Hillington, Council**, reported in (1974) 2 All ER 643, wherein it had been held as under.

"It has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy.

.....

The statutory system of appeals is more effective and more convenient than application for certiorari and the principal reason why it may prove itself more convenient and more effective is that an appeal to (say) the secretary of State can be disposed of at one hearing whether the issue between them is a matter of law or fact or policy or opinion or a combination of some or all of these....whereas of course an appeal for certiorari is limited to cases where the issue is a matter of law and then only it is a matter of law appearing on the face of the order.

.....

An application for certiorari has however this advantage that it is speedier and cheaper than the other methods and in a proper case therefore it may well be right to allow it to be used.....I would, however, define a proper case as being one where the decision in question is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction or in consequence of an error of law."

34. Similar view has been reiterated in **Seth Chand Ratan Vs. Pandit Durga Prasad & Ors**, reported in 2003 AIR SCW 3078.

35. In view of the aforesaid law laid down by the Apex Court and considering the facts and circumstances of the case, this writ petition is disposed of by providing that the petitioner, may make reference petition against the order impugned before the Chancellor of the University, under Section 68 of the U.P. State within three weeks from today, along with a certified copy of this order. On such reference petition being filed, the Chancellor of the respondent-University is requested to consider and decide the same, in accordance with law by means of a reasoned speaking order, preferably within one month thereafter after affording opportunity of hearing to the parties concerned.

(2021)12ILR A505
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2021

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ-C No. 32017 of 2021

C/M Janta Inter College Jaitpur Kalan, Agra & Anr. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Prabhakar Awasthi

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Article 14 & 21 – UP Intermediate Education Act, 1921 – Section 16-A – Committee of management – Single operation of bank account – Principle of natural justice – Applicability – No opportunity of hearing was given – Effect – Ex parte order passed – Validity challenged – Held, there is substance in the submissions that the impugned order directing single operation of bank accounts of the petitioners' institution, is passed in violation of principle of natural justice and Articles 14 and 21 of the Constitution of India, as there is no whisper as on which date, opportunity of hearing has been afforded to the petitioners or to any office-bearers of the Committee of Management of the petitioners' institution before passing the same, hence, the same is an ex-parte order – High Court remitted back the matter to the DIOS after setting aside the impugned order. (Para 9, 12 and 13)

Appeal allowed. (E-1)

Cases relied on :-

1. Committee of Management, Anjuman Hidayatul Islam High School & anr. Vs St. of U.P. & ors.; 2013(5) ESC 2748 (All).

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Prabhakar Awasthi, learned counsel for the petitioner and Mr. Shailendra Singh, learned Standing Counsel for State-respondents.

2. This writ petition has been filed by the petitioner for quashing the impugned order dated 20.11.2021 passed by respondent no.4, District Inspector of Schools, Agra, whereby he has directed single operation of bank accounts of the petitioners' institution. He has also prayed for a direction upon the respondents not to interfere in the peaceful functioning of the petitioners' Committee of Management continuously in managing day to day affairs of the institution, which has been validly elected on 22.08.2021 and approved on 13.10.2021.

3. Learned counsel for the parties are agree that the present writ petition may be decided at this stage, without calling for any further affidavits specially in view of the order proposed to be passed, as no purpose would be served by keeping the present writ petition pending.

4. The brief facts of the case are that the petitioners' institution is a recognized intermediate college in the name and style of "Janta Inter College, Jaitpur, Kalan" District Agra which is managed by a Committee of Management, duly elected, strictly in consonance with the provisions of scheme of administration framed and drawn under exercise of powers under Section 16-A of U.P. Intermediate Education Act, 1921 (hereinafter referred to as the "Act, 1921").

5. The aforesaid institution is under grant-in-aid of the State Government, as such, provisions of U.P. High School and Intermediate (Payment of salary to Teaching and other Staff) 1971 (hereinafter referred to as the "Act, 1971") is fully applicable. The last valid election of Committee of Management was held on 31.08.2017 from 13 members, wherein Shri Dayaram was elected as Manager and Mahesh Babu was elected as President. The aforesaid elections were approved by the District Inspector of Schools on 26.09.2017.

6. The aforesaid elections were challenged, by means of Writ Petition No. 59533 of 2017, and the said writ petition stood rejected by the order dated 13.12.2017. During the sustenance of term of the aforesaid Committee of Management, 16 new members were enrolled, out of which, petitioner no.2 also stood enrolled as a member. The Manager of the aforesaid Committee of Management, namely, Shri Dayaram expired on 19.04.2021, as a result whereof, a casual vacancy came into existence. The petitioner no.2 being a valid member was elected as Manager for residue period under the resolution dated 27.06.2021, strictly in consonance with Clause 9(4) of the scheme of administration and the same was approved by the District Inspector of Schools vide order dated 23.07.2021.

7. The term of the Committee of Management, as provided in the approved scheme of administration, is 4 years and since the last elections were held on 31.08.2017, therefore, the term of the aforesaid Committee of Management was come to an end on 30.08.2021, hence, valid elections of the Committee of Management were held on 22.08.2021, wherein again Committee of Management headed by petitioner no.2 as Manager came to be elected and the same was also approved by the District Inspector of Schools vide order dated 13.10.2021. In between, an order dated 12.10.2021 was passed by District Inspector of Schools,

wherein the election of Shri Sridhar Srivastava as Manager for the residue period was discarded, as the aforesaid claim was made after the expiry of the term of Committee of Management, which was elected on 31.08.2017.

8. Surprisingly, on a complaint made by the Principal of the said institution, who happens to be ex-officio office-bearer, the District Inspector of Schools has passed the impugned order dated 20.11.2021, whereby he has directed single operation of bank accounts of the petitioners' institution.

9. Learned counsel for the petitioners submits that the impugned order dated 20.11.2021 passed by District Inspector of Schools, Agra, directing single operation of bank accounts of the petitioners' institution, is in violation of principle of natural justice and Articles 14 and 21 of the Constitution of India, as there is no whisper as on which date, opportunity of hearing has been afforded to the petitioners or to any office-bearers of the Committee of Management of the petitioners' institution before passing the same, hence, the same is an ex-parte order and liable to be quashed on that ground alone.

10. Learned counsel for the petitioner next submits that order impugned dated 20.11.2021 passed by D.I.O.S. is wholly without jurisdiction as after approving the petitioners' Committee of Management, the District Inspector of Schools becomes functus officio and, therefore, he cannot uproot the petitioners' Committee of Management, which has already been approved by him vide his order dated 13.10.2021. In support of the aforesaid submission, learned counsel for the petitioner has placed reliance upon a judgement of this Court in the case of ***Committee of Management, Committee of Management, Anjuman Hidayatul Islam High School And Another Vs. State of U.P. And Others*** decided on 3rd October, 2013 in Civil Misc. Writ Petition No. 46324 of 2013, reported in ***2013(5) ESC 2748 (All).***

11. Learned Standing Counsel has not satisfactorily controverted or rebutted the aforesaid submissions made by the learned counsel for the petitioners.

12. Having heard the learned counsel for the parties, considered their submissions and gone through the order impugned, this Court finds substance in the submissions made by the learned counsel for the petitioners.

13. In such circumstances, the order dated 20.11.2021 passed by the District Inspector of Schools, Agra directing single operation of bank accounts of the petitioners' institution is set aside and the matter is remitted back to the District Inspector of Schools, Agra for decision afresh. While considering the same afresh, the District Inspector of Schools, Agra shall call for the objections/reply and other documents from the petitioners regarding the complaint made against him, within two weeks from date of production of a certified copy of this order. On calling for objections/reply or documents, the petitioners shall file their reply/objections, supported by such documents, as they may be advised, within two weeks thereafter. In case, such objections/reply is filed within the aforesaid time, the District Inspector of Schools, Agra shall consider and decide the same, strictly in accordance with law, by means of a reasoned and speaking order preferably within two weeks thereafter after affording opportunity of hearing to the parties concerned.

14. The present writ petition is allowed subject to the observations made above.

(2021)12ILR A508
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2021

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-C No. 45899 of 2017

Zakir ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Parvez Alam, Sri Devesh Vikram

Counsel for the Respondents:
C.S.C.

A. UP Scheduled Commodities Distribution Order, 2016 – Section 13(1) – Fair price shop license – Allotment – Filing of appeal by a person not participated in the allotment proceeding – Locus challenged – Held, only aggrieved person, who has participated in the process of allotment of fair price shop can file appeal. Any appeal filed by stranger/ outsider is not maintainable. (Para 12)

Writ petition allowed. (E-1)

Cases relied on :-

1. Babu Ram Singh Vs St. of U.P. & ors.; [2009 (10) ADJ 24]

2. Neeraj Kumar Mishra Vs Dy. Commissioner (Food) Region Allahabad & ors.; 2017 (3) AdJ 834

3. Writ-C No. 49975 of 2015; Kailash Singh Vs St. of U.P. & ors. decided on 03.09.2015.

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

1. Heard learned counsel for the petitioner and learned Standing Counsel for State-respondents.

2. Present petition has been filed for writ of certiorari quashing the impugned order dated 22.08.2017 passed by Joint Commissioner (Food), Saharanpur Region, Saharanpur-respondent no. 2.

3. Learned counsel for the petitioner submitted that he is resident of Village Parasauli, Block Kandla, Tehsil Budhana, District Muzaffarnagar and there are four fair price shop established in the said village having total number of 9230 beneficiaries. To meet out the interest of local residents, Gaon Sabha decided for establishment for 5th fair price shop in the same village. Accordingly, vide resolution dated 26.08.2016, decision was taken for allotment of fair price shop under the reserve category i.e. reservation of Gram Pradhan. Under the aforesaid resolution, three applicants, namely, Zakir (petitioner), Raees and Abdul Hasan applied for allotment of fair price shop and unanimously, it was allotted in favour of petitioner. After aforesaid resolution, an agreement was executed and now after completion of all legal formalities, he was issued allotment letter dated 21.10.2016 by respondent no. 4.

4. He next submitted that to utter surprise, Ex-Pradhan, namely, Satyendra Saini (respondent no. 5), on the very next date of allotment order i.e. 21.10.2016, filed an application before Block Development Officer, Block- Budhana, Muzaffarnagar alleging irregularities of process of allotment of fair price shop such as allotment was made without calling open meeting of Gaon Sabha. After receiving the aforesaid complaint, respondent no. 4 directed the Block Development Officer to hold enquiry vide order dated 25.10.2016. Pursuant to order dated 25.10.2016, Block Development Officer constituted enquiry committee of two members vide order dated 27.10.2016. Enquiry committee investigated the matter and vide its letter dated 04.11.2016 submitted enquiry report categorically stating that allotment of fair price shop in favour of petitioner was done in

accordance with law. Respondent no. 4 on the basis of enquiry report, passed the order dated 22.02.2017 directing the Regional Supply Officer, Supply Center, Budhana for allotment of essential commodities in favour of petitioner.

5. Learned counsel for the petitioner submitted that against the very said order, complainant-respondent no. 5 filed an Appeal No. 21 of 2016-17 under Section 13(1) of U.P. Scheduled Commodities Distribution Order, 2016 before Commissioner, Saharanpur Region, Saharanpur, which was transferred before Joint Commissioner (Food), Saharanpur Region, Saharanpur- respondent no. 2 and respondent no. 2 vide its order dated 22.08.2017 contrary to settled provision of law and most mechanical manner, partly allowed the appeal filed by the complainant.

6. Learned counsel for petitioner is assailing the impugned order on two grounds, first of all, respondent no. 5 was not an applicant for allotment of fair price shop, therefore, he is not a person aggrieved. He is having no locus standi to file appeal and in support of that, he has placed reliance upon the judgments of this Court in the matter of ***Babu Ram Singh Vs. State of U.P. and others; [2009 (10) ADJ 24], Neeraj Kumar Mishra Vs. Dy. Commissioner (Food) Region Allahabad and others, 2017 (3) AdJ 834 and Kailash Singh Vs. State of U.P. and others; (Writ-C No. 49975 of 2015)*** decided on 03.09.2015. Secondly, he submitted that in the impugned order, no finding is recorded either against the petitioner or violation of any procedure in allotment of fair price shop by the authorities, but partly allowed the appeal rejecting the order dated 21.10.2016 and remanded the matter back to Sub Divisional Magistrate-Respondent no. 4 to pass fresh order. He next submitted that under such legal and factual position, respondent no. 5 is not the person aggrieved and further there is no adverse finding against the petitioner in the impugned order, therefore, impugned order dated 22.08.2017 passed by respondent no. 2 is bad and liable to be set aside.

7. Learned Standing Counsel has vehemently opposed, but could not dispute the factual as well as legal submissions made by learned counsel for the petitioner.

8. I have considered the rival submissions made by learned counsel for the parties and perused the record as well as impugned order dated 22.08.2017 passed by respondent no. 2. At no point of time, it is stated that respondent no. 5 was also an applicant and it is admitted factual position that respondent no. 5 has never participated in the process of allotment of fair price shop.

9. Further, this Court has considered the very same issue in the judgement of ***Babu Ram Singh (supra)*** and held that only aggrieved person can file appeal. Relevant paragraphs of aforesaid judgements are being quoted herein below;

"Having heard learned counsel for the parties, the position in law is more than clear, inasmuch as, sub-clause 3 of Clause 28 clearly prescribes that an appeal shall be maintainable on behalf of an aggrieved agent. The word "agent" has also been defined under Clause 2 (c). In such a situation the Gaon Sabha cannot be said to have been conferred with a right to prefer an appeal under Clause 28.

It is by now well settled that an appeal is a creation of a statute and the right therein can neither be enhanced or reduced on the strength of any interpretation as suggested on behalf of the Gaon Sabha. Had the rule making authority intended to provide for an appeal on behalf of the Gaon Sabha then the words prescribing the right of appeal in sub-clause 3 of Clause 28 would have been any person instead of any aggrieved agent.

An appeal is provided under a statute for the correction of an error which might have crept in on account of incorrect application of law and such right of appeal has been explained by the Apex Court in the case of Sita Ram and others Vs. State of Uttar Pradesh reported in (1979) 2 SCC 656 (see paragraphs 25, 41 and 45).

Accordingly this Court is of the opinion that where the statute is explicit and clear, and does not suffer from any ambiguity there is no scope for the Courts to read a provision which does not exist. The Gaon Sabha ought to have either filed a writ petition before this Court or could have approached a forum which may be otherwise available in law.

In the facts and circumstances of this case, the Gaon Sabha filed an appeal under the said provision which obviously was not maintainable before the Commissioner at the instance of the Gaon Sabha. In view of this, the interim order passed by the Commissioner on an incompetent appeal cannot be sustained. "

10. Again in the matter of Neeraj Kumar Mishra (supra), Court has taken the same view and after considering the judgement of Division Bench, has held that only aggrieved person can file appeal. Relevant paragraphs of the said judgement are being quoted herein below;

"11. In the case of Dharmraj (supra) Division Bench of this Court considered in the matter of fair price shop agency the question as to whether a complainant is an aggrieved person to challenge the order of restoration of licence by the Sub Divisional Magistrate and held as under:

12. According to our opinion a "person aggrieved", means a person who is wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. "Person aggrieved" means a person who is injured or he is adversely affected in a legal sense."

11. This matter was also before this Court in the matter of Kailash Singh (supra) where writ petition was filed by the complainant and Court has in detailed dealt, who is person aggrieved and finally held that only aggrieved person can file petition in the matter of allotment of fair price shop. Relevant paragraphs of the said judgement are being quoted herein below;

"A preliminary objection has been raised by the learned Standing Counsel regarding the maintainability of the writ petition at the behest of the complainant against the final order passed in appeal. Reliance has been placed on Dharam Raj Versus State of U.P. and others, 2010 (2) AWC 1878 (LB), Ram Baran Versus State of U.P. and others, 2010(2) AWC 1947 (LB) and Amin Khan Versus State of U.P. and others, [2008(4) ADJ 559 (DB)].

The petitioner admittedly is a complainant in the present case, hence would not be an aggrieved person.

The meaning of the expression 'person aggrieved' will have to be ascertained with reference to the purpose and the provisions of the statute. One of the meanings is that person will be held to be aggrieved by a decision if that decision is materially adverse to him. The restricted meaning of the expression requires denial or deprivation of legal rights. A more legal approach is required in the background of statutes which do not deal with the property rights but deal with professional misconduct and morality. (Refer-Bar Council of Maharashtra v. M.V.Dabholkar, (1975) 2 SCC 702, 710-11, paras 27 & 28).

Broadly, speaking a party or a person is aggrieved by a decision when, it only operates directly and injuriously upon his personal, pecuniary and proprietary rights (Corpus Juris Seundem. Edn. 1, Vol.IV, p.356, as referred in

Kalva Sudhakar Reddy v.Mandala Sudhakar Reddy, AIR 2005 AP 45,49 para 10)

The expression 'person aggrieved' means a person who has suffered a legal grievance i.e a person against whom a decision has been pronounced which has lawfully deprived him of something or wrongfully refused him something. The petitioner is not an aggrieved person by merely filing a complaint. The order of revocation of cancellation of fair price shop license do not affect him in any manner.

The Division Bench in Dharam Raj Versus State of U.P. and others, 2010 (2) AWC 1878 (LB), held that the petition on behalf of the complainant against the licensee of fair price shop is not maintainable against the final order passed by the competent authority as the complainant cannot be said to have any grievance in the matter being not an aggrieved person rather is a 'person annoyed'.

Recently Supreme Court in Ravi Yashwant Bhoir versus District Collector, Raigad and others (2012) 4 SCC 407 was dealing with the removal of the President of Uran Municipal Council under the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. The ex-President was the complainant, the Court was of the opinion that the complainant cannot be party to the lis as he could not claim the status of an adversarial litigant. The relevant extract is as follows:

"58. Shri Chintaman Raghunath Gharat, Ex-President was the complainant, thus, at the most, he could lead the evidence as a witness. He could not claim the status of an adversial 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 whosuffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eyes of 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 valuntas reasons i.e. a claim devoid of reasons.

60. Under the garb of being 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 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. (Vide: Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General ofMaharashtra, AIR 1971 SC 385; Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed & Ors., AIR 1976 SC 578; Maharaj Singh v. State of Uttar Pradesh & Ors., AIR 1976 SC 2602; Ghulam Qadir v. Special Tribunal & Ors., (2002) 1 SCC 33; and Kabushiki Kaisha Toshiba v. Tosiba Appliances Company & Ors., (2008) 10 SCC 766). The High Court failed to appreciate that it was a case of political rivalry. The case of the appellant has not been considered in correct perspective at all."

Similarly, the Supreme Court in Ayaaubkhan Noorkhan Pathan versus State of Maharashtra and others (2013) 4 SCC 465, 466 was dealing with the issue of caste certificate being challenged by a person who did not belong to the reserved category. The Apex Court

imposed exemplary cost of one lakh upon the stranger to the lis as he abused the process of the Court to harass the appellant.

The Court held as follows:-

" 9. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the Authority/Court, that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant 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; Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal & Ors., AIR 1962 SC 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).

10.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 jeopardised. (Vide: Shanti Kumar R. Chanji v. Home Insurance Co. of New York, AIR 1974 SC 1719; and State of Rajasthan & Ors. v. Union of India & Ors., AIR 1977 SC 1361)."

A Division Bench in Amin Khan versus State of U.P and others 2008(2) AWC 2002: (2008) 2 UPLBEC 1256 was of the opinion that a complainant had no locus to challenge the order of the District Magistrate withdrawing the administrative and financial powers of the Pradhan. The Court placed reliance upon Suresh Singh's case (Supra) as well as Smt. Kesari Devi versus State of U.P & others 2005(4) AWC 3563.

This Court in Ram Baran Versus State of U.P. and others, 2010(2) AWC 1947 (LB), again reiterated the principle that a complainant would have no locus to maintain the petition against the final order passed by the District Magistrate pursuant to direction in a petition under Article 226 of the Constitution against the Pradhan.

In the case of R.V. London Country Keepers of the peace of Justice, (1890) 25 Qbd 357, the Court held:

"A person who cannot succeed in getting a conviction against another may be annoyed by the said findings. He may also feel that what he thought to be a breach of law was wrongly held to be not a breach of law by the Magistrate.

He thus may be said to be a person annoyed but not a person aggrieved, entitle to prefer an appeal against such order."

The petitioner complainant shall have an opportunity during the course of regular enquiry to lead oral and documentary evidence if

provided under the rules, but would have no locus to assail the final order passed by the authority on the complaint.

Having due regard to the facts and circumstances of the case, I am not inclined to interfere. The petition filed at the behest of a complainant being not maintainable is, accordingly, dismissed."

12. In all the three cases referred herein above, Court has taken constant view that only aggrieved person, who has participated in the process of allotment of fair price shop can file appeal. Any appeal filed by stranger/ outsider is not maintainable. In present case too, undisputedly respondent no. 5 was never participant in the process of allotment of fair price shop, therefore, this Court is also of the same view that he is not the person aggrieved and cannot file appeal against the order of Sub Divisional Magistrate. It is required on the part of respondent no. 2 to first consider about the maintainability of appeal and return findings upon the ground taken by the petitioner in reply of appeal. In case, it was found that appellant is not the aggrieved person, appeal has to be rejected on the this ground alone, but here while partly allowing the appeal, respondent no. 2 has committed error of law as undisputedly appellant was not the "person aggrieved". Therefore, impugned order dated 22.08.2017 passed by respondent no. 2 is bad and liable to be set aside.

13. Further, so far as second argument of the petitioner is concerned, about the absence of adverse finding, is also having substance. Respondent no. 2 has not recorded any adverse finding or about violation of any procedure. Even in case, appeal was maintainable, it is required on the part of respondent no. 2 to return finding about the procedural lapses and illegality in the order, if any, but nothing has been recorded in the impugned order. Therefore, on this ground too, the impugned order is bad and liable to be set aside.

14. Accordingly, under such facts of the case as well as law laid down by this Court referred as above, impugned order dated 22.08.2017 passed by Joint Commissioner (Food), Saharanpur Region, Saharanpur-respondent no. 2 is hereby quashed and writ petition is **allowed.**

15. This Court vide order dated 3.10.2017 has stayed the effect and operation of the order dated 22.8.2017 passed by respondent no. 2 and petitioner is running the fair price shop as on date, therefore, no further order is required.

(2021)12ILR A513
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2021

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 53843 of 2010

Pratap Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rajesh Kumar Mishra

Counsel for the Respondents:
C.S.C.

A. Civil Law - Indian Stamp Act, 1899 – Sections 47-A & 56 – Deficiency of stamp – Ex-parte order passed relying upon ex-parte inspection report – Though three exemplar instruments relied upon to ascertain the market value, the report also proceeded to assess the value of the land, in question, on the basis of the minimum rates prescribed by the Collector – Validity challenged – Held, assessment of the value of the land in question

on the basis of the minimum rates prescribed by the Collector could not have been done in view of the express provisions of Section 47-A(3) of the Act – Smt. Pushpa Sareen's case relied upon. (Para 9 and 11)

Writ petition allowed. (E-1)

Cases relied on :-

1. Ram Khelawan @ Bachcha Vs St. of U.P. & anr.; 2005 (2) AWC 1087

2. Smt. Pushpa Sareen Vs St. of U.P.; 2015 (3) ADJ 136

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

1. Heard Shri Rajesh Kumar Mishra, learned counsel for the petitioner and Shri Awadhesh Chandra Srivastava, learned Standing Counsel appearing for the respondents.

2. By means of this petition, the petitioner seeks to challenge the order dated 31.12.2009 passed by the Additional District Magistrate (Finance & Revenue), Moradabad in Case No.407/09 under Section 33/40/47 of the Indian Stamp Act, 18991 whereby, by means of an ex-parte order, deficiency of stamp has been imposed upon the petitioner while relying upon the report dated 16.10.2009 of the Assistant Inspector General of Registration. Further under challenge is the order dated 26.05.2010 passed by the Additional Commissioner (Administration), Moradabad Mandal, Moradabad, whereby the appeal filed by the petitioner under Section 56 of the Act, being Appeal No.74/2009-10, has been partly allowed by reducing the amount of penalty imposed upon the petitioner.

3. The facts as mentioned in the petition are that the petitioner purchased an area of 0.002 hectares from Khasra No.869-Ka, an area of 0.130 hectares from Khasra No.948 and an area of 0.255 hectares from Khasra No.950, totalling 0.387 hectares in Village-Bhogpur, Mithauni, Tehsil & District-Moradabad by means of a sale-deed executed on 27.09.2007, which was registered thereafter. It is stated that the aforesaid land was purchased for agricultural purposes and the stamp duty was paid in accordance with the minimum rates specified by the Collector. The name of the petitioner was also mutated in the revenue records. It is alleged that the respondent no.2 passed the impugned order dated 31.12.2009 without issuance of summons or notice to the petitioner, in which it was held that the plots in question are for residential usage and, therefore, deficiency of stamp duty of Rs.1,38,400/- and penalty of Rs.1,38,400/- alongwith interest at the rate of 1.5% per mensem were imposed. It is stated that on coming to know of the ex-parte order passed by the respondent no.2, an appeal was filed by the petitioner before the Additional Commissioner (Administration) which was partly allowed by reducing the amount of penalty imposed, though no error was found in the order of the respondent no.2 in assessing the land in question as residential.

4. The contention of the learned counsel for the petitioner is that an ex-parte report of the Assistant Inspector General of Registration has been relied upon by the respondent no.2 to record a finding regarding evasion of duty which could not have been relied upon by the authority in view of the judgment of this Court in the matter of **Ram Khelawan alias Bachcha v. State of U.P. and another**2. It is further contended that the vendors of the sale-deed in question had sold their entire share of the land on the khasra numbers to the petitioner, and the admitted terms of the habendum clause appearing in the sale-deed reflect that the land in question was bhumidhari over which agricultural activities were being carried on. The learned counsel states that the order of the respondent no.2 was passed ex-parte without affording any opportunity of hearing to the petitioner. It is

further contended that the Additional Commissioner (Administration), in the appellate order, has committed an error of law in affirming the order of the respondent no.2 and that neither the penalty nor the deficiency in stamp duty could have been imposed upon the petitioner under the facts and circumstances of the present case.

5. Learned Standing Counsel has opposed the writ petition stating that the report of the Assistant Inspector General of Registration dated 16.10.2009 has referred to three exemplar sale-deeds pertaining to parts of land of those very Khasra numbers that were sold to other persons in which the purpose for purchase was stated to be residential. The contention is that, accordingly, no fault exists in the order of the respondent no.2 on this ground and, also on the ground that the service of notice on the petitioner was deemed sufficient.

6. It is noticed, as is admitted, that the impugned order dated 31.12.2009 was ex-parte. It is not the contention of the learned counsel for the petitioner that any restoration application was filed on behalf of the petitioner in respect of the aforesaid order dated 31.12.2009. The petitioner straightaway proceeded to file the appeal under Section 56 of the Act. The grounds of appeal, that has been enclosed as Annexure-6 to the writ petition, do not contain any ground with regard to the non-receipt of notice. Among the grounds raised is of lack of opportunity of hearing to the petitioner. In view of the aforesaid, the affirmation on behalf of the petitioner that no notice was received by him, is belied. The order of the respondent no.2, Additional District Magistrate, has been passed relying upon the report of the Assistant Inspector General of Registration dated 16.10.2009 in which it was mentioned that portions of lands of those very Khasra numbers, were subject of instrument Nos.4894/05, 601/06 and 2463/07 on which stamp duty on the basis of the residential rates was paid. The respondent no.2 has observed that since neither the petitioner nor his counsel had appeared nor any objection was filed, it would be deemed that he accepts the report and notice. Accordingly, the deficiency in stamp duty and penalty were imposed.

7. Annexure-5 is the report made by the Assistant Inspector General of Registration dated 16.10.2009. The relevant part of the report dated 16.10.2009 is extracted below:-

"..... अधोहस्ताक्षरित द्वारा अर्द्धनगरीय एवं उपान्त क्षेत्र के कृषि आधारित मूल्यांकन वाले विक्रय विलेखों के मूल्यांकन जांच के क्रम में उक्त विक्रय विलेख मेरे संज्ञान में आया। अभिलेखों के अवलोकन से खसरा न० 869, 948 व 950 स्थित ग्राम भोगपुर मिठौनी से सम्पत्ति क्रय की गयी तथा आवासीय दर के मूल्यांकन पर स्टाम्प शुल्क अदा किया गया है। उक्त प्रकार के कतिपय विलेखों का विवरण निम्न सारिणी में दिया जा रहा है:-

क्रमांक	विक्रय विलेख संख्या	निष्पादन तिथि	खसरा न०	अन्तरित क्षेत्रफल (वर्ग मी० में)	दर प्रति वर्ग मी०	मूल्यांकन जिस पर स्टाम्प शुल्क अदा किया गया	अदा किया गया स्टाम्प शुल्क
1.	4894/05	9.11.05	869, 948, 950	140.00	1500	210000	21000

2.	601/06	8.2.06	948	132.47	1500	1990000	20000
3.	2463/07	5.4.07	869, 948, 950	245.91	1600	3940000	31600

उपरोक्त सारिणी के अवलोकन से स्पष्ट है कि खसरा न० 869, 948, 950 स्थित ग्राम भोगपुर मिठौनी से सम्बन्धित विक्रय विलेख संख्या 4894/05, 601/06 तथा 2463/07 का निबन्धन किया गया तथा निर्धारित आवासीय दर के मूल्यांकन पर स्टाम्प शुल्क अदा किया गया है। एक ही ग्राम एक ही एक ही खसरे की भूमि के दो दर्रो के आधार पर सम्पत्ति के बाजार मूल्य का निर्धारण किया जाना तर्क संगत एवं विधि सम्मत् नही है कि सारिणी में उल्लिखित विलेख विवादित विलेख संख्या 5733/07 के द्वारा अन्तरित सम्पत्ति के मूल्यांकन हेतु उपयुक्त एवं तर्क संगत पूर्व दृष्टांत / दृष्टांत स्टजित करते है। ....."

8. As is evident from the report, as extracted above, that three specific exemplar deeds have been relied upon by the Assistant Inspector General of Registration to reflect the residential usage over the land in question.

9. In the decision of **Ram Khelawan (supra)**, a coordinate Bench of this Court had made an observation that no reliance can be placed on an ex-parte report for deciding the case. It was observed that the ex-parte inspection report may be relevant for initiating the proceedings under Section 47-A of the Act and after initiation of the case, inspection is to be made by the Collector or the authority hearing the case after due notice to the parties to the instrument as provided under Rule 7(3)(c) of the U.P. Stamp (Valuation of Property) Rules, 1997.

10. Though this Court is in respectful agreement with the aforesaid observations made by this Court in the case of **Ram Khelawan (supra)**, however, in the present case at hand, the ex-parte report specifically refers to three exemplar instruments that were considered by the Assistant Inspector General of Registration while making his report. It was, therefore, open for the District Magistrate, in the facts and circumstances of the present case, where despite notice, neither any objection was filed on behalf of the petitioner nor had any advocate appeared on his behalf, to rely upon the ex-parte report which was based upon the exemplar deeds. It is always open to the Collector or the authority undertaking an examination of an instrument under Section 47-A(3) of the Act, to refer to exemplar deeds for the purpose of ascertaining the market value even though they may form part of an ex-parte report that has led to the initiation of the proceedings under Section 47-A(3) of the Act. Therefore, no fault can be attributable to the respondent no.2 in relying upon the three exemplar deeds that find mention in the ex-parte report dated 16.10.2009. In view of the above, the order of the Additional Commissioner, upholding the order of the respondent no.2, cannot faulted as far as this aspect is concerned.

11. However, the matter of concern in the present petition is that despite relying upon the aforesaid exemplar deeds, the respondent no.2 has proceeded to assess the value of the land in question on the basis of the minimum rates prescribed by the Collector. This could not have been done in view of the express provisions of Section 47-A(3) of the Act that is also relied in the judgment of this Court in **Ram Khelawan (supra)** and several other decisions. In the decision of a three Judge Bench of this Court in the case of **Smt. Pushpa Sareen vs. State of U.P.**3, it has been held as follows:-

"26. The true test for determination by the Collector is the market value of the property on the date of the instrument because, under the provisions of the Act, every instrument is required to be stamped before or at the time of execution. In making that determination, the

Collector has to be mindful of the fact that the market value of the property may vary from location to location and is dependent upon a large number of circumstances having a bearing on the comparative advantages or disadvantages of the land as well as the use to which the land can be put on the date of the execution of the instrument.

27. Undoubtedly, the Collector is not permitted to launch upon a speculative inquiry about the prospective use to which a land may be put to use at an uncertain future date. The market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future. The possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land. This potential has to be assessed with reference to the date of the execution of the instrument. In other words, the power of the Collector cannot be unduly circumscribed by ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a period reasonably proximate thereto. Again the use to which land in the area had been put is a material consideration. If the land surrounding the property in question has been put to commercial use, it would be improper to hold that this is a circumstance which should not weigh with the Collector as a factor which influences the market value of the land.

28. The fact that the land was put to a particular use, say for instance a commercial purpose at a later point in time, may not be a relevant criterion for deciding the value for the purpose of stamp duty, as held by the Supreme Court in State of U.P. and others v. Ambrish Tandon and another, (2012) 5 SCC 566. This is because the nature of the user is relateable to the date of purchase which is relevant for the purpose of computing the stamp duty. Where, however, the potential of the land can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value. At the same time, the exercise before the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale-deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration. The Collector, therefore, would be within jurisdiction in referring to exemplars or comparable sale instances which have a bearing on the true market value of the property which is required to be assessed. If the sale instances are comparable, they would also reflect the potentiality of the land which would be taken into consideration in a price agreed upon between a vendor and a purchaser."

12. Accordingly, the impugned order of the respondent no.2 dated 31.12.2009, insofar as it assesses the valuation of the land in question on the basis of the minimum rates, is set aside. The order of the Additional Commissioner (Administration) dated 26.05.2010 is also set aside insofar as it affirms the order of the respondent no.2 assessing the market value on the basis of the minimum rates. The matter is remitted to the respondent no.2 or the competent authority who may be seized of the matter, to assess the market value taking into account the monetary consideration reflected in the exemplar deeds aforesaid or any other exemplar deeds, and not on the basis of the minimum rates. This exercise shall be done by the authority concerned within a period of three months from today. Since the petitioner is represented, no separate notice is required to be sent to him. It is, however, provided that the petitioner shall appear before the respondent no.2 on 22.12.2021 alongwith a certified copy of the order passed today, whereafter dates may be fixed. In case of

failure of the petitioner in appearing on that day, it will be open to the authority concerned to proceed in accordance with law.

13. In view of the aforesaid observations and to the extent mentioned above, this writ petition is allowed.

(2021)12ILR A518
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2021

BEFORE

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

Writ-C No. 59863 of 2015
Connected with
Writ-C No. 11072 of 2017

Sun Tower Residents Welfare Asso. ...Petitioner
Versus
Ghaziabad Dev. Auth. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prashant, Sri Abhijeet Mukherji, Sri Prashant, Sri S.K. Pal

Counsel for the Respondents:
Sri Ram Bilas Yadav, Sri Anoop Tivedi, Sri Anoop Trivedi (Sr. Adv.), Sri Himanshu Tyagi, Sri Kartikeya Saran, Sri Rahul Agarwal, Sri Rakesh Kumar Singh, Sri S. Shekhar, Sri Vrindavan Mishra, Sri M.C. Chaturvedi

A. UP Parks, Playgrounds and Open Spaces (Preservation and Regulation) Act, 1975 – Parks, claimed to be encroached – Burden of proof – Layout plan nowhere describes any piece of land to be a park exclusively – Writ petition does not specify any location or area as 'park' which park is, as per petitioner, allegedly being encroached upon but nothing assertive brought on record to establish existence of park - apart from a bald averment in the writ petition – Effect – Held, the burden to prove fact of green area earmarked in the layout plan dated 06.01.2005 to be a park is on the petitioner. (Para 101, 102 and 138)

B. Constitution of India – Article 226 – Writ – Maintainability – Concealment of material fact – Suppression of an order passed by the Competent authority on the same issue – Held, the behaviour of the petitioner is not fair and the petitioner has not approached with clean hands, instead, it has suppressed material facts / order passed by the G.D.A. in the year 2015 and indirectly sought to get over the inconvenient parts of it through the present writ petition while seeking enforcement of the portions favourable to it through another writ petition – High Court found the petitioner guilty of *'suppressio veri and sugestio falsi'* and refused to entertain the writ petition. (Para 150 and 151)

C. Jurisprudence – Law of equity – One who seeks equity must come with clean hands. (Para 151)

Writ petition disposed of. (E-1)

Cases relied on :-

1. Gorie Gouri Naidu (Minor) & anr. Thandrothu Bodemma & ors.; (1997) 2 SCC 552

2. Shri Narayana Dharmasanghom Trust Vs Swami Prakasananda & ors.; (1997) 6 SCC 78

3. K.A. Abdul Jaleel Vs T.A. Shahida; (2003) 4 SCC 166

4. Mehar Singh Saini, Chairman Haryana Public Service Commission & ors., In re; (2010) 13 SCC 586

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

1. Heard Sri Sudeepta Kumar Pal and Sri Abhijeet Mukherji, learned counsels representing The Petitioner Association, Sri M.C. Chaturvedi, learned Senior Counsel assisted by Sri Vrindavan Mishra, learned Advocate representing Ghaziabad Development Authority, Sri Rahul Agarwal and Sri Kartikeya Saran, learned counsel representing respondent no. 2 and Sri Himanshu Tyagi, learned counsel representing respondent no. 3 and perused the record.

2. The following prayer has been made in the above leading petition (Writ-C No.59863 of 2015):-

"(i) Issue a writ, order or direction quashing the plan dated 31.07.2013 released by respondent no.1.

(ii) Issue a writ, order or direction quashing the allotment of additional FAR given to respondent 3 and 4 by respondent no.1.

(iii) Issue a writ, order or direction directing the respondent no.1 not to release any further building plans in respect of the Group Housing Society being developed by respondent no.2 in violation of the law.

(iv) Any other relief or relief which the Court deems fit and proper to be awarded to the petitioner in the interest of justice.

(v) Award cost of the petition."

3. Further in the above connected petition Writ-C No.11072 of 2017, the prayer made is extracted as herein under:-

"(i) Issue a writ, order or direction to the respondent no.1 to initiate action against the respondent no.3 for not implementing its order dated 17.02.2015.

(ii) Issue a writ, order or direction to the respondent no.1 to ensure completion of the buildings named "SUN TOWERS" through its own department or engage a reputed developer / contractor or allow the petitioner association after collecting the amount based on the present or assessment dated 14.08.2016 by the developer himself whichever is more within a reasonable time.

(iii) Issue a writ, order or direction directing the respondent no.2 to take necessary steps to complete the two staircases and other deficiencies in fire safety as per its order dated 14.11.2014 through respondent no.3 within a reasonable time.

(iv) Issue a writ, order or direction directing the respondent nos.1 and 2 to initiate departmental proceedings against their own officers for awarding completion certificate and Fire NOC in 2007 under extraneous circumstances if not already initiated.

(v) Any other relief or relief which the Court deems fit and proper to be awarded to the petitioner in the interest of justice.

(vi) Award cost of the petition."

4. Both the sides have exchanged their respective pleadings.

Facts of the case:-

5. Matrix of the case appears to be that a memorandum of understanding was reached on 08.01.2001 between Ghaziabad Development Authority, respondent no.1 and respondent no.2 Shipra Estate Ltd. to develop a group housing project over Plot No.10 Vaibhav Khand Indirapuram, Ghaziabad at 1.5 F.A.R., as the respondent No.1 found it inconvenient to complete the project itself.

6. Perusal of the memorandum of understanding C.A.-2 to the counter affidavit filed by respondent no.2 is explanatory of certain aspects of this case to the ambit that initially the scheme was framed and launched in the year 1991 and the work commenced in the year 1991 and 1993, partially by passage of time in the year 1995 because of certain problematic offshoots, project was halted and it was decided that sale of flats should be managed on "as is where is basis" and the lessor shall be Ghaziabad Development Authority - respondent no.1- and it shall be the sole owner. Further it indicates that bulk residential flats were included in the module of F.A.R basis, the tenders were invited on 29.03.2000, the said developer was selected on the bulk sale basis.

7. The map was first approved on 26.05.2001 which was amended on 07.10.2002 then lastly it was amended / revised on

06.01.2005 which is admitted to the petitioner with F.A.R. 1.5 applicable as per building bye-laws 2000 Clause 3.3.6 applicable for Ghaziabad Development Authority.

8. In this case, allotment to the respondent no.2 was made on the bulk sale basis. Based on the building plan dated 06.01.2005, the construction commenced.

9. Noticeable that Type A and Type B buildings in Plot No.10 were constructed as per plan dated 08.10.2002 and Type D was completed in the year 2007 and lease deed was executed by Ghaziabad Development Authority in favour of the allottees of the petitioner-apartment Type D. This building in which allottees had interest consisted of G+12 Floors. It means that one ground floor with 12 storeys. The number of buildings comprised of 4 towers and each tower consisted of 84 apartments, thus totalling to 336 apartments. The total area of apartment Type D is 16995.84 square meters as per the deed of declaration dated 24.03.2015. The deed of declaration was filed by the respondent no.2 on 24.03.2015. Type A and Type B are two bedroom apartments and were constructed and handed over and lease deed executed from 2004 onwards. The present petitioner's apartments (three bedrooms) were handed over and lease deed executed from the year 2007 onwards and partial completion certificate was obtained for Type D apartments on 29.01.2010.

10. So far as the respondents are concerned, respondent no.1 is Ghaziabad Development Authority which is competent authority in this case. Respondent no.2 - Shipra Estate Ltd. is builder and promoter, whereas, respondent no.3 Saya Homes Pvt. Ltd. stepped into shoes of respondent no.2 in the year 2008 by way of execution of the lease dated 30.04.2008 executed by Ghaziabad Development Authority between respondent no.2 and respondent no.3 and it is constructing and developing towers in Type-C apartments, as such.

11. Noticeable that the petitioner society was formed in the year 2008. It is gathered from perusal of lease deed pertaining to Type D apartments (available as annexure no.II to the petition) that each flat was ad-measuring approximately 116 square meters and the proportionate share of each apartment owner in the piece of land mentioned in the lease deed is fixed at 47.13.

12. Since the development work could not take place on the site earmarked for development of Type E (which later on was rechristened as Type C) apartment, the Ghaziabad Development Authority, respondent no.1 leased out the land in favour of M/s Rose Berry Development Developers Pvt. Ltd. on 30.04.2008, on which Type E apartments were to be raised and as per the lease, developmental rights have been given to it (respondent no.3 as assignee of M/s Rose Berry Developers). Apart from that, in continuation of earlier agreement, the duty to have plan sanctioned or modified rests with the respondent no.2 - Shipra Estate Pvt. Ltd.

13. In the year, 2009, the Housing and Urban Planning Department of the Government of U.P. vide order dated 04.08.2009 increased the basic F.A.R. from 1.5 to 2.5. Consequently, model bye-laws were issued by the State Government by virtue of Section 57 of U.P. Urban Planning and Development Act, 1973 which were adopted by all development authorities in the State of U.P. including the Ghaziabad Development Authority. This increase in F.A.R. thus enabled the concerned developers to increase the number of floors in their respective projects.

14. Pursuant to the aforesaid model bye-laws, the Ghaziabad Development Authority

brought certain amendment and revised Clause 3.3.6 (xi) of its bye-laws, thus raising F.A.R. from 1.5. to 2.5 qua three localities Kaushambi, Indirapuram and Vaibhaiv Khand of the district Ghaziabad and increased F.A.R. from 1.5 to 2.5 for group housing society on bulk sale basis.

15. Amended bye-laws notified on 17.08.2009 vide notification no.3084/8-3-09-73/Vividh/07 Lucknow, this F.A.R. (2.5) was treated to be basic F.A.R. in the aforesaid three localities of district Ghaziabad. In view of the aforesaid increase in the nature of the F.A.R. from 1.5 to 2.5, respondent no.2 proposed to further revise the lay out plan (06.01.2005) and sought for revision / amendment of the layout plan (06.01.2005) for Type E apartment. By seeking the amendment in the lay out plan, respondent no.2 proposed to raise construction in the area meant for development on Plot No.10 i.e. Vaibhaiv Khand Ghaziabad (as stipulated in layout plan dated 06.01.2005) and to increase height of apartments from G+12 to G+34. The respondent no.2 submitted the lay out plan under Section 15 of the U.P. Urban Planning and Development Act, 1973 which was approved by respondent no.1 on 31.07.2013 which is the bone of contention between the two sides and claim has been raised by the petitioner that this change / amendment in the layout plan (06.01.2005) as has been sought by respondent no.2 from Ghaziabad Development Authority - respondent no.1 - in fact requires consent of the petitioner society, as a pre-requisite to the sought for amendment / change in the layout plan. Relevant to mention that by way of amendment, the respondent nos.2 and 3 have admittedly used the increased F.A.R. 2.5 as per model bye-laws notified by the State of U.P. and consequent amendment brought in by the Ghaziabad Development Authority (in its bye-laws).

16. Noticeable that on approval of the aforesaid lay out plan, Type E apartments were rechristened to Type C apartments.

17. For proper understanding of various circumstances of this case, it would be pertinent to have brief reference of certain writ petitions / applications. These petitions create impact on certain aspects of this case in hand.

18. On 22.03.2010, the petitioner association filed the petition - Writ-C No.15782 of 2010 before this High Court challenging the revision proposed to the lay out plan (06.01.2005) (as subsequently allowed by the GDA by sanctioning Map on 31.07.2013), whereby the petitioner claimed that new blocks were allowed to be added including the encroached 'park' area and designated open area, whereby height of Tower-C was increased from G+12 to G+34 floors by utilizing F.A.R. 2.5 without obtaining N.O.C. from petitioner society and it was claimed to be contrary to the map dated 06.01.2005 (this is also the centre point of the dispute in the instant writ petition no.59863 of 2015) in hand. The aforesaid writ petition along with connected petitions; the leading one being Writ-C No.33826 of 2012 M/s Designarch Infrastructure Pvt Vs. Vice Chairman, Ghaziabad Development Authority and another, was disposed of by a co-ordinate Bench of this Court on 14.11.2013 clarifying the law on various aspects and directing the petitioner to file representation before the competent statutory authority ventilating the grievance which was to be decided in accordance with law on the basis of fact. Thereafter, aggrieved parties were permitted to approach the Courts for redressal of their grievance, if any.

19. Pursuant to the aforesaid directions, the petitioner's association filed the representation before Ghaziabad Development Authority on 07.09.2014, which was pending disposal and in the meanwhile the petitioner's association filed yet another petition Writ-C No.53524 of 2014 wherein prayer was made to expedite consideration and disposal of the representation dated 07.09.2014 moved by the petitioner association on earlier

occasion. This Court vide order dated 07.10.2014 directed Ghaziabad Development Authority to take decision within a period of three months from the date of receipt of the certified copy of the order. Pursuant thereto, Ghaziabad Development Authority considered the aforesaid representation dated 07.09.2014 and passed order on 17.02.2015, copy whereof has been brought on record vide C.A.-7 by the respondent no.2. It specifies that as per description contained in the representation dated 07.09.2014, request was made, inter-alia, to the ambit that the deed of declaration should be made available to R.W.A. (residents welfare association) by the builder apart from raising issue of consent of petitioner association being obtained and objection to use of additional F.A.R.

20. Bare perusal of the aforesaid order (17.02.2015) made by the competent authority - i.e. O.S.D., Ghaziabad Development Authority upon the representation (aforesaid dated 07.09.2014), it is explicitly discernible that the builder was directed to file the deed of declaration at the earliest. Pursuant to this specific direction, respondent no.2 filed the two separate deed of declaration on 24.03.2015, one for Type-D and one for Type-A and B apartment. Insofar as other points in respect of utilization of F.A.R. and consent of the petitioner's society being obtained in relation to the construction (to be raised for Type-C apartments) are concerned, it was opined by the G.D.A. authority that U.P. Apartment Act, 2010 was made applicable since 18.03.2010 and prior to that, there was no provision for obtaining consent from apartment owners as such. It further observed that common area, facility and services etc. of Plot No.10 are not affected by the revision of the map. Moreover, the map was sanctioned on the basis of basic F.A.R. as determined by the State Government, consent of apartment owners was not required. Therefore, in regard to the above two points, representation (07.09.2014) was rejected.

21. Further in the order of O.S.D., G.D.A. dated 17.02.2015, it was noted that the land concerned (Type E and Type C) was found to have been demarcated as 10/1, 10/2 and 10/3 and lease was executed in relation thereto on 30.04.2008 for constructing multi-storey building and the map was sanctioned in relation thereto. This lease deed was executed separately and the developers M/s Rose Berry Developers Pvt. Ltd and M/s Saya Homes Pvt. Ltd were nominees of respondent no.2. It was further observed in paragraph no.2 that the sanctioned map dated 31.07.2013 was in relation to a part of Plot No.10 and the land was shown as 10/1, 10/2 and 10/3, which part of the land was sanctioned earlier (vide map dated 06.01.2005) also for construction of multi-storey building.

22. For the enforcement of certain aspects of the order dated 17.02.2015 passed on the aforesaid representation (07.09.2014), petition Writ-C No.11072 of 2017 was moved before this High Court on 7th of the March, 2017 which is connected writ petition in this case. It was preferred by the petitioner's association. The instant petition in hand, Writ-C No.59863 of 2015 was presented before this Court on 14.10.2015, much after the order dated 17.02.2015 had been passed by O.S.D., Ghaziabad Development Authority.

23. Relevant to mention that objection to the present deed of declaration dated 24.03.2015 was filed by the petitioner's association before the competent authority i.e. Ghaziabad Development Authority, - respondent no.1 - vide letter dated 19.05.2015, copy whereof is annexure no.5 to the writ petition.

24. Relevant to note that respondent no.2 had filed a separate deed of declaration on 24.03.2015 for Type A and Type B Blocks. Essentially, respondent no.2 had filed two separate deeds of declaration on 24.03.2015 one for Tower D Block (petitioner's society) and another for Tower A & B Block (Windsor and Nova society).

25. Pertinent to mention that Windsor and Nova Apartment Owner Association (for Type A and Type B apartments)- had moved petition Writ-C No.39147 of 2015 Windsor and Nova Apartment Owner Association Vs. Ghaziabad Development Authority and 2 others, seeking direction against respondent no.1 that the deed of declaration should tally with the original plan dated 03.10.2002 and a proper deed of declaration was required to be filed as per U.P. Apartment Rules 2011 and the deed of declaration filed on 24.03.2015 by respondent no.2 for Tower A & B Blocks be set aside as per Rule No.3 of the U.P. Apartment Rules, 2011. Unless the deed of declaration is accepted, the amended building plan 2013 be set aside. The aforesaid writ petition was disposed of by this Court on 24.07.2015 with the direction to the Vice Chairman, Ghaziabad Development Authority that the deed of declaration filed by the builder Shipra Estate Ltd. shall be examined in accordance with the provisions of the Act and Rules framed thereunder after hearing the parties, including respondent no.3, (here in this petition it is respondent no.2) expeditiously, preferably within a period of six weeks from the date of filing of the objection with the certified copy of the order.

26. However, in the concluding part of the order, this Court observed that it has not expressed any opinion on merits of the case, it will be for the Vice Chairman, Ghaziabad Development Authority to examine the same and take decision in accordance with law. The matter was finally decided by the Vice Chairman, Ghaziabad Development Authority, vide order dated 24.09.2015.

27. By the aforesaid order dated 24.09.2015, the Vice Chairman, Ghaziabad Development Authority, after considering rival claims and the objection filed by Windsor and Nova apartment, held that the original map / lay out plan relates back to 2001 - 2002 and 2005 which was accorded sanction for Windsor and Nova and map revised and completion certificate was issued / obtained in 2006 and 2010, respectively.

28. It was further observed that there are two apartment owners' association though on one land (Plot No.10), the deed of declaration is in consonance with the map of year 2005 and this is in relation to the built up area belonging to Windsor and Nova apartments. Therefore, deed of declaration in respect of Windsor and Nova apartments as should be made, is based upon map / lay out plan dated 06.01.2005 and is in compliance with the lease deed executed in favour of the allottees by the Ghaziabad Development Authority. Direction was issued by the Vice Chairman, G.D.A. to respondent no.2 Shipra Estate by directing that the columns which have been left blank in the deed of declaration should be properly filled up as per lease executed in respect thereof within 30 days.

29. Relevant to state, albeit, at the cost of repetition that insofar as the deed of declaration dated 24.03.2015 filed earlier by the respondent no.2 (Shipra Estate) in respect of Windsor & Nova Apartments is concerned, a revised deed of declaration dated 09.10.2015 was filed in compliance of the direction issued by the Vice Chairman, Ghaziabad Development Authority vide its order dated 24.09.2015 and the deed of declaration dated 09.10.2015 was challenged by preferring petition Writ-C No.26598 of 2016, Windsor & Nova Apartment Vs. Ghaziabad Development Authority and 2 others.

30. After due consideration, the aforesaid writ petition was dismissed by this Court vide order dated 30.05.2016 by observing that;

"the deed of declaration so submitted by the promoters / builders has not been brought on record and the petitioner has hopelessly failed to establish as to how the deed of declaration dated

09.10.2015 does not satisfy the direction which had been issued by the Vice Chairman, Ghaziabad Development Authority in its order dated 24.09.2015. We see no reason to entertain the writ petition, therefore, it is, accordingly, dismissed."

31. By the aforesaid order (30.05.2016), it was also observed that this order will not prejudice the rights of Windsor & Nova apartments society to re-approach the competent authority.

32. Consequent thereupon, a representation dated 06.06.2016 was moved by Windsor & Nova apartment society which was considered by the Vice Chairman, Ghaziabad Development Authority and the order dated 24.09.2016 was passed by it whereby the representation was rejected. Against this order dated 24.09.2016, the petition Writ-C No.61615 of 2016 was filed by Windsor and Nova apartment society before this Court which was disposed of by this Court on 03.01.2017 directing that alternative remedy open to the petitioner under Section 27(3) of the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010, may be availed by filing appropriate representation / revision before the State of U.P.

33. The petitioner herein claims by way of supplementary rejoinder affidavit in reply to the supplementary counter affidavit filed by respondent no.2 that the revision was filed by Windsor & Nova Association against the aforesaid order dated 24.09.2016 (annexure SRA-3) in the year 2017.

34. Now the respondents claim that insofar as filing of the aforesaid revision before the State Government is concerned, they have no knowledge on account of fact that no notice, whatsoever, has been received by them till date. There is also no proof of service / receipt of the said revision / document on the State Government. This revision, if any, claimed to have been been filed by the Windsor & Nova Society for Type A & Type B apartments thus becomes doubtful.

35. Insofar as the filing of this petition (in hand) Writ-C No.59863 of 2015 is concerned, we come across fact that it was filed on 14.10.2015 which was entertained by this Court and after due consideration, the same was dismissed on 25.02.2016 and it was observed, inter-alia, in paragraph no.4 and 5 of the order as is extracted herein below:-

"4. In our view, the present dispute involves disputed question of fact such as the amenities available in the original plan, changes made in this subsequent plan etc. These disputed question of fact could not be adjudicated in a writ jurisdiction under Article 226 of the Constitution of India. However, the petitioner for the redressal of his grievances may approach the court concerned by filing a suit for injunction.

5. The writ petition is devoid merits and is, accordingly, dismissed."

The aforesaid order is pasted on the back of page no.7 of the writ petition itself.

36. Against this order of dismissal dated 25.02.2016, the petitioner moved before the Hon'ble Apex Court in Civil Appeal No.3602 of 2017 arising out of SLP (C) 26475-2016 Sun Tower Residents Welfare Association Vs. Ghaziabad Development Authority and others. The extract of the order dated 03.03.2017 passed by the Hon'ble Apex Court is extracted as hereinbelow:-

"Heard learned counsel for the parties.

Leave granted.

The Writ Petition had not been entertained by the High Court. In the writ petition, claim was raised that construction was being made in

the area reserved for park. The High Court, in our opinion, prima facie ought to have examined the matter and clalled for the reply and thereafter should have decided the matter in accordance with law.

We set aside the impugned order and Matter is remitted to the High Court. Liberty is granted to the respondents to file their response to the writ petition in the High Court. Thereafter the High Court to hear the matter and to decide the same afresh in accordance with law.

All the issues are kept open. In case the High Court finds it is not possible to determine that it was a park, obviously the question of maintainability of the writ application can be considered.

The High Court to hear the matter as expeditiously as possible.

The appeal is accordingly allowed."

37. By the aforesaid order, the matter was remanded for afresh consideration with specific direction that all issues are open and in case High Court finds it is not possible to determine that it is a park, obviously question of maintainability of writ petition application can be considered.

38. We also come across the fact from perusal of the order sheet dated 15.11.2017 passed in this writ petition that a Court commission consisting of three members - two Advocates and one architect - was issued to make spot inspection and they were required to see whether there is violation of the agreement as alleged against the respondent no.1 and 2 and the report was directed to be submitted after joint inspection is made. Pursuant thereto the joint Court commission inspected the spot on 02.12.2017 and the desired report was submitted separately on 20.12.2020 one by the two Advocates and the other (one) by the architect. Both the sides preferred their respective objections to the aforesaid Court commissioner reports.

39. Further perusal of the order sheet dated 14.05.2019 passed by this Court reflects that the respondent no.1 Ghaziabad Development Authority, Ghaziabad was directed that till the next date of listing, it shall not issue 'completion certificate' in favour of the respondent no.2.

40. As the matter proceeded further, Special Leave Petition (Civil) Diary No(s).11807 of 2020 filed by respondent no.3, Saya Homes (P) Ltd. Vs. Sun Tower Residents Welfare Association, which was considered and disposed of, inter-alia, vide order of the Hon'ble Apex Court dated 08.06.2020 whereby direction was given to this "High Court to decide the matter after rehearing within a period of two months or as early as possible."

41. However, while the writ petition (59863 of 2015) was still pending, yet another Miscellaneous Application No.1246 of 2021 was moved by the respondent no.3, Saya Homes (P) Ltd against Sun Tower Residents Welfare Association before the Hon'ble Apex Court which after considering the matter issued direction on 23.08.2021 which is extracted as here under:

"Having regard to the special circumstances of this case, we request the Chief Justice of the High Court of Judicature at Allahabad to issue appropriate directions so that the Bench can be reconstituted and the matter can be heard on day-to-day basis and disposed of at the earliest, preferably within one month from date.

The Miscellaneous Application is, accordingly, disposed of."

Submission by the petitioner:-

42. Specific claim has been raised that so far as the revised sanctioned plan dated 31.07.2013 is concerned, it is contrary to the layout plan dated 06.01.2005, for the reason that

basic facilities, amenities, undivided interest of the petitioner's association in respect of the amenities / facilities shall be greatly interfered with and reduced if the revised layout plan dated 31.07.2013 is allowed to stand without obtaining the requisite consent of the petitioner's association. Admittedly, the provisions of U.P. Apartment Act, 2010 and Rules framed in 2011 are applicable in this case. That way, the procedure prescribed in this Act would always be followed by the respondents - say - competent authority - respondent no.1 and the promoter / developer - respondent nos.2 and 3.

43. It is to be seen that construction regarding the petitioner's block Type D was completed and the lease was executed on 17.03.2007 in terms of U.P. Flat Act, 1975 which gives undivided right to the allottees in the entire Plot No.GH-10-, Vaibhaiv Khand, Indirapuram, Ghaziabad. That way, the undivided interest of the petitioner had fructified and any alternation or any change in the layout plan subsequently to that would directly interfere with the undivided interest and enjoyment of facility by the petitioner's association and it would be against mandate of various provisions of the U.P. Apartment Act, 2010 as such violative of the vested right of the petitioner.

44. Learned counsel for the petitioner engaged attention of this Court to the order / direction / observation of the coordinate Bench of this Court in the matter of Writ-C No.33826 of 2012 whereby the aforesaid petition along with other several writ petitions was decided by a common judgment / order dated 14.11.2013 wherein certain aspects of this case were considered and in the light of illegal construction in the shape of extra floors and structures being added to the original sanctioned plan dated 06.01.2005 for the declared group housing scheme which was not permitted under law unless consent was obtained before the amended plans were sanctioned. Under these circumstances, the coordinate Bench of this Court had observed in its order inter-alia:-

"The FAR or any additional FAR is a property, appended to rights in the property on which the building is constructed and is thus a property in which the apartment owners have interest by virtue of the provisions of the U.P. Apartment Act, 2010. The purchase of additional FAR is not permissible to be appropriate by the promoter without any common benefits to the apartment owners. The consent of the apartment owners obtained by resolution in the meeting of the apartment owners by majority will be necessary for purchasing additional FAR. Its utilization will also be subject to the consent of the apartment owners."

45. Learned counsel for the petitioner read out the aforesaid extract as has been described in the body of the petition and urged that in view of the above specific observation regarding use of FAR or additional FAR, the respondents are changing the proportionate share of undivided ownership of the plot and by virtue of adding more flats within the same plot are raising the height of floors upto G+34 which was originally fixed to G+12. That way, there is no denying fact, the pressure of men, women and children for using the various undivided interest of members of the petitioner's society will be put to great peril.

46. The various coordinate Benches of this Court while considering the matter pertaining to the subject matter of the dispute have considered and disposed a number of writ petitions by clarifying the provisions of U.P. Apartment Act, 2010 and have opined that the same is applicable under U.P. Apartment Act, 2010 for Plot No. GH-10, Vaibhav Khand, Indirapuram, Ghaziabad. Consequently, the allottees of the said plot have all the rights and privileges as provided under U.P. Apartment, Act 2010.

47. The respondent no.1 released a revised plan on 31.07.2013 without seeking N.O.C. from the members of the petitioner's association. The respondents carried out the said alternation on the building plan without demanding a written majority resolution in favour of N.O.C. from the petitioner's society as per the provisions of U.P. Apartment Act, 2010. Now the respondents are making public offer to book apartments in Type-C as G+34 storeyed tower. Initially, Type-C block was having a plan to raise tower to the height of G+13 building of 20316 square meters with 152 dwelling units, having two rectangular towers but by the amended plan by raising height of the building up to G+34 would block air flow and sun light to the inhabitants of the petitioner's association which is in violation of Section 4(4) of U.P. Apartment Act and Rules 4 of Apartment Rules framed thereunder. The excavation work was uninterruptedly going on in the area shown as park (green area) in the plan dated 06.01.2005.

48. The petitioner, in fact, wrote letter to the Ghaziabad Development Authority and respondent nos.2 and 3 on 01.11.2014 to ensure that only sanctioned plan dated 06.01.2005 is implemented as no prior written consent of the petitioner / association was obtained which is a necessary pre-requisite to modify the plan as per U.P. Apartment Act, 2010 but no reply ever sent.

49. Pursuant to the order dated 24.07.2015 passed by the coordinate Bench of this Court in Writ Petition No.39147 of 2015 whereby respondent no.1 was directed to hear objection on the deed of declaration filed for the other category / type of building in GH Plot No.10, Vaibhav Khand, Indirapuram, Ghaziabad. The Vice Chairman after hearing the matter directed respondent no.2 to make composite deed of declaration for all buildings as per layout plan dated 06.01.2005 which includes towers of the petitioner society. Obviously, any height of floors above the G+12 cannot be allowed without obtaining consent of the petitioner's society but after the apartments have been sold out and sub-lease executed in favour of the petitioner on 17.03.2007, partial completion certificate was issued on 29.01.2010. The original plan (06.01.2005) cannot be amended by way of map dated 31.07.2013. The act of the respondents is in violation of the Article 21 of the Constitution of India.

50. As per Section 10 of the old 1975 Act and Section 4(c) of 2010 U.P. Apartment Act, the developer is under statutory obligation to disclose all the plans and specifications approved by or submitted for approval of the entire building to the local authority. The allotment of the purchasable F.A.R. and amendment of the sanctioned map behind back of intending purchasers / allottees is illegal and violative of the Act.

51. Section 3.3.5 of Ghaziabad Development Authority building bye-laws 2000 clearly specifies that all plots having area above 3000 square meters must have open area for park as such the respondents cannot say that the area shown in the map dated 06.01.2005 was not a park. The sales brochure distributed to sell the apartments to the petitioner depicts two parks adjacent to the petitioner's Sun tower Type-D. Two parks were Joggers park and Central park (near G+13, Type-C) which is now being separated from petitioner's building. A false statement has been made by respondent no.1 in the counter affidavit that the revised map allows G+34 constructions to suppress basement building after completely excavating the soil beneath green area making it suitable for planting trees and plants and thus trying to convert the space for car parking.

52. The definition of green space includes parks, community gardens and cemeteries, thus green area in map of 2005 is park area for all

practical purposes. The placement of the cars over green area near Type-C on the uncontroverted fire map of 06.01.2005 after fire N.O.C. was obtained showing the area as landscape green area is illegal. It is settled law that the fire map cannot be changed. The word 'park' is used conceptually and contextually in U.P. Development Act, 1973 and U.P. Park Act 1975.

53. The sanctioned map 31.07.2013 / 25.04.2015 gives picture that Type-C and Type-E towers have been expanded horizontally from 2133.29 square meters in 2005 to 5459 square meters in 2013/2015, similarly green area of Type-E was Nil in 2005 which has been extended to 2168.589 square meters in 2013, thus green area was reduced.

54. So far as maintainability of the present writ petition is concerned, the very construction being raised is in violation of the sanctioned map in the year 2005 as per revised plan dated 31.07.2013, then meaning of aggrieved person is to be ascertained with reference to the purpose of the provisions of the statute U.P. Flat Act 1975 and U.P. Apartment Act, 2010, suffering a legal grievance. In this case, obviously, the consent as was required to be taken under Sub-section 4 read with Section 1, 2, 3 and 4 U.P. Apartment Rules was not taken by the respondent developers or Ghaziabad Development Authority from the petitioner. Therefore, the petitioner has right to maintain the instant writ petition against the Ghaziabad Development Authority which has violated Rule 4 of U.P. Apartment Rules, 2011. Since the point of maintainability involves violation of the provision of U.P. Apartment Act 2010 and bye-laws, therefore, alternative remedy against against the order dated 17.02.2015 issued by Ghaziabad Development Authority or admittedly with respect to map dated 31.07.2013 as such was valid till the said map of 2013 was again amended on 25.04.2015 giving rise to fresh cause of action as per civil jurisprudence. This writ petition was filed after noticing that the construction work at the site started before receiving copy of the order dated 17.02.2015 and the map dated 25.04.2015.

55. Ghaziabad Development Authority being interested party did not knowingly refer to the order dated 17.02.2015 while filing counter affidavit on behalf of the respondent no.1. Moreover, unregistered and incomplete deed of declaration dated 24.03.2015 is unsustainable as per the law and the judgment dated 14.11.2013 passed by the coordinate Bench of this Court in writ petition no.33826 of 2012 (as above) as such this Court had power to decide the land regarding filing of the deed of declaration in U.P. The Ghaziabad Development Authority had colluded with the respondents-company in secretly sanctioning the plan dated 31.07.2013 and 24.03.2015, at a time when there was no cause of action for the petitioner to raise any objection before filing of the present writ petition.

56. The developers and Ghaziabad Development Authority have no legal base to decide the land share of the allottees in violation of law which gives undivided proportionate land share on the entire plot / scheme to apartment owners as envisaged in Section 5 of U.P. Flat Act 1975. When the sale deeds have been executed by the act of the respondents, the percentage of undivided interest of the petitioner in the common areas and facility have been separated. Admittedly, the apartment of 116 square meters area could not have been built with the land share of 47.13 square meters unless 47.13 square meters at the ratio of 1.5 F.A.R. which comes to 70.69 square meters of built up area which is lesser than 116 square meters of apartment. The builders cannot take advantage of their own wrong. The interest in the common area and facility cannot be separated from flat to which it was appurtenant

even if such interest is expressly not mentioned. As per Section 5 (3) of U.P. Flat Act, 1975 and U.P. Apartment Act, 2010, it connotes that the respondents cannot use land share of 47.13 square meters which is not being derived from the map dated 06.01.2005 sanctioned by Ghaziabad Development Authority as no consent was obtained from the petitioner's society.

57. The point is that Ghaziabad Development Authority made 2.5 F.A.R. in violation of Ghaziabad Development Authority building bye-laws 2000 and 2008 and the government orders dated 04.08.2011 and 17.08.2009 and purchase of F.A.R. was allowed for Rs.167/- crores, thus enhanced the F.A.R. from 1.5 to 2.5 in 2013. The builders had opportunity to purchase maximum 33 % (0.5 F.A.R.) under 3.3.6 as per Ghaziabad Development Authority building bye-laws 2000 and cover 35 % green area but it was not explored knowingly and the map dated 06.01.2005 was declared to the buyers as such Ghaziabad Development Authority cannot allow use of additional F.A.R. without the consent of the petitioner society and its members.

58. Ghaziabad Development Authority itself admitted in its note dated 15.10.2020 (SAR-1) to the Ghaziabad Development Authority board in 2013 that 182990 square meters of flat has been partially completed, only 252 square meters of plot is undeveloped as per earlier map dated 06.01.2005 as such the plot falls in the category of developed project and cannot be treated undeveloped which is requirement of allowing 2.5 F.A.R. Thus, action of the Ghaziabad Development Authority is in clear violation of the Ghaziabad Development Authority building bye-laws 2008 in Section 3.3.6 (iii). The deed of declaration is required to be filed within 90 days from the date of notification but the respondent no.2 has admittedly filed two separate deeds of declaration, one for Type-A and B and the other for Type-D in which the respondent authority did not provide a complete and registered deed of declaration dated 24.03.2015 and also did not pass any order to the objection dated 19.05.2019 filed by the petitioner, therefore, there is no valid deed of declaration in existence for the plot GH-10, Vabhaikhand Indirapuram Ghaziabad. It being so, the admitted position, the maps dated 31.07.2013 and 25.04.2015 become illegal documents and are liable to be quashed as they are in the teeth of Section (4) of U.P. Apartment Act, 2010.

Submission / Reply by Respondent No.1

59. Learned counsel for the respondent no.1- Ghaziabad Development Authority has brought to the notice of this Court various aspects of this case and has also detailed various reasons as to how F.A.R. was enhanced from 1.5 to 2.5 in the year 2008 and 2009 and the concerned bye-laws of the Ghaziabad Development Authority were amended. Thereafter, it is obvious that the respondent no.2 Shipra Pvt. Ltd. proposed revision in the map dated 06.01.2005 as per new F.A.R. applicable to new areas and undeveloped areas namely Kaushambi, Vaishali and Vaibhavkhand of district Ghaziabad. That being so, Plot GH 10 is located at Vaibhavkhand Indirapuram Ghaziabad. Admittedly, Type A and Type B (blocks) were represented by Windsor and Nova Welfare Association and it was having two bedroom flats with other amenities regarding which no interference was warranted from the other block / society / association. The petitioner's block is Type-D for which the petitioner's association Sun Tower Residents Welfare Association has been formed and duly acknowledged as such, it looks after welfare of the residents of that block. Admittedly, block A and block B were completed way back in the 2004 year, there was no controversy regarding the map which was applicable in relation to the

construction of block A and B. In that block, the construction was completed and the possession was given to the allottees way back in 2004.

60. Now it so happened that all the flats for Type-D block were three bedroom apartments which were also completed as per revised plan dated 06.01.2005 and the flats were completed and lease deed was executed in respect of the individual flat to its allottees on 17.03.2007 and partial completion of Type D block was made in 2010, to be specific on 29.01.2010. That way, to claim ipso-facto and assume user right over a piece of land which was not meant to be used as common facility is nothing but misconceived idea. To claim that the area shown as green area / open area in the Type-C block on the land earmarked as Type C block and to contend that excavation work has been done upon this area which was, to all intents and purposes, a park and park only, the definition of park is exclusive and the entire map up to 06.01.2005 does not specify or earmark any piece of land exclusively as park. But various pieces of land on plot GH-10, Vaibhavkhand Indirapuram Ghaziabad that exist in 61 acres (approximately) do not denote any particular area to be exclusively a park and common amenities and facilities to be utilized by all was said to be commercial, hospital, school and there is one big park say Joggers park near Type-D block.

61. Now point is that in the writ petition like the present one, contention is that brochure which was shown and given to the allottees of the petitioner's association contained specific mention of park adjacent to Type D block is misconceived, reason being that this offer was initially made by the promoter construction company and this brochure also contained various terms and conditions. Assuming it to be that it shall be acted upon even then it is of contentious nature. It is up to the petitioner to prove and establish before the competent authority that this brochure was base and should be treated to be base of right of the petitioner. Apart from that, it is applicable to Type C block the parcel of land adjacent to the plot (block Type C Vaibhav Khand Indirapuram Ghaziabad as plot no. GH 10), which was earmarked for construction of different type of building.

62. 4Admittedly, in the present writ petition, one of the grounds (Ground L) taken by the petitioner's association asserts in relation to Type C parcel of land in question to be piece of land not developed then it is admitted to the petitioner's association that Type-C block is fit one where F.A.R. 2.5 is applicable as per bye-laws 2008 made by the Ghaziabad Development Authority and that cannot be treated to be purchasable F.A.R., for the reason that once F.A.R. was enhanced from 1.5 to 2.5 and that was to be applicable to a particular locality where development is to take place on bulk sale basis for the group housing society. Now the increased basic F.A.R. 2.5 shall be applicable in respect of undeveloped area i.e. Type E block and using that F.A.R. (2.5) height of apartment was raised from G+13 to G+34. There is no violation of any bye-laws. However, the Ghaziabad Development Authority treated this enhanced F.A.R. from 1.5 to 2.5 to be adjusted as additional F.A.R. and for which formula was made and based on the formula, some fee / payment was required to be made by the builders concerned. Consequently, certain amount was deposited in order to facilitate use of enhanced F.A.R. and that has been misconstrued by the petitioner as additional F.A.R. which aspect cannot be accepted.

63. Learned counsel for the respondent no.1 has also claimed that contentious matter has been raised and based upon the statute and there is no violation of any F.A.R. There is no mention of any park. Merely on the strength of argument, one can establish one fact to be another thing but that would not be reality but the reality is what exists on the papers /

documents brought on record. The revised map is in consonance with the bye-laws and if any flaw is pointed out then that requires proper consideration only after both the sides are invited to give their testimony documentary as well as oral and issues are framed and finding to that effect is recorded by a competent authority. When the matter was taken up to the Hon'ble Apex Court, the Apex Court in its order has categorically directed that this High Court should consider about the fact of existence or non-existence of park and should record finding if it finds that it is not possible that it was a park then maintainability of the writ petition shall arise.

64. In this case, assertion of park has been made by the petitioner who is required to prove it tooth and nail but the same has been tried to be explained away by hook or by cook on imaginative thinking, whereas the definition of park as envisaged in U.P. Park Act, 1975 overthrow claim of the petitioner that in fact open green area marked on Type C block was exclusively a park and park only. The order dated 17.02.2015 was passed by answering respondent (No.1) has been deliberately and maliciously concealed because it was related to preparation of the deed of declaration and on point of the requirement of consent and use of F.A.R. which though decided by the Ghaziabad Development Authority was tried to be re-agitated by way of the present writ petition, which is not permissible and the material facts have been concealed. What an irony that things were divulged at a stage when counter affidavits were filed by the respondents - in particular respondent no.2 - the builder and various annexures have been brought on record by way of counter affidavit and the order dated 17.02.2015 was made clear and brought on record even though no amendment was sought by the petitioner to be incorporated in its writ petition and particularly when the petitioner got its pleading amended vide order of this Court dated 07.09.2021 in paragraph no.16 of its petition regarding construction of building on the land i.e. block Type C which means that the petitioner refrained itself from raising issues of requirement of requisite consent and use of F.A.R. as permissible under bye-laws of 2008 and the deed of declaration prepared by respondent no.2 and considered by the competent authority - that is the answering respondent. For the aforesaid reasons, the present writ petition is not maintainable and the petitioner has not approached the Court with clean hands. The more we delve deep in the pleading made out by the petitioner, the more confusion arises and the matter becomes puzzled and contentious. Controversy raised by the petitioner can be decided only by preferring appropriate action before the competent authority concerned, such contentious matter cannot be decided in the writ petition.

65. Surprisingly, the entire writ petition no.11072 of 2015 is nothing but meant for compliance of those parts of the order dated 17.02.2015 which are favourable to the petitioner and prayer to that effect and the pleading in respect thereto has been made in that connected writ petition. Obviously, there is no need to file any such petition. The order dated 17.02.2015. as it stands is required to be complied with by the concerned respondents-promoters. Apart from that, learned counsel for the respondent no.1 has engaged attention of the Court to the revised plan that is within admissible F.A.R. and is permissible under bye-laws 2008 of the G.D.A. which is applicable to the parcel of land earmarked as Type-C block, and to claim that construction should be raised within F.A.R. 1.5 is vague, misleading and unreasonable contention. Learned counsel for the respondent no.1 has brought to the notice of this Court various aspects of the map (31.07.2013) and has claimed that insofar as Type-D and Type A and B blocks are concerned, nothing has been constructed on it and these

blocks have not been touched even in the least by the revised plan 2013.

Submission / Reply by the Respondent No.2

66. Sri Rahul Agarwal, learned counsel for the respondent no.2 has opened argument claiming that initially on the point of park that this writ petition was dismissed on 25.02.2016 by the coordinate Bench of this Court and the matter was remanded vide order dated 03.03.2017 passed by Hon'ble Apex Court in Special Leave Appeal with the direction that the fact of existence of park was required for consideration of this Court and will be decided whether the construction impugned is on piece of land earmarked as a park. The construction was basically in respect of Type-C block and Type-E block where building in the shape of G+13 and G+17 respectively were to be raised initially as per plan dated 06.01.2005 which was revised on 31.07.2013. Later on, this parcel of land and blocks were renamed as Type-C and construction was revised to G+34 floors.

67. Primarily, the question of park is essential one and central point of controversy and the petitioner is required to prove the existence of the park and specific direction of the Hon'ble Apex Court would prevail upon this Court to consider the same. The burden of proof is on the petitioner to establish that a particular piece of land in block Type-C was earmarked as park in the undisputed sanctioned layout plan/dated 06.01.2005. The petitioner has deliberately tried to bring the point of fire layout plan dated 06.01.2005, wherein certain areas were earmarked for block Type-C (G+13) and Type-E (G+17) marked as landscape green and green area and by way of revised/sanctioned map on 31.07.2013, the same is claimed by the petitioner to have been taken away and the construction was being raised thereon as block Type-C (G+34). To rely on the fire layout plan dated 06.01.2005 is a pretentious and tends to confuse things. It may be appreciated that layout plan dated 06.01.2005 is not conclusive as to any area earmarked there, except to indicate fire path of the plot intended to earmark path for fire tender movement. It is only indicative of fire path and does not deal with green areas. It does not mention any measurement or marking of ground coverage of the plot. The town and country planner of respondent no.1 personally appeared before this Court and produced its record and explained facts that upon written recommendation of the fire department, respondent no.1 sanctioned fire plan with the aforesaid objective. Further, fire layout plan has not been made part of the pleading in the writ petition, whereas, this point has been raised by the petitioner through supplementary rejoinder affidavit to the counter affidavit filed by the respondent no.1. Reliance of the petitioner on fire layout plan dated 06.01.2005 is in contravention of its own stand taken in this writ petition, where he relied on layout plan dated 06.01.2005.

68. The petitioner without any rhyme or reason is relying on the advocate commissioner report dated 20.12.2017 and is claiming construction being carried out over the park, whereas the petitioner has filed objection to the advocate commissioners' report and contrary to that architect commissioner has categorically denied encroachment of green area. The advocate commissioners found that presently after 2015 sanctioned plan the total green area required for Type-C Block is 8100 square meters and green area ad-measuring 8130.91 square meters have been proved to be existing in Block Type-C.

69. Further, report of the architect commissioner clearly shows that the allegations in respect of park is one totally unfounded as there was no such park in 2005 plan, the open area shown in 2005 plan belonged to only Type-

C apartment (Saya Gold towers) and was not common to the adjoining society. Moreso, the architect commissioner being an expert person and has got expertise in these matters would give better report as his examination of the land in question is more precise than that of the advocate commissioner. Some bald averment that park is being encroached upon would not save face of the petitioner and on that basis alone, the matter was got remanded to this Court for fresh consideration by order of Hon'ble The Supreme Court but the writ petition is silent about its (park) specific location particularly existence of the park in the layout plan sanctioned on 06.01.2005 which is claimed to have been encroached upon by revision of the layout plan on 31.07.2013.

70. Neither the measurement of the park nor its boundaries as per plan dated 06.01.2005 can be found and disclosed in the plan 2005 itself. Moreover, plan dated 06.01.2005 nowhere shows that park would in all probabilities come up in the Type-C and Type-E areas. It only mentions open area, green area or landscape green.

The park is supposed to have predominant spread of grass, shrubs, trees while landscape may comprise with intermittent greenery as defined under U.P. Parks Play Ground and Open Spaces (Preservation and Regulation) Act, 1975. Thus, the petitioner fails to come out specifically about existence of park with any encroachment over park area of Type-C building. In fact, green area / open space was gradually increased with several revision of map. Analytical study of plan dated 06.01.2005 and 31.07.2013 would itself give correct picture and statistics uncontrovertable on this aspect. It can be consistently argued that for the aforesaid specific facts and circumstances of the case it is impossible to adjudicate upon point of existence and location of the park in Type-E block and once the petitioner has failed to establish fact of park, the present writ petition becomes not maintainable, because contentious issue in regard to existence of park has been tried to be raised which cannot be adjudicated upon precisely and conspicuously by way of the present writ petition for which statutory remedy available to the petitioner is to approach to the competent civil court or the authority concerned as the case may be. Not only, on the point of maintainability, but also on concealment of the material facts by the petitioner, the petition should go.

71. The order dated 17.02.2015 decided specific question of requisite consent being obtained or not through the petitioner society pertaining to the revised plan dated 31.07.2013 as also point of use of additional F.A.R. by the respondents and deed of declaration. Apart from that, several points were raised in the representation of the petitioner dated 07.09.2014, prime being regarding preparation of the deed of declaration, point of consent being obtained from the petitioner society for the revised plan dated 31.07.2013, use of excessive F.A.R. Apart from that, certain ancillary points were also raised regarding completion of construction work tending to injure common interest in the plot of the petitioner. The representation was admittedly decided on 17.02.2015 wherein the deponent (Laxmi Chand) of this petition was also heard. The point of consent being obtained and use of additional F.A.R. was decided against the petitioner and the Shipra Estate was directed to prepare and complete deed of declaration.

72. Now it is surprising that determination on point of consent was an order passed in quashi-judicial capacity and not simplicitor administrative order, for specific reason that the petitioner moved to filing of the writ petition seeking direction to the respondent no.1 Ghaziabad Development Authority to consider the - very representation. Pursuant to this order passed by High Court and a representation dated

07.09.2014 was moved by the petitioner before the G.D.A. The Ghaziabad Development Authority after due consideration rejected (on 17.02.2015) the representation giving specific reasons. The competent authority passed that order under U.P. Apartment Act, 2010. Thus the matter was virtually adjudicated to the point that the consent by the petitioner was not needed prior to approval of plan dated 31.07.2013, but the petitioner association instead of taking proper course of action, surprisingly filed this writ petition agitating again point of consent and the entire writ petition is silent about this specific finding recorded by the Ghaziabad Development Authority vide its order dated 17.02.2015 and copy of the order was directed to be served on the Secretary, Sun Tower Residents Welfare Association.

73. It is noticeable that after lapse of eight months of passing of the aforesaid order, the writ petition was filed on 14.10.2015. Now to claim that from 17.02.2015 up to 14.10.2015, the petitioner's association was not knowing the order dated 17.02.2015 is absolutely unbelievable and unacceptable plea and has been deliberately made to conceal material facts relevant for decision of this writ petition. The proper remedy against the order dated 17.02.2015 would be by preferring the revision before the State Government. Inaction by the petitioner itself shows a waiver of the right of proper remedy on the point of consent and use of excessive F.A.R. and the petitioner was exposed when the writ petition no.11072 of 2017 was filed (as Annexure-6) by him based on the aforesaid order dated 17.02.2015 which is connected writ petition.

74. Further claim is that no cause of action accrues to the petitioner and no locus standi to maintain the present writ petition, for the reason that the interest of the petitioner's association remained unaffected through revision of the layout plan dated 31.07.2013.

75. In this case, certain sections of U.P. Apartment Act, 2010 bear relevance for deciding the present writ petition, these are Sections 3(B), 3(d) 3(i), 5(1) and 5(2). Bare perusal of the above Sections is connotative to the point about the rights of an apartment owner are defined in respect of building that is apartments situated therein and right of apartment owner is confined to Section 5(1) and Section 5(2) of U.P. Apartment Act, 2010. The rights of the apartment owner are restricted to exclusively possession and control over the apartment sold or transferred to him together with common areas and facilities appended to the building wherein apartment concerned is located. This right does not overreach the other building or apartment located therein and common area and facility appended to such other building. This right is restricted to percentage of common areas and facilities vis-à-vis the area of apartment owned by the allottees. Further for a specific block, there is specific association. The undivided interest that an apartment owner is entitled to enjoy in the common areas and facilities is statutorily defined and is limited to the building / building complex containing apartment of the allottee is located.

76. Section 14 of U.P. Apartment Act, 2010 postulates setting up of an association of apartment owner "for the administration of the affairs in relation to the apartments and the property appurtenant thereto and for the management of common areas and facilities". The proviso to Section 14 of the Act mandates that where certain area is demarcated for construction of building, there shall be a single association in such demarcated area and this aspect is virtually admitted to the petitioner because he contest the case for Type-D (Block) as Sun Tower and got registered as such association, whereas, for another apartment say - Type A and Type B - is governed by another society Windsor and Nova Resident Welfare Association and it is functional over the set of

building constructed on the same plot no.10 Vaibhavkhand, Indirapuram Ghaziabad and these associations are administering common areas and facilities in their respective buildings and not of the entire plot and it cannot be claimed that the petitioner society has the right to administer affairs of Type-C apartment or manage common areas facilities of Type-C apartment. Type-C apartment owners shall form their own independent association. It is not pleaded by the petitioner that it has right to administer affairs in relation to Type-C apartment or manage common areas and facilities of Type-C apartment.

77. The deed of apartment which is sample lease deed and that has been brought on record by the petitioner's association identifies the building and the land to which the apartment owner has right as defined in U.P. Apartment Act, 2010 as this lease deed fixes the extent of the right of apartment owner and no right beyond that can be claimed by the petitioner. The layout sanctioned plan dated 06.01.2005 shows Type-D apartments (Sun Tower) and Type-C apartments (Saya Gold) are separated by 18 meters wide internal road. Sun tower and Saya Gold blocks have their separate boundaries and Schedule A of the lease deed executed by the Ghaziabad Development Authority also specifies that undivided share in land, common areas and facilities of the members of the petitioner's association is restricted to building having 84 apartments in one tower and not to the entire plot of 61 acres.

78. Since F.A.R. was increased by way of notification of amended bye-laws of the U.P. Government and Ghaziabad Development Authority, only basic F.A.R. has been utilized for revision of the map. The relief has been sought in the writ petition seeking quashment of the allotment of the additional F.A.R. given to respondent nos.2 and 3 by the respondent no.1. There is no averment in the writ petition that the revised map is with respect to purchasable F.A.R. Only ground 1 mentions 33% purchasable F.A.R. and that too, vaguely.

79. Substituting bye-laws of 2002 and powers conferred under Act No.11 of 1973, the State of U.P. issued model bye-laws which is known as Development Authority building Construction and Development of bye-laws 2008 providing for maximum F.A.R. of 2.5 for new and undeveloped area applicable to bulk sale residential group housing plots. Accordingly, the Ghaziabad Development Authority revised clause 3.3.6 (XI) of its bye-laws to provide for a base F.A.R. of 2.5 for real estate projects allocated as bulk sale. In Clause 3.3.6 (XI) of 2008 bye-laws, subject plot no.10 being bulk sale plot in terms of M.O.U. dated 08.01.2002 became fully entitled for basic F.A.R. 2.5, the element of purchasable F.A.R. as mooted by the petitioner is altogether misleading. By way of revision (of plan 2005) the basic F.A.R. is admissible to the project which is the right and entitlement of the developer. Admittedly, the basic F.A.R. or base F.A.R. is different from additional F.A.R. Unlike additional F.A.R., basic F.A.R. is not purchasable. Basic F.A.R. is meant to permit a basic permissible extent of construction in a building. There is no discretion with the Ghaziabad Development Authority in allowing a layout plan within basic F.A.R. and it does not require any allotment from a development authority. To construct a building, using basic F.A.R. as per bye-laws is right of the developer. The additional F.A.R. is purchasable by the developers and is allotted by the Development Authority.

80. The petitioner has relied on the decision of this Court in the case of *M/s Designarch Infrastructure Pvt. Ltd. and another Vs. Vice Chairmain Ghaziabad Development Authority and others, 2013 (9) ADJ 594 (DB)*, particularly in paragraph nos. 66 (14), which

deals with F.A.R. as property in which the apartment owners have interest by virtue of the provisions of U.P. Apartment Act, 2010 and the restriction has been placed by this Court on real estate developers on the purchase and utilization of the additional F.A.R as distinguished from basic F.A.R.

81. The basic F.A.R. was increased to 2.5 in the year 2009 that is before U.P. Apartment Act, 2010 came into force and the revision in the layout plan is in pursuance of the entitlement to 2.5 F.A.R. The revision does not pertain to purchasable F.A.R. and this finding of fact has been recorded by the Ghaziabad Development Authority. The order dated 17.02.2015 remained unchallenged by the petitioner. Similarly, the petitioner has not challenged the deed of declaration dated 24.03.2015 which is annexure C.A.8 to the counter affidavit of the answering respondent. Neither there is any relief against the deed of declaration nor any pleading nor ground in the writ petition alleging any illegality in this document and it is not a private document but it is a public document and the petitioner cannot be permitted to take that excuse. In its supplementary rejoinder affidavit filed on 15.10.2020, the petitioner has conveniently mentioned that this deed of declaration is a private document but the same cannot be accepted in view of fact that the deed of declaration was filed only after direction for the same was issued by this Court dealing with the matter in the case of Designarch (supra), when vide order dated 14.11.2013 passed by this Court, (a coordinate division Bench), the petitioner was also given option to move its representation before the respondent no.1 which he did by moving representation dated 07.09.2014 which was considered and disposed of on 17.02.2015 by the G.D.A. then how can it be said to be private document. To term this document as private document is always shocking, for the reason that identical deeds of declaration filed by respondent no.2 in respect of Type-A and Type-B apartment were challenged by filing writ petition no.39147 of 2015 Windsor and Nova Apartment Owners Association Vs. Ghaziabad Development Authority and two others, wherein this Court decided it on 24.07.2015 and asked the petitioner to file representation before respondent no.1 and the decision taken thereon by the Chairman, Ghaziabad Development Authority on 24.09.2016 was again subject to challenge by filing writ petition no. 26598 of 2016 Windsor and Nova Aparment vs. Ghaziabad Development Authority and 2 others, then how can deed of declaration (filed by respondent no.2) be treated to be a private document in respect of one set of apartment owners namely Sun Tower residence welfare association and a document accessible to it and subject to challenge by another set of apartment owners Windsor and Nova Owners Association before this Court. The deed of declaration had already been brought on record by respondent no.2 as Annexure No.CA-8 to the counter affidavit. The coordinate bench of this Court has already upheld identical deed of declaration filed for Type-A and B apartments. The total land area and undivided interest in land in the deeds of declaration of Type-A and B apartments and Type-D apartments have been worked out on identical line and taking another view in the present proceeding would be judicially improper. In the annexure appended to the deed of declaration, total covered area of the apartments of the respective blocks, common areas and facilities are mentioned. The land area of the petitioner association as mentioned in the deed of declaration aggregates to 16995.84 square meters. The undivided share of land to which a member of the petitioner association is entitled to has been mentioned as 47.13 square meters. The same 47.13 square meters has also been mentioned as the members of the petitioner association's undivided share in land in the deed of apartment executed in their favour by the Ghaziabad Development Authority in the year

2008, the area 47.13 square meters mentioned therein remained unchallenged. The total land area for the Windsor and Nova Apartment Owner Association has been mentioned in the deed of declaration to be 48326.39 square meters and this length of area was challenged by Windsor and Nova Association which was restricted to 48326.39 square meters for Type-A and B building in Schedule D to the deed of declaration.

82. Once the Ghaziabad Development Authority vide order dated 24.09.2016 rejected the submission of the Windsor and Nova Apartment Association and that order was again put to challenge in writ petition no.61615 of 2016 whereby the coordinate Bench of this Court dismissed the writ petitioner on 03.01.2017 and in absence of any interference with the order dated 24.09.2016 passed by the competent authority, that order has become final.

83. The petitioner's association was not a party to the proceeding arising out of the deed of declaration filed in respect of Type A and B apartments, the demarcation of the land area of apartment block in both the deeds of declaration filed by respondent no.2 has been done on similar basis. Only measurement area varies while in the case of the petitioner, it is 16,995 square meters for Type-D apartment. The deed of declaration remained unchallenged by the petitioner is not mystery but a reality, and F.A.R is admissible on the whole plot of the plan and it is open to the developers to load F.A.R. as much as it desires on the separate pocket / blocks depending on its business plan and no apartment owner can claim ownership right over space meant for community use. While clarifying the various aspects of the case, learned counsel for the respondent no.2 has placed reliance to the principles laid down by Hon'ble Apex Court in the case of DLF Ltd. Vs. Manmohan Lawe and others (2014) 12 SCC 231 wherein Hon'ble Apex Court held that the independent apartment owner has absolutely no ownership right in the area meant for community use and only has right of user.

Submission / Reply by the Respondent No.3

84. Learned counsel for the respondent no.3 has contended that petitioner had preferred a similar writ petition before this Court and the same has been decided along with bunch of petitions by a common order passed by the coordinate Bench of this Court in writ petition no.33826 of 2012 Designarch Vs. State of U.P. and others, whereby mechanism for redressal of the grievance of the apartment owners or their respective associations were clarified and various provisions of U.P. Apartment Act, 2010, U.P. Apartment Rules 2011 and Model bye-laws and its applicability, was interpreted.

85. Now pursuance thereto, the petitioner's association preferred the representation before Ghaziabad Development Authority on 07.09.2014. Thereafter, the petitioner filed writ petition no.53524 of 2014 Sun Tower Residents Welfare Association Vs. State of U.P. and three others on 25.09.2014. This Court vide order dated 07.10.2014 directed to decided the aforesaid representation. Subsequently, the representation was decided on 17.02.205 and all the disputes raised by the petitioner in the present writ petition were decided by speaking order. Point of consent being obtained, use of additional F.A.R. was specifically decided and the plea on this issue raised by the petitioner was after due consideration rejected, therefore, this writ petition is barred by principle of res-judicata.

86. On October 14, in the year 2015, the petitioner preferred this writ petition suppressing and concealing aforesaid aspects and the writ petition sans description of similar writ petition

no.53524 of 2014 previously filed by the petitioner. The entire petitioner is silent on point of consent to be obtained from the petitioner by the developers-respondents no.2. The petition does not refer to this aspect that point of consent and use of excess F.A.R. by respondent no.2 was rejected by the G.D.A. Can the petitioner answer to it as to how and why he kept silent over it and he had alternative and efficient remedy available by preferring revision or availing other remedy before the State Government against the aforesaid order dated 17.02.2015 passed by the Ghaziabad Development Authority but the writ petition has been cleverly drafted suppressing material facts.

87. Now the petitioner shrewdly invented another idea and preferred writ petition no.11072 of 2017 before this Court seeking compliance of the order dated 17.02.2015 passed by the respondent no.1- Ghaziabad Development Authority and by way of prayer made in the aforesaid petition, implementation of the order dated 17.02.2015 was sought, one can see that vague and misleading prayer has been made in that writ petition. The writ petition is thus barred by doctrine of acquiescence and estoppel and the same is liable to be dismissed with heavy cost. Besides, learned counsel for the respondent no.3 more or less adopted arguments extended by the learned counsel for the respondent no.2.

88. Besides, he urged on certain different points and claimed that by way of this writ petition, disputed question of facts have been tried to be raised in this writ petition which is not possible. None of the rights of the allottees of the petitioner's association have been infringed by the development made by the respondent no.3. The U.P. Apartment Act, 2010 sets out law to provide for ownership of an individual apartment in a building as well as undivided interest in common areas and facilities appurtenant to such apartment and envisages that interest is inheritable and transferable. Section 41 of U.P. Apartment Act defines the term apartment and Section 3 (d) of the U.P. Apartment Act defines the term apartment owner whereas Section 5(1) U.P. Apartment Act, 2010 provides for the rights of a purchaser in relation to the flat sold out. Similarly ownership rights are entailed under Section 5 (2) U.P. Apartment Act, 2010. These rights are restricted only to those apartment that forms association for particular building.

89. The two building complexes are completely independent of each other having its own boundaries entry / exit and common areas facilities. The undivided interest is to be gathered in the deed of declaration filed by respondent no.2 with respondent no.1. The petition though refers to aforesaid declaration but the same has not been filed.

90. We have also considered the respective submissions of both the sides.

91. At the outset, we may take note of the fact that vide order of the Hon'ble Apex Court dated 03.03.2017 passed in Civil Appeal No.3602 of 2017 arising out of SLP (C) 26475-2016 Sun Tower Residents Welfare Association Vs. Ghaziabad Development Authority and others, direction was specific to this Court for expeditious disposal of the case and further that all issues were kept open and it was observed that in case the High Court finds it is not possible to determine that it was a park obviously the question of writ application can be considered. Keeping in mind the above direction, we asked both the sides to first argue on the point of existence of park and then to address other issues involved in this writ petition between the parties. Both the sides dealt exhaustively on the issue of park. However, upon consideration only a few vital issues arise in this case, for adjudication as hereinunder.

92. **Issue no.1** whether landscape 'green' and 'open area' as shown in the map / layout plan

dated 06.01.2005 pertaining to plot no.10 Vaibhavkhand Indirapuram Ghaziabad be considered as park and the construction raised in block Type-C was encroachment upon open park area (as shown in layout plan 06.01.2005)?

Further,

in the alternative whether the petitioner have established fact that the 'green area' and 'open area' as shown in the map layout plan dated 06.01.2005 is earmarked as park exclusive?

93. **Issue no.2** whether additional F.A.R. was utilized towards construction in respect of building on block Type C as per plan dated 31.07.2013 without obtaining consent of the petitioner's association under proviso to Sub-section 4 read with Section 12 and Rule 3 and Rule 4 of the U.P. Apartment Rules, 2011 and the allotted 2.5 F.A.R is in violation of the G.D.A. Building bye-laws 2000 and 2008 and the G.O. Dated 17.08.2009 and 04.08.2011?

94. **Issue no.3** whether consent of the petitioner's association was essential / pre-requisite and must have been obtained by the developers and the G.D.A. prior to the approval of the revised layout plan dated 31.0.7.2013?

95. **Issue no.4** whether undivided interest of the members of the petitioner's association has been violated as envisaged in Section 5 of U.P. Flat Act, 1975 and the F.A.R. (1.5) initially allotted and block Type-C being treated as an independent area is justified when this aspect was alien to U.P. Flat Act, 1975?

96. **Issue no.5** whether there is material concealment of fact in writ petition no.59863 of 2015 and vital facts suppressed on account of which the petition deserves to be dismissed?

Issue no.1

97. This issue pertains to claim of the petitioner on the point of existence of park and its encroachment by the developers - respondent nos.2 and 3 by raising construction on it as pleaded by the petitioner. Here we may observe that the question of existence of park has been taken to be base of the petition asserting that by way of construction, being raised by respondent nos.2 and 3 the developers, the area earmarked as park in the layout plan dated 06.01.2005 has been encroached upon which interferes with the undivided interest of the members of the petitioner's association. Claim is that any construction raised on the area earmarked as park in block Type-C would be violative of the provisions of the U.P. Apartment Act, 2010. Both the sides have raised their rival claim, however, we may take into account the submissions on the point raised by the learned counsel for the petitioner and in order to properly address the issue, we have also perused the particular pleading on the point (claiming encroachment of the area earmarked as park) made in the writ petition (59863 of 2015).

98. We may observe that this writ petition was previously dismissed by coordinate Bench of this Court vide order dated 25.02.2016 by observing that contentious matter has been tried to be pressed into service by the petitioner for consideration which cannot be decided in the writ petition. Against this order, when the matter was entertained by the Hon'ble Apex Court in the concerned special leave to appeal (as above) and the observation made by the Hon'ble Apex Court was, to all intent and purposes, for recording specific finding about existence / non-existence of park in block - Type-C, which was marked as green area, open space and landscape etc. in the layout plan dated 06.01.2005, therefore, first and foremost point before us is to consider that particular aspect pertaining to 'existence of park'.

99. In that regard the claim of the petitioner is rested on the anvil that the brochure

distributed to sell the apartment to the petitioner has shown two parks adjacent to petitioner's sun tower Type-D, the two parks shown were - Joggers Park and Central Park (near G+13, Type-C, which is now being separated from the petitioner's building) and that way incorrect statement has been made in paragraph no.8 of the counter affidavit by respondent no.1 as G+34 to suppress the construction made in the basement area by completely excavating the soil beneath the as green area making it unsuitable for planting trees and plants. Learned counsel for the petitioner claims that green area would mean that the area which is completely or partly covered with grass, trees. shrubs or other vegetation. Thus, the area shown green area in the layout map dated 06.01.2005 is 'park' area for all practical purposes.

100. Before we proceed further in pursuance of the aforesaid specific submission on point of treating 'green area' as 'park' in the layout map dated 06.01.2005, it would be convenient to take into account the definition of park as given in the Uttar Pradesh Parks, Playgrounds and Open Spaces (Preservation and Regulation) Act, 1975, [U.P. Act No.55 of 1975], as defined under Section 2 (b):-

"(b) "park" means a piece of land on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden with trees plants or flower-beds or as a lawn or as a meadow and maintained as a place for the resort of the public for recreation, air or light;".

101. Obviously, the burden to prove fact of green area earmarked in the layout plan dated 06.01.2005 to be a park is on the petitioner. It is obvious that the writ petition itself does not specify by specific measurement the location or the area of park by any metes and bounds. But there is mere bald averment in the writ petition that the green area as marked in the layout plan (06.01.2005) for all purposes is a park. This is based upon conjectural analogy emanating from brochure, issued by the promoter / developer to the petitioner when they were offered to purchase apartments in Type D block.

102. It is admitted position that the layout plan dated 06.01.2005 nowhere describes any piece of land to be a park exclusively. Similarly, there is no indication or marking in the layout plan 06.01.2005 that a park would come up in the Type-C and Type-E areas as such. The layout plan (06.01.2005) depicts open area / green area or areas described as landscape green etc. but it nowhere depicts word park as such. We can construe meaning of park as entailed herein above by seeking guidance from Section 2(b) Uttar Pradesh Parks, Playgrounds and Open Spaces (Preservation and Regulation) Act, 1975, [U.P. Act No.55 of 1975]. The layout plan dated 06.01.2005 shows that on the area claimed to be park by the petitioner association, car parking at various places is shown. These cars are shown to be parked all over the open / green area depicted as part of block Type-C and the cars are not shown to be parked in a corner of this open / green area. We do not think that an area which depicts cars parked all over the place can be treated to be a park as defined in the U.P. Parks, Playgrounds and Open Spaces (Preservation and Regulation) Act, 1975 or even as commonly understood. May be that area could have some trees, plants and hedges planted in the open / green area to provide shade or improve aesthetics, but that would not, by itself, make the open / green area as a park especially when cars are shown all over that area in the plan (06.01.2005) and not only in a corner thereof.

103. Commonly, park is a piece of land which is supposed to have a predominant spread of grass, shrubs, trees, while open area and the landscape green may be an area which may comprise covered flooring with intermittent

greenery as defined under the Uttar Pradesh Parks, Playgrounds and Open Spaces (Preservation and Regulation) Act, 1975. A statistical analysis of the data / measurement given in the layout plan would further clarify the fact that total green area / open space on the entire plot i.e. (243242.63 square meters), Plot No.10, Vaibhav Khand Indirapuram, Ghaziabad was 64599.84 square meters amounting to 26.56 % of the plot area. Type-C plot area was earmarked as an area spreading 20036.00 square meters which includes the green area / open areas scattered in four patches in pocket 'C' i.e. 2950.333.00 square meters amounting to 14.73 % of 'C' pocket area.

104. Now on comparative analysis of the layout plan dated 31.07.2013 it shows total area of the plot (No.10) was 243242.63 square meters, whereas, the area of Type-C pocket is 20036.00 square meters, and the total green area / open area on the entire plot was shown to be admeasuring 67493.81 square meters that amounts to 27.75% of the plot area which includes green area scattered in three patches in Type-C pocket which comes to 3279.56 square meters, thus totaling 16.37% area in pocket 'C'. We find that revision of the layout plan (06.01.2005) was made on 31.07.2013 in respect of pocket C and subsequently on 25.04.2015.

105. Perusal of map indicates that it was again revised reversing the position of open land / green area etc. Total green area / open area in pocket C increased to 8130.91 square meters, which amounts to 40.58% of the total area of pocket 'C'. Above calculation and statistics based upon figures as shown in the layout plan dated 06.01.2005, 31.07.2013 and 25.04.2015, the total area of park and open area in the layout plan of 2013 went up by about 4500 square meters. To be precise, revision plan dated 25.04.2015 in respect of Type-C building indicates that the total green area / green landscape area has been mentioned as 8130.91 square meters, thus availability of open area / park area experiences an enhancement with the revised plan in 2013 and 2015.

106. Now we would like to discuss the report dated 20.12.2017 submitted by the two Advocates and the Architect Commissioner, who were directed by this Court previously vide order dated 15.11.2017 with direction to make on the spot inspection on the site (Type-C) and to submit a report. The Court commission visited the spot on 02.12.2017 and submitted the report (as above). Mr. Satyam Singh and Ms. Saumya Mandhyan, learned counsels and an Architect Mr. Manish Gujral were named in the order to make inspection and submit report. The detailed report was prepared by both the two advocates and the architect and both submitted their factual report (20.12.2017).

107. We scanned carefully both the reports filed by the advocate and the architect and we on perusing the report submitted by the advocate commissioner come across that topography of the area in particular of block Type-C and the area adjacent to it has been taken note of by the advocate commissioner whereby various descriptions have been made, relevant description relating to the fact of existence / non-existence of park in block Type-C has been made. There was found 18 meters wide road that separates the two towers -say Sun tower Type D and Windsor and Nova Tower (Type A and B) blocks respectively on one side on the road, whereas, Saya Gold block Type C lies on the other side of this road. Observation in paragraph no.7 of the report on point that on one side of the road is the Sun tower with no boundary wall but only a fence like iron railing surrounding its periphery and entry-exit, whereas on the other side is Saya Gold with distinct boundary wall and entry-exit - is under construction. The relevant photographs have been marked as annexure no.1 to the report. The advocate commissioners have observed in paragraph no.9

of the report that there were three parks operational which were accessible to all the residents of plot no.10 (60 acres). One such park namely, the Joggers park is situated just beside the Sun tower, and in paragraph no.10, it proceeds on to say about independent car parking for Type-A, B, C, D and E. As we proceed further we come across description as entailed in the report that no park is situated inside the Sun tower only open area has been provided at the centre of four buildings. Further, it describes about open landscape area facing Sun tower as per layout plan dated 06.01.2005, sanctioned to be built for Saya Gold (Types -C and E) and according to the revised layout plan dated 31.07.2013, that same area is indicated to be park area (dotted box), now lies towards the rear side.

108. As we proceed further with the report, we come across fact as described in paragraph no.12 itself that the advocate commissioners were shown another revised sanctioned plan dated 25.04.2015 by the G.D.A. This plan shows structure of only Saya Gold wherein the park area which was situated at the rear side of the construction of the Saya Gold, as according to the revised plan dated 31.07.2013, has now vide 2015 plan been shifted to front side of block - Type-C facing Sun tower and marked as green landscape area and the details of green area have been specifically described in the map.

109. Further perusal of paragraph no.13 of the report submits that the advocate commissioners found this green landscape area of Saya Gold to be under construction due to the three level basement parking being constructed. When asked about the green landscape area, they were informed that after the structure is complete there shall be open landscape area on that land and no park area. Further reference pertains to club house, swimming pool, parking of each block etc. In paragraph no.4, it has been observed that according to 2013 plan, park area was supposed to be built at the rear end of the premises of Saya Gold but that has been shifted now in front of block Type-C according to the 2015 plan but admittedly, no green park was being constructed on it even though open area has been left for the residents.

110. Insofar as this factual report by the advocate commissioners regarding existence of the park is concerned, the very description of indication of park as per the revised layout plan 31.07.2013 is on the face based on misconception and fallacy that the layout plan dated 31.07.2013 indicated 'park' in the dotted box (in green colour) in Type-C block, on perusal of the layout plan dated 31.07.2013, we do not see any area in Type C block marked as park.

111. *It appears that the advocate commissionerd took the green dotted lines as shown in Type-C block to be a park, which is not the correct position. Not a single word has been spelt denoting these green dotted spots to be a park in the revised plan dated 31.07.2013. Therefore, any reference to park as such in reference to the green dotted spots is not acceptable*.

112. Now we switch over to the report of Architect Commissioner in the same reference. Bare perusal of the report dated 20.12.2017 on the point of existence of park, proceeds to describe in paragraph no.6 " Nevertheless the most important issue of the park as discussed by the petitioner in his petition is totally unfounded as there was no park demarcated in the sanctioned (plan) of the year 2005 on the plot where the construction is going on. Open area shown towards road in 2005 plan was mostly shown as car parking and moreover this open area clearly belongs to Saya tower society and is not common to all adjoining society". Further in paragraph no.8, the report describes that there were three parks operational which were

accessible to all residents of the plot no.10 (60 acres). One Joggers park stated to be situated just beside the Sun tower.

113. Thus, it is not possible to determine that the area in question in block Type-C is a park (as being claimed by the petitioner). Both the sides have filed their objection to the commissioner reports.

114. The petitioner has objected to the architect as well as the advocate commissioners report dated 20.12.2017 by contending that both the advocate as well as the architect commissioner have acted in non-compliance of the order of this Court dated 15.11.2017 whereby only one commission was appointed and specifically directed to conduct on the spot joint inspection and it was required to submit one single report, whereas, in this case, the two advocate commissioners have on the one hand filed their separate report dated 20.12.2017 whereas on the other hand architect commissioner has filed his separate report and in the light of above. Castigation is that report submitted by the architect commissioner suffers from minority view, therefore, it should be rejected out-rightly and advocate commissioners' report being majority report be treated as report of the commission. However, the petitioner has objected to both the reports, on those points which are adverse to him.

115. We first take up the objection to the architect's report by the petitioner. Upon perusal of the objection, we come across discontent shown to the report in the sense that the factual finding of both the advocate and the architect commissioner is almost same but paragraph no.5 of the architect commissioner report is stated to be wrong when the commissioner observed that the parking, entry and exit level of Sun tower building as the sole independent entry forgetting the fact that inspection would apparently show that all the four towers in Type-D building have multiple separate, free entries at ground level from the common roads due to absence of any boundary wall, the landscape area defined by the commissioner has been seriously objected to be beyond the purview of the commission. The architect's report is self-contradictory. He failed to describe the actual landscape area in the plan 2005 as it stands today. It did not take note of landscape area as per 2013 plan that has been completely taken over for construction, similarly while, considering about the 18 meters wide road, he wrongly observed that the road divides Sun tower with Saya Gold, whereas, 18 meter wide road is part of the single scheme to allow the inhabitants of the whole plot to move in and out of the plot.

116. The report regarding three operational park accessible to all has been accepted as correct by the objector. The report was stated to be partially correct when the Chief Town Planner told that plan 2013 was passed as per notification dated 17.08.2009 but it failed to mention that U.P. Apartment Act notified in 2010 prohibits any change in plan based on additional F.A.R. as per government notification dated 17.08.2009 without obtaining the consent of other existing allottees. The commissioner also did not take note of fact that Town Planner had told him that there is no boundary wall permitted around Saya (Type-C) or any tower in the plot.

117. The paragraph no.11 of the architect's report has been accepted to be correct regarding mention of use of increased F.A.R. by the developer.

118. It is also incorrect when the architect commissioner observed that in plan 2005, the front open area was shown as parking and not green area because the map supplied to the three commissioners clearly

marked the entire area as "landscape area" , the commissioner incorrectly stated that the open area has been increased in 2013 plan as compared to 2005 plan.

119. The commissioner has stated that after questioning about green land area, he was informed that after the construction is complete there shall be an open area and not park area. The construction is now being headed on the basis of new sanctioned plan dated 25.04.2015 but such plan is not acceptable to the petitioner. The architect commissioner stated just opposite to what Chief Town Planner has stated before the three men commission. The architect commissioner was partly correct when he stated that there are other parks in the scheme.

120. Besides, the petitioner also scathed the advocate commissioners report on similar lines like the one he castigated architect commissioner report, the same averments and the same objection to this report have been made on the same line that the three commissioners ought to have filed one single report. Although the report of the advocate commissioners is rated to be partly correct. In paragraph no.5 of the objection, a request has been made that advocate commissioner report being majority report be considered as the report of the commission appointed by this Court.

121. Objection is that the advocate commissioner also failed to take note of fact that there are four parks out of which one is adjacent to Type C building and it is being destroyed. The contents of the paragraph no.7 and 8 of the report was assailed in regard to the description that 18 meter wide road separates the two properties in question - on one side of the road, there is Sun tower building with no boundary wall but only an iron like fencing surrounding its periphery and entry and exit, whereas, on the other side, is Saya Gold. It is claimed that there are multiple entries into four towers of Type-D building because of absence of any boundary wall and set back line. The statement of Chief Town Planner that no boundary wall was sanctioned around any type of buildings as such the boundary wall found around Saya Gold (Type-C) building is illegal and has to be removed.

122. There are four parks and reference of fourth park has not been mentioned. Paragraph no.10 of the report of the advocate commissioners makes contradictory statement, when it submits that residents of Windsor and Nova were parking their vehicles on sides of the road, meaning thereby there is no parking for any type of building and it was never required. The advocate commissioners failed to record fact that the revised map of 2015 was never part of this case when the advocate commissioners were told by the Chief Town Planner that G.D.A. has revised the map subsequently. From perusal of the photograph appended to the report, it can be seen that open landscape area has been converted into building on ground floor level, whereas, there was no landscape area as per 2005 plan. It was never reported that the open landscape area as per 2013 plan has been completely taken over for construction.

123. Paragraph no.16 of the report is stated to be partly correct that the sun light due to construction of G+34 instead of G+12 has been partially restricted for the residents of Sun tower (Type-D) and sun light and air flow of the petitioner building which is G+12 building is completely restricted and lastly contents of paragraph no.16 of the report was stated to be incorrect when it observed that the allegations of the petitioner in the present writ petition are partly in affirmation and partly in negation.

124. Respondent no.2 has also objected to the report of the advocate commissioner dated 20.12.2017 to the ambit that commission was required to ascertain about the allegations of the

petitioner with regard to the agreement (sale deed) executed between the petitioner and the G.D.A. respondent no.1. Therefore, as per direction of this Court, the commission was to look into violation of the agreement (sale deed) between the petitioner and respondent no.1. The commission instead of confining itself within the four corners of directions given by the Court travelled beyond directions of this Court and made observations which were uncalled for and the commission was not required to ascertain about change in landscape of an independent area where development was being carried out (by respondent no.3). It being an independent area enclosed by distinct boundaries having its own entry and exit. While clarifying about construction (being made out), it was claimed that vide order dated 04.08.2009, the Housing and Urban Planning Department, Government of the U.P. increased F.A.R. from 1.5 to 2.5, thus developers proposed plan (31.07.2013) was within limits. The objection also narrates the past story as to how lease was granted and how the F.A.R was increased from 1.5 to 2.5 and that being so, the height of the floors was also increased. It also described fact that construction of Type-E apartment was undeveloped, therefore, respondent no.2 was entitled to further seek revision to the layout plan dated 06.01.2005 and to increase the height of the floors up to G+34 storey. After narrating various aspects and gradual development of law pertaining to U.P. Apartment Act, 2010 and the bye-laws of 2008 which facilitated revision of the layout map dated 06.01.2005. However, it was claimed, inter-alia, that Windsor and Nova has its independent and separate common areas, facilities and services as well as separate and independent entry and exit. The vehicles of Windsor and Nova apartment association were parked within premises of the society. Plot no.10 being huge land spread into 60 acres and development of the entire plot cannot be made at one stroke, therefore, respondent no.2 at all times proposed to develop different group housing scheme over plot no.10 having its independent common areas and facilities and construction being carried out by respondent no.3 over plot no.10/1 having its own common areas and facilities as well as entry and exit.

125. It is claimed that averments made in paragraph no.11 are in contrast to contents of paragraph no.9. Apart from that, chronological background of the incidental development of the project in respect of society Windsor and Nova for Type-A and B building has also been elaborated and claimed that due to change in the F.A.R., the parcel of land demarcated as Type-C building in the revision of map sought and the consequent construction raised thereon is in consonance with the bye-laws of G.D.A. and Rules and provisions of the U.P. Apartment Act, 2010.

126. The respondent no.3 has raised objection to the advocate commissioner report and has asserted that while the commissioner took account of construction of G+34 and thereby opined that sun light has been partially restricted for the residents of Sun tower and has compared this finding with architect commissioner report which tells another story that this construction falls towards south of the sun tower, therefore, sun light is not much affected and on the basis of this report, learned advocate commissioner report has been criticized severely to the tune that the relevant aspect about the building being constructed on the southern side has not been considered properly. Further observations regarding existence of common facilities as stated by the advocate commissioner report has been put to question on the ground that architect commissioner has opined differently. In fact, the factual aspects have been properly explained by the architect, he being an skilled and technical man to understand the technicalities of the building vis-a-vis use of the land, his dealing with the land and building is more authentic and

accurate than that the advocate commissioner. He has dealt with the relevant aspects of facts. However, the members of commission were unanimous on the point in their individual reports that both the societies are separated by 18 meter wide road and construction raised by respondent no.3 is not affecting any common area of the petitioner society as the project has sufficient distance between the two blocks (Type-D and Type-C). By saying so, the respondent no.3 has concluded that the advocate commissioner travelled beyond its power and opined in the matter which was not called for.

127. Now insofar as the aforesaid reports of the advocate and the architect commissioners and its objection by both the sides, are concerned, it is apparent, that vide order of this Court dated 15.11.2017, it was directed that commission shall visit the spot comprising of two advocates and one architect and they were specifically named in the order itself and were directed to make the spot inspection on 02.12.2017 which they did on 02.12.2017.

128. Now the claim raised by the petitioner that one single report ought to have been filed by all the three - the two advocate and one architect - is altogether misconceived idea, for the reason that there is no such direction that the report must be one and jointly filed, as such, by all the three commissioners. So far as factual aspect of filing of the commissioners report in this case is concerned, obviously we disapprove idea of majority and minority reports mooted by the petitioner.

129. All the three commissioners were found competent only then they were appointed by this Court to make on the spot inspection of the site. Both the reports are fact finding reports and the objection raised to it by the petitioner insofar as it relates to factual aspects of this case need not be elaborated at this stage as that would tend to touch directly on the merits of this case which aspects we will discuss and deal in this judgment later on. However, both the commissioner reports concur on the point that the Sun tower i.e Type-D - is surrounded by iron like fencing on its periphery. Apparently, the petitioner has not stated in its objection that this particular fact to be against real fact or incorrect. Now it can be considered in the light of the commissioner report(s) that Sun tower building / area is surrounded by an iron like fencing then obviously, it does not make difference because iron like fencing itself separates the area from the rest of the other areas of Plot no.10. If such is the conduct of the petitioner society itself, the impression given by the construction of iron like fencing surrounding the Sun tower building would always mean that notwithstanding the denial by the petitioner, that there is no separate parcel of land on plot no.10, however, by conduct it admits of separate parcel of land on plot no.10, which is looked after by Sun Tower Association. Here the conduct of the petitioner in not telling about iron like fencing surrounding Sun Tower speaks louder than the claim raised by the petitioner to the contrary. In this regard, area of Type-D building of the petitioner society is posed to be separated from other areas, though it is not the legal position and the law as it holds in relation to the building in question.

130. If fact of an iron like fencing is existing surrounding periphery of Sun Tower and that being the case, then entry to all the four blocks of Type-D cannot be made directly from the main road, whereas, the fact is that only one entry and exit gate is found to be operational for Type-D Sun tower as there is existing an iron like fencing around the Sun tower, as described in both the reports one by the Advocate and another by the architect commissioners, therefore, objection to that extent raised by the petitioner is not sustained.

131. So far as reference of revised map of 2015, use of F.A.R. / additional F.A.R. by the

respondents and the other similar legal issues are concerned that need not be addressed by us at this stage, for the reason that these questions will be decided first by the revisional authority, if the revisional authority - the State - is approached by the petitioner and the jurisdiction so vested in the State Government cannot be usurped merely on the asking of the petitioner association at this stage. However, we are quite surprised that the advocate commissioner's report, without any rhyme or reason, has described besides open landscape area (facing Sun tower) sanctioned to be built for Saya Gold (Type-C and E) and according to the revised layout plan dated 31.07.2013, that area is indicated to be a 'park' area (dotted box) now towards the rear side. We are unable to to find any specified piece of land in block Type-C to have been described as park area and shown in the map of 31.07.2013 on the parcel of land where Saya Gold building is being raised.

132. Even the petitioner could not show us anything while we discussed about the two maps / layout plans one dated 06.01.2005 and the subsequently revised layout plan dated 31.07.2013. The layout plan 2005 though mentions open area and 'car park' places at a number of places in Type-C area, whereas, at one place it refers to green area vis-a-vis open area opposite to each other. There is no mention of any park in the plan 2005 for blocks Type-C and Type-E where Saya Gold is raising construction subsequently to the revised plan dated 31.07.2013. The reference of park area shown by green dots as referred by the advocate commissioner report is thus illusory thinking and not the real one. Therefore, fact finding search made by the advocate commissioner is accepted to the extent that some construction work has been done in respect of block Type-C with surrounded concrete boundary wall. Similarly, both Type-D and Type-C blocks lie opposite to each other with 18 meter wide road in between the Sun tower (Type-D) with iron like fencing, (which too is a type of boundary wall surrounding the block), because it tends to fulfill work of a wall in the sense that it prevents free approach to the land of block Type-D from outside road directly. Rest of the aspects narrated in the commissioner reports being matter of merit of the case and would be subject to our appreciation, therefore, that need not be elaborated in consideration of these reports of the advocate as well as the architect commissioners at this stage. We will take into account meritorial aspect of this case in its contextual reference when appropriate.

133. Subject to the aforesaid observation, the above two commissioner reports one by two the advocates and another by the architect and the objection thereto as preferred by both the sides, are disposed of.

134. Again we revert back to the question of park. The definition of park as entailed under Section 2 (b) of the U.P. Parks, Playgrounds and Open Spaces (Preservation and Regulation) Act, 1975, [U.P. Act No. 55 of 1975], stipulates that it is a piece of land where there are no building or of which not more than one-twentieth part is covered with buildings and the whole or remainder of which is laid out as a garden with trees, plants or flower-beds or as a lawn or as a meadow and the same is maintained as the resort of the public for recreation, air or light. Now in absence of any measurement or specification of park in the layout plan 2005 poses question - whether the area shown as open area / green area in the layout plan dated 06.01.2005 would be a park?

135. We upon statistical analysis of the aforesaid plan 2005 gather come across fact that there exists 18 meter wide road between the two blocks - block D and block C to the southern side of it lies block Type-C and to the northern side lies block Type-D. In Type-C the open area and the areas meant for car parking have been

described at specific places in front of block Type C. It starts with the area shown for car parking then green area and adjacent to green area is open area and after this area again area for car parking. The aggregate area mentioned is 1166.643 square meters, opposite to the place is a piece of land described as open area ad-measuring 919.97 square meters. Then two more places for car parking have been shown and in between the two open areas and car parking there is little space shown and marked as open area ad-measuring 266.31 square meters.

136. The petitioner's claim that description of area in block Type C as 'green area' in front of it is park and in support of the claim, specific argument is extended that the green area in the layout plan 06.01.2005 is de-facto park area for all practical purposes. Now the fire N.O.C. obtained for block Type-C has been castigated that as per annexure no.1 to the supplementary rejoinder affidavit (whereby claim of the petitioner is) to the purport that placement of cars over the landscape / green area near Type C on the uncontroverted fire map of 06.01.2005 after fire N.O.C. was obtained showing the area as landscape green area is illegal and the car parking area in the map (06.01.2005) in place of green area cannot be considered in this case to reduce the green area in the plan 2005. The petitioner has not pleaded in its petition any word on point of fire map, it is barred from raising argument in that regard. Further the petitioner claims that word 'park' is used conceptually and contextually in the U.P. Development Act 1973 and the U.P. Park Act, 1975 defining the word 'park'. Learned counsel for the petitioner added that law makers have treated the park and open space in the same yardstick and have disallowed any encroachment and construction over it.

137. In that regard, at the cost of repetition, we may observe that burden to prove the construction on plot Type-C (G+34 floors) to be on the piece of land that was meant and earmarked to be used as 'park' in the undisputed sanctioned layout plan / map dated 06.01.2005 is on the petitioner. The petitioner has relied on the fire layout plan dated 06.01.2005 wherein certain areas earmarked for block Type C (G+13) and E (G+17) marked as landscape green and green area and based on that claim is raised to the point that after revision of the sanctioned map on 31.07.2013 the same has been taken away, does not carry force. The layout plan dated 06.01.2005 (which is inclusive of the fire layout plan dated 06.01.2005) is not conclusive to any area earmarked there, except to indicate fire path of the plot intended to earmark path for fire tender movement. It is indicative of fire path and does not deal with the green area. It does not mention any legend or elaborate marking or measurement of even ground coverage of the plot. The town and country planner of respondent no.1 had personally appeared before this Court and produced its record and explained the facts that upon written recommendations of the fire department, the respondent no.1 sanctioned the fire plan with the said objective. It is no denying fact that the fire layout plan is not part of the pleading as it has been filed by the petitioner through its supplementary rejoinder affidavit to counter affidavit filed by the respondent no.1. Moreover, the reliance of the petitioner on fire layout plan dated 06.01.2005 is in contravention of its own stand taken in the writ petition, where it relied without any protest on the layout plan dated 06.01.2005 and it never challenged its sanctity. The plan dated 06.01.2005 is admitted paper of the petitioner and by way of argument, now the petitioner is craving for inherent defect on strength of the fire map to put in doubt the very authenticity of the admitted layout plan. Fire map is unchallenged in the petition. A fact not pleaded cannot be argued. The petitioner should know that he cannot travel beyond periphery of his pleading in the writ petition.

138. The writ petition does not specify any location or area as "park" which park is, as per

petitioner, allegedly being encroached upon but nothing assertive brought on record to establish existence of park - apart from a bald averment in the writ petition. The petitioner has not specified as to how and in what manner, the layout plan sanctioned on 31.07.2013 has reduced or diminished the alleged "park area" when compared to the layout plan dated 06.01.2005. The word park has not been used in the layout plan 2005 and it does not mark any specific portion as park that would come up in the Type-C and Type-E block. The plan dated 06.01.2005 only mentions open area / green area or areas described as landscape green.

139. A park, as commonly understood, is very different from an area described as open area or landscape green. A park is supposed to have predominant spread of grass / shrubs / trees, while open area / landscape green may comprise covered flooring with intermittent greenery as defined under U.P. Parks, Playgrounds and Open Spaces (Preservation and Regulation) Act 1975. As seen in the layout plan dated 06.01.2005, cars are parked almost all over the area claimed to be park by the petitioner. As we have discussed above, an area with a splattering of cars parked everywhere cannot be commonly understood as a park. Merely because some trees or other greenery could be planted / provided over the area would not mean that the open green area as shown in the layout plan dated 06.01.2005 can be treated to be a park.

140. It can be asserted here that all open area can not be considered to be park. Upon statistical analysis of the measurement of the areas shown in the map as green area / open space, we gather that space of green / open space have been increased with every revision of the map. Statistic is apparent as under.

(i) On 06.01.2005, total plot area was 243242.63 square meters (including plot area of pocket i.e. 20036.00 square meters) and total green area / open space on the entire plot was 64599.84 square meters that amounts to 26.56% of the plot area (including green area / open area scattered in four patches in pocket C i.e. 2950.333 square meters amounting to 14.73 % of C pocket area);

(ii) On 31.07.2013, total plot area was 243242.63 square meters (including plot area of pocket i.e. 20036.00 square meters) and total green area / open area on the entire plot was 67493.81 square meters amounting to 27.75% of the plot area (including green area scattered in three patches in pocket 'C' i.e. 3279.56 square meters amounting to 16.37% of 'C' pocket area); and

(iii) On 25.04.2015 revision of plan made only in respect of pocket 'C' and total green area / open area of this pocket 'C' stood increased to 8130.91 square meters amounting to 40.58% of the total 'C' pocket area.

141. Above analysis brings out fact that the total park and open area in the layout plan of 2013 went up about 4500 square meters when compared to the originally sanctioned plan of 06.01.2005. We have also taken note of the revised map in respect of pocket C dated 25.04.2015 and we discover that total green area / green landscape area of Type C building depicted is 8130.91 square meters. Thus, availability of open area / park area has undergone an enhancement with every revision to the layout plan (06.01.2005) in 2013 and 2015, therefore, claim of the petitioner cannot be sustained that the green area shown in pocket C was a park. We have every reason to hold that the petitioner has failed to prove either the existence of park in the layout plan sanctioned on 06.01.2005 (the then block Type-C (G+13) as indicated in the layout plan) or that it has been encroached upon while revising the layout plan in 2013 and raising the present constructions. Consequently, claim of the petitioner on point of existence of park becomes an issue highly

contentious and cannot be decided in the writ petition.

142. The Hon'ble Apex Court while considering civil appeal no.3602 of 2017 arising out of SLP (C) 26475-2016 Sun Tower Residents Welfare Association Vs. Ghaziabad Development Authority and others passed order on 03.03.2017 whereby it mandated that:-

"all the issues are kept open. In case the High Court finds it is not possible to determine that it was a park, obviously the question of maintainability of the writ application can be considered".

Since existence of park and the claimed encroachment on it has neither been proved nor is it so inferred, under prevailing facts and circumstances of this case, therefore, the question of maintainability of this writ petition in its present form opens up for consideration.

On maintainability of the writ petition

143. Once it is obvious that contentious claim of existence of park can not be decided, the petitioner need seek other efficacious remedy for vindicating its claim. On point of maintainability, certain aspects of this case need be scrutinized and it would be relevant to record finding also on issue no.5 on point of concealment of material fact as that is relevant for our discussion of point of maintainability of this writ petition.

Issue no.5

144. This issue relates to fact whether there is material concealment in writ petition no.59863 of 2015 and vital facts suppressed on account of which the petition deserves to be dismissed.

145. In that regard, contention of the respondent nos.1, 2 and 3 is to the ambit that the petitioner has suppressed material facts and is adopting contradictory stand before this Court. In that regard, it is apparent that the petitioner initially filed writ petition no.15782 of 2010 on 22.03.2010, this writ petition was part of bunch writ petition, the leading one being writ petition Writ-C No.33826 of 2012 M/s Designarch Infrastructure Pvt. Ltd. Vs. V.C. Ghaziabad Development Authority and others, it was disposed of by coordinate Bench of this Court on 14.11.2013, revision in the map 2005 was, inter-alia, challenged by the petitioner on various counts. This Court asked the petitioner to file its representation before the Ghaziabad Development Authority (now to be referred as G.D.A.). Consequent thereupon, representation dated 07.09.2014 was moved. But it was kept pending. Hence another writ petition no.53524 of 2014 was filed wherein order was passed on 07.10.2014 directing the G.D.A. to take action within three months. The representation was decided on 17.02.2015, copy whereof is annexure CA-7 to counter affidavit of respondent no.2. It is noteworthy that Laxmi Chand, who has sworn the affidavit on behalf of the petitioner in the present writ petition, was specifically heard by the G.D.A. during the proceeding culminating into passing of the order dated 17.02.2015, but the petitioner claims that the petitioner was not aware of this order.

146. In the representation (07.09.2014), the point of consent to be obtained from the petitioner prior to approval of revised plan 2013 and the issue of F.A.R. was raised inter-alia but the same was rejected vide aforesaid order dated 17.02.2015. However, the respondent no.2 - developer was directed to file deed of declaration at the earliest. While deciding the representation, it was held that " The map for the plot no.10 Vaibhav Khand, comprising of its sub parts 10/1, 10/2 and 10/3 has been sanctioned before 18.03.2010 with approved multi storey buildings and on 30.04.2008, part of the land (10/1) has separately been transferred to Rose Berry and on the same part revised map of 2013

is sanctioned, which is within the basic F.A.R, hence the common area facilities have not been compromised and consent of the R.W.A. is not required".

147. Thus, the competent authority under the U.P. Apartment Act, 2010 passed the said order on 17.02.2015 in a quasi judicial proceeding after giving opportunity of filing their respective claim and hearing all the concerned parties including the petitioner and found that the revision of the layout plan was within the basic F.A.R. admissible on the plot and the consent of the petitioner R.W.A. was not needed. The petitioner as applicant as well as being participant in the said proceeding was fully aware of the order passed by the G.D.A., the copy of the said order was also marked and sent to the petitioner as well, even then the petitioner did not challenge the finding made in the said order dated 17.02.2015 and contrary to that the petitioner actively suppressed the order dated 17.02.2015, while filing the present petition, filed after eight months of the aforesaid order (17.02.2015) on 14th October, 2015 before this Court. We also scanned carefully entire pleadings made by the petitioner in its petition but could not come across a single averment about order dated 17.02.2015 in the present writ petition when, as recorded by us earlier, the deponent of the affidavit in support of the present writ petition was specifically heard by the G.D.A. during the proceedings and would definitely be aware of the same.

148. We are constrained to observe that the said order dated 17.02.2015 was concealed for two long years after filing of this writ petition and another writ petition no.11072 of 2017 (which is connected writ petition with this petition), was filed in which it was claimed, inter-alia, that the order dated 17.02.2015 passed by the G.D.A. be enforced.

149. Moreso, in case the instant writ petition preferred by the petitioner is allowed without setting aside the finding recorded by the G.D.A. in its order dated 17.02.2015, that would be adverse to an order passed by a competent authority which is binding inter-se between the parties in view of fact that the order passed by the G.D.A. dated 17.02.2015 is not under challenge before this Court. A finding, even an order wrongly passed by any authority is binding inter-parties as held by Hon'ble Supreme Court in *Gorie Gouri Naidu (Minor) and another Thandrothu Bodemma and others, (1997) 2 SCC 552 paragraph 4; Shri Narayana Dharmasanghom Trust Vs. Swami Prakasananda and others (1997) 6 SCC 78 paragraph 6; K.A. Abdul Jaleel Vs. T.A. Shahida (2003) 4 SCC 166 paragraph 17; and Mehar Singh Saini, Chairman Haryana Public Service Commission and others, In re (2010) 13 Scc 586 paragraph 131*, unless set-aside in appropriate proceedings by a competent authority / court.

150. It is beyond our comprehension as to how the petitioner having failed to challenge the order dated 17.02.2015 passed by the G.D.A., can use this writ petition as an indirect mechanism to set it at naught. Far from being challenged, its very existence was not disclosed by the petitioner in the present writ petition - (59863 of 2015) and there is no whisper regarding this order in the present writ petition. The behaviour of the petitioner is not fair and the petitioner has not approached with clean hands, instead, it has suppressed material facts / order passed by the G.D.A. in the year 2015 and indirectly sought to get over the inconvenient parts of it through the present writ petition while seeking enforcement of the portions favourable to it through another writ petition (writ petition no.11072 of 2017). On the point of maintainability - as held by the order dated 17.02.2015 - the interest of the petitioner association is not affected and on that count, the locus standi to maintain the present writ petition, when interest of the petitioner remains unaffected as categorically held in the order dated 17.02.2015, does not exist.

151. The order dated 17.02.2015 was only brought on record of the present writ petition by the counter affidavit filed by the respondent no.2 as annexure no.CA-7. Now that being so, the petitioner is guilty of 'suppressio veri and sugestio falsi', on that count we are inclined not to entertain the present writ petition. The petitioner has certainly not come with clean hands. One who seeks equity must come with clean hands.

152. Therefore, we can sum up that on ground of suppression of material fact, we decline to exercise our discretion to entertain the writ petition and hold that the writ petition is not maintainable.

Issue no.3

153. This relates to fact regarding consent of the petitioner association being obtained by the developers and the G.D.A. as prerequisite prior to the approval of the revised layout plan dated 31.07.2013. In view the above discussion, it is obvious that the point of consent has already been decided by the competent authority i.e. the G.D.A. vide its order dated 17.02.2015, which has not been challenged by the petitioner. Therefore, the point of consent being quasi-judicial order as such binding between the parties carries its force. For the sake of argument, if the order pertaining to consent to be obtained is claimed (by the petitioner) to be erroneous even then the finding holds good for all purposes. As stated above, finding, howsoever, erroneous it may be, is always binding on the parties inter-se unless otherwise set aside by any competent authority or the order of the Court of law, as the case may be. Therefore, on this issue, there is no need of detailed discussion because it may pre-empt and pre-judge things which are yet to be shaped, decided.

154. There are certain compelling reasons for not entering into question of merit or demerit of F.A.R.(1.5) or additional F.A.R. (2.5) and its utilization, besides the point of consent being obtained for revision of the plan dated 06.01.2005 because on plot no.10 Vaibhav Khand Indirapuram Ghaiziabad, the another association of residents known as Windsor and Nova Apartment Association (for block Type A and B) preferred writ petition before this Court numbered 39147 of 2015 Windsor and Nova Apartment Association Vs. Ghaziabad Development Authority whereby the deed of declaration dated 24.03.2015 (prepared by respondent no.2) was asked to be made as per plan dated 30.10.2002 and proper deed of declaration was sought to be prepared as per U.P. Apartment Rules 2011 and the deed of declaration dated 24.03.2015 was desired to be set aside, besides claiming that unless deed of declaration is accepted the building plan dated 31.07.2013 should not be accepted / approved. However, while deciding aforesaid writ petition, direction was issued for moving fresh representation before the G.D.A. and it was directed to test the deed of declaration and its applicability as per the provisions of the U.P. Apartment Act, 2010 and the U.P. Apartment Rules, 2011. The Vice Chairman, Ghaziabad Development Authority vide order dated 24.09.2015 decided the representation and asked the respondent no.2 to file a revised deed of declaration. Now in compliance of the aforesaid order dated 24.09.2015, a revised deed of declaration was filed on 09.10.2015. This revised deed of declaration was challenged in writ petition no.26598 of 2016 by the Windsor and Nova Apartment Association (for block A and B apartments), in the matter of the Windsor and Nova Apartment Association Vs. Ghaziabad Development Authority and two others, this writ petition was dismissed on 30.05.2016 by observing that the petitioner failed to establish as to how the deed of declaration does not satisfy the direction issued by Vice Chairman, G.D.A. vide order dated 24.09.2016, however, liberty was given to the Windsor and Nova to approach the authority concerned whereupon the Windsor

and Nova Association moved a representation dated 06.06.2016 before the Vice Chairman, Ghaziabad Development Authority which after considering the matter, rejected the representation vide its order dated 24.09.2015. Against this rejection order, the Windsor and Nova again moved before this Court by filing writ petition no.61615 of 2016 which was disposed of on 03.01.2017 whereby the coordinate division Bench of this Court directed the petitioner to avail alternative remedy and to move application / revision under Section 27(3) before the State of Uttar Pradesh. However, the coordinate division Bench of this Court did not set aside order dated 24.09.2016 passed by the Chairman, Ghaziabad Development Authority. Similarly, no stay order was passed against aforesaid order dated 24.09.2016.

155. In view of above development in the matter of deed of declaration, which originated from the date of the order dated 17.02.2015 touched its peak on 03.01.2017 while the coordinate division Bench of this Court specifically asked the identically and similarly placed apartment association (Windsor and Nova) for block Type A and B on plot no.10 to seek the remedy before the Government of Uttar Pradesh by appropriate application / revision. Now in such peculiar circumstances, obviously the claim of the petitioner association in this petition being identical and similar to that of the Windsor and Nova Apartment Association, in this backdrop, the thrust of the petitioner's case is that the entire plot no.10 is to be taken as a single unit and he has an unaffected right of access to the so-called 'park' area in front of Type C and E building shown in plan dated 06.01.2005. The petitioner association is claiming rights to F.A.R. on that very basis, and claims that the respondents cannot utilize F.A.R. of entire plot no.10 only over Type C and E buildings. This was the exact plea taken by Windsor and Nova Association while challenging the deed of declaration (which matter is now pending before the State Government in a revision as directed by a coordinate Bench of this Court on 03.01.2017), which claimed that the respondent no.2 had illegally bifurcated plot no.10 and wrongly reduced the land area mentioned in their deed of declaration only to cover land of Type A and B apartments and not entire plot no.10, thereby depriving them of their rights. The only difference is that the Windsor and Nova Association looks after affairs of apartment owners of block A and block B, whereas, the petitioner association is concerned with the affairs of block D, however, this difference in the name of block does not separate the very cause based on the deed of declaration which is common cause applicable to both the above associations.

156. In case the matter is entertained by this Court on points of deed of declaration, the requisite consent of the petitioner to be obtained for the layout plan dated 31.07.2013 and utilization of F.A.R. or additional F.A.R. then that would be in the teeth of the order of the coordinate division Bench of this Court which has considered that aspect and passed order in the matter on 03.01.2017 and in the light of that order, the petitioner claims, by way of filing supplementary rejoinder affidavit, that a revision has been filed against the order dated 24.09.2016 (annexure SRA-3) in the year 2017. This averment in the supplementary rejoinder affidavit by the petitioner is direct admission of appropriate course of action adopted in the matter by filing revision against the order of G.D.A. dated 24.09.2016 before the State of Uttar Pradesh by its sister association Windsor and Nova. Because of the aforesaid specific reasons, now it would be adverse to the judicial propriety, norms and interest to discuss the merit of the aforementioned points of controversy raised in this petition regarding the deed of declaration as similar deed of declaration is under adjudication before the State of U.P. in a

revision (SRA-3) and any finding by this Court on the deed of declaration as urged by the petitioner would have a direct impact on the pending revision. Similarly the question of F.A.R. / additional F.A.R. and consent of the petitioner society, as settled vide order dated 17.02.2015 is also linked to the issues concerning the correctness of the deed of declaration, therefore, these issues may more appropriately be raised before the State Government by filing a revision.

157. Now it is up to the petitioner to move in revision against the order dated 17.02.2015, insofar as it adversely affects the petitioner, before the State of Uttar Pradesh as that is the appropriate remedy. At this juncture, appropriate to observe that in the connected writ petition no.11072 of 2017, the petitioner has primarily sought implementation of the order dated 17.02.2015, while doing so, it did not question, even in the least, those points / findings of the order dated (17.02.2015) which are adverse to it. The petitioner appears to have no grievance against the finding adverse to it. This, omission, without reserving the right to challenge adverse findings of the order dated 17.02.2015, tantamounts to waiver of the right to challenge that part of the order dated 17.02.2015 which are adverse (to it).

158. The point of consent having been decided by the G.D.A. as above vide its order dated 17.02.2015 (while considering representation of the petitioner dated 07.09.2014), would prevail upon the petitioner and the petitioner now cannot be allowed to undo the outcome of its own efforts (when moved above representation) whereby specific questions / objections have been raised before the competent authority which pronounced its verdict on it which needs to be challenged before the revisional authority i.e. - the State of Uttar Pradesh, if otherwise permissible in law keeping in mind the conduct of the petitioner.

Issue nos. 2 and 4

159. Issue no.2 relates to fact whether additional F.A.R. was utilized towards construction in respect of building on block Type-C as per revised plan dated 31.07.2013 without obtaining consent of the petitioner association under proviso to Sub-section 4 read with Section 12 and Rule 3 and Rule 4 of the U.P. Apartment Rules, 2011 and the allotted 2.5 F.A.R. is in violation of the G.D.A. Building bye-laws 2000 and 2008 and the G.O. dated 17.08.2009 and 04.08.2011? whereas, issue no.4 relates to fact whether undivided interest of the members of the petitioner's association has been violated as envisaged in Section 5 of U.P. Flat Act, 1975 and the F.A.R. (1.5) initially allotted and block - Type-C being treated as an independent area is justified when this aspect was alien to U.P. Flat Act 1975?

160. Much has been argued before us on the point of floor area ratio (F.A.R.) and its applicability in relation to its utilization in respect of construction in block Type-C. However, as discussed in the matter of finding recorded in respect of issue no.3 herein above, the same discussion would be applicable here also in consideration of both the issues, for the same reasons but for fact that the matter of F.A.R. and its utilization for Type-C block has also been considered and decided by the competent authority - G.D.A. - vide its order dated 17.02.2015 against the petitioner that part / adverse finding of the above order remained unchallenged by the petitioner, therefore, the proper remedy for the same is to file application / revision before the State of Uttar Pradesh, if otherwise permissible in law keeping in mind the petitioner's conduct of seeking enforcement of the order dated 17.02.2015 in the writ petition no.11072 of 2017. Now it is up to the petitioner to choose the proper course of action because if any touch is given at this stage to the context of use and applicability of the F.A.R. and its

utilization for construction of building in block Type-C that would inalienably tend to pre-judge aspect of applicability and utilization of F.A.R. which now lies in the exclusive domain of the competent authority - that is to say - the State Government which is vested with the power to consider and dispose of revision against order dated 17.02.2015 passed by the G.D.A., if it is found to be legally maintainable.

161. Perusal of the revised plan dated 31.07.2013 apparently connotes to the point that the revised map / plan (dated 31.07.2013) is with regard to a particular parcel of plot no.10 and it is not with regard to the entire plot no.10 and in this case the claim raised regarding the existence of park/central park in block Type-C has not been established by the petitioner, this aspect stares and questions the point of 'locus' to file the writ petition. The point of locus becomes relevant for the reason that the center theme of this petition (59863 of 2015) is, after all, found to be contentious and raises complicated and disputed question which on the face ask simple question whether the writ petition is maintainable which on the face raises disputed and contentious matter which cannot be determined accurately and precisely in exercise of power under writ jurisdiction.

162. Perusal of the pleading made in the writ petition brings it to the fore that the petitioner moved representation dated 19.05.2015 before the Vice Chairman, G.D.A. / competent authority G.D.A., whereby the deed of declaration (dated 24.03.2015) filed by respondent no.2 - Shipra Estate Pvt. Ltd. - for Sun Tower (block Type D) Plot No.10 Vaibhav Khand Indirapuram Ghaziabad, was objected and it (deed of declaration) was stated to be incorrect and not prepared as per the U.P. Apartment Rules 2011. During course of the argument, it was stated by the petitioner that the above representation has not been decided as yet, a copy of the representation is annexure no.5 to the writ petition. However, it can be pointed out that the deed of declaration has not been challenged by the petitioner in this writ petition, and the competent authority has already taken into consideration the deed of declaration dated 24.03.2015 and in the same matter another apartment association (Windsor and Nova for Type A and Type B block) has taken the proceeding to the level of State of Uttar Pradesh while it is claimed that a revision has been filed against order of the competent authority G.D.A. dated 24.09.2016 which order, inter-alia, includes consideration regarding deed of declaration. The petitioner may follow the same course of action, if it so chooses and is otherwise permissible in view of its conduct.

163. In view of the above, writ petition no.59863 of 2015 lacks merit and is dismissed. The interim order dated 14.05.2019 stands discharged.

Re: WRIT PETITION NO.11072 OF 2017

164. In this writ petition, prayer has been made primarily for implementing order passed by the O.S.D. - Ghaziabad - dated 17.02.2015 against respondent no.3 - Shipra Estate Ltd as well as suitable direction to respondent no.1 to ensure completion of the building named 'Sun Towers' either through its own department or engage a reputed developer etc. and direction to respondent no.3 to take necessary steps to complete the two staircases and other deficiencies in fire safety etc. The prayer has also been made for issuing direction for respondent nos.1 and 3 to initiate departmental proceeding against their own officer for awarding completion certificate etc.

165. In respect of aforesaid specific prayer, contention is more or less based on the pleading made in the writ petition and the order dated 17.02.2015 and exterior of the building,

staircases, common club, amenities over head tank of C-1 and C-2 building and entrance lobby area of Sun Tower building (Tower-D) being incomplete within full knowledge of the Vice Chairman, Ghaziabad Development Authority and the Chief Fire Officer Ghaziabad, yet no action has been taken in spite of coming to know about the admitted cost of completion rupees one crore seventy lakhs as per letter and list dated 14.08.2016 provided by the respondent no.3. The G.D.A. being co-developer has colluded with private partner in the project developed by respondent no.3, full consideration has been received and sub-lease executed before completing the buildings strictly as per NBC 2005 and GDA sanctioned plan in violation of Article 21 of the Constitution of India and public policies like U.P. Apartment and U.P. Fire Prevention and Safety Act, 2005. Due to aforesaid illegal activities of the respondents, the order dated 17.02.2015 remains in moribund state and property of the members of the association is in danger of being damaged permanently.

166. We have also taken note of aforesaid submissions as well.

167. So far as the background of the order dated 17.02.2015 is concerned, comprehensive detail of the same have been given in this judgment (as above), however, only this much can be stated for recap that as per the order of a coordinate division Bench of this Court, the direction was passed on 14.11.2013 which asked the petitioner to move suitable representation regarding various grievances / issues that had been raised by the petitioner (by way of writ petition no.15782 of 2010) pursuant thereto, representation dated 07.09.2014 was moved by the petitioner that was decided by the competent authority G.D.A. on 17.02.2015. Vide this order, the builder was directed to file deed of declaration at the earliest, the deed of declaration was filed on 24.03.2015. Insofar as point of obtaining consent from the petitioner association, as approval for raising construction, and the issue of F.A.R. raised by the petitioner are concerned, the authority (G.D.A.) held that U.P. Apartment Act, 2010 was made applicable since 18.03.2010 and prior to that there was no provision for obtaining consent from the apartment owners as such. The O.S.D. - Ghaziabad Development Authority - order (17.02.2015) also reflects that vide lease deed pertaining to land existing was demarcated as 10/1, 10/2 and 10/3 and lease of the same created on 30.04.2008, in relation to multi storey building and map was sanctioned for it.

168. Now insofar as the order dated 17.02.2015 is concerned, it is admitted to the petitioner, although as held above in relation to finding recorded by us on issue no.5 (above) regarding concealment of material fact, that the two points pertaining to obtaining consent of the petitioner, and the F.A.R. adversely decided against the petitioner have not been detailed in this petition (11072 of 2017), only the portion of the order which was favourable to the petitioner has been desired to be implemented. However, the prayer clause seeks to implement (order dated 17.02.2015) against the respondent as a whole which means the petitioner admits the order dated 17.02.2015 and it has no objection to it, whatsoever. This act directly and indirectly amounts to waiver of right to challenge to those part of the order (dated 17.02.2015) which adversely affect interest of the petitioner. In the absence of integral challenge to the order dated 17.02.2015, on the point of consent, use of F.A.R., the consequent preparation of deed of declaration becomes admitted to it. The petitioner has not made any rider in its prayer clause that the order dated 17.02.2015 is conditionally accepted (upto a particular extent) to them though it specifically seeks completion of incomplete construction in block Type-D.

169. While considering aspect of incomplete construction, we may direct

respondent no.3 - Shipra Estate Pvt. Ltd. that insofar as construction claimed to be remaining incomplete in regard to block Type-D is concerned, it is the bounden duty of the respondent no.3 to complete the same and the petitioner association has every right to seek completion of the incomplete project as per terms and conditions of the agreement and the brochure issued by the respondent no.3 for the buildings. However, insofar as controversial point (complete / partial construction) with differing views from both the sides are concerned, we gather from the record vide report of the Additional Chief Judicial Magistrate, Court No.1, Ghaziabad, dated 19.09.2020, (the same runs into four sheets) and the order sheet of this Court dated 18.08.2020 that an order was passed on 18.08.2020 in this writ petition whereby direction was given to the Chief Judicial Magistrate, Ghaziabad to conduct on the spot inspection after deputing any Magistrate to inspect the building in question being Sun Tower, Shipra Sun City, Indirapuram Ghaziabad, particularly with regard to the pending work as stated in the order dated 17.02.2015 passed by the respondent no.1. Consequently, an exhaustive report has been filed in the matter, in compliance of aforesaid order dated 18.08.2020 passed by this Court, by the aforesaid A.C.J.M. Ghaziabad and a number of shortcomings have been found in the constructions which have been specified in the report itself. In some matter, respondent no.3 raised objection that some items of the list were not conveyed to it in writing and it has got no concern with those items. The report submitted by the Additional Chief Judicial Magistrate, Ghaziabad, dated 19.09.2020 is consistent, exhaustive and elaborative on the point and gives fact finding report complete in all respects.

170. Further bare perusal of the report of A.C.J.M. Ghaziabad is reflective of facts that there were differences between respondent no.3 - developer and the petitioner in their rival claim regarding the work done and the work remaining incomplete. However, as per the mandate of the order dated 17.02.2015, a direction was given to the respondent no.3 in regard to the issue no.5 of the representation dated 07.09.2014 (moved by the petitioner) and it was observed that completion certificate has been obtained which is dated 29.01.2010 and the residents welfare association (petitioner) has given a list of 25 items stated to be incomplete, therefore, the mandate of the order dated 17.02.2015 was specific when the builder - respondent no.3 - was directed to complete the incomplete work in accordance with the sanctioned layout plan within a period of three months. It was observed that in this case, the builder has already obtained the completion certificate, therefore, the differences between the petitioner and the builder so based on brochure and term of agreement between the two may be redressed by approaching the competent court of law, if the petitioner association finds that the terms and conditions of agreement have been violated by the respondent no.3.

171. We upon careful perusal of the aforesaid specific order/direction passed (vide order dated 17.02.2015) by the O.S.D. - Ghaziabad Development Authority, discover that the direction issued to respondent no.3 is specific and the respondent no.3 is duty bound to act in compliance of the direction and to complete the incomplete work in Type-D in letter and spirit, however, the direction regarding approaching the competent court of law in case of difference between the petitioner and the builder based on brochure and agreement entered into between the parties, is equally effective and binding on both the sides - that is to say - the petitioner and the respondent no.3. Prior to exhausting above remedy (by approaching competent court of law), it would not be feasible to pre-empt the situation at this stage.

172. Let respondent no.3 ensure completion of incomplete buildings which are admitted to it to be incomplete as per list of 25

items given by the petitioner and insofar as it (respondent no.3) contests claim of the petitioner in respect of any building remaining incomplete then in regard to that, proper course of action shall be followed by the petitioner, as has been directed by the order dated 17.02.2015 passed by O.S.D. Ghaziabad Development Authority.

173. In view of above, we direct the respondent no.3 - Shipra Estate Pvt. Ltd. - to ensure compliance of the order dated 17.02.2015 passed by the O.S.D., Ghaziabad Development Authority for which fresh period of three months is allowed to it. The period of three months will be counted as commencing from 01.01.2022 and shall automatically come to an end three months next after 01.01.2022 as above, that is on 31.03.2022.

174. With these observations, writ petition no.11072 of 2017 is disposed of.

175. No orders as to cost.

(2021)12ILR A558
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2021

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-C No. 60228 of 2013

Umesh Chandra Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prabha Shankar Pandey, Sri Santosh Kumar Pandey, Sri Shobhit Pathak

Counsel for the Respondents:
C.S.C.

A. The Arms Act, 1959 – Section 17 – Fire Arm License – Cancellation – Ground of pendency of criminal case and probability of its misuse in future – Relevancy – Subsequent acquittal from criminal case – Effect – Held, firearm could be suspended or revoked by the licensing authority on the ground that it was necessary for public peace or for the public safety and if any of the condition of the license has been contravened – A perusal of acquittal order does not show the use of firearm. The reason for cancellation of the petitioner's firearm license mentioned in the order has been wiped out. (Para 10 and 18)

Writ petition allowed. (E-1)

Cases relied on :-

1. Suneel Vs St. of U.P. & ors.; 2020 (113) ACC 1

2. Ram Prasad Vs Commissioner & ors.; 2020 (113) ACC 571

3. Masiuddin Naimuddin Vs Commissioner, Allahabad & ors.; 1972 AIR (Allahabad) 510

4. Habib Vs St. of U.P.; 2002 (44) ALL Cri Cases 783

5. Sheo Prasad Misra Vs D.M. Basti & ors.; 1978 AWC 122

6. Dr. Ram Manohar Lohia Vs St. of Bihar; AIR 1966 SC 740

7. Sheo Prasad Mishra Vs District Magistrate, Basti & ors.; 1978 AWC 122

8. Masiuddin Vs Commissioner Allahabad; 1972 AIR Allahabad 510

9. Harprasad Vs St. of U.P. & ors.; 2005 (52) ACC 226 (Alld)

10. Vishal Varshney Vs St. of U.P. & ors.; 2009 (75) ALR 593

11. Suneel Vs St. of U.P. & ors.; 2020 (113) ACC 1

12. Ram Prasad Vs Commissioner & ors.; 2020 (113) 571

13. Ashiq Hussain Vs Commissioner, Moradabad & ors. 2009 (10) ADJ 635

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Santosh Kumar Pandey, learned counsel for the petitioner, learned

Standing Counsel for the State and perused the record.

2. The present writ petition has been filed by petitioner under Article 226 of the Constitution of India with the following prayers:

"(i) issue a writ order or direction in the nature of certiorari quashing the impugned order dated 11.1.2013 passed by the respondent no.2 (Annexure no.1 to this writ petition) and order dated 5.9.2013 passed by the respondent no.3 (Annexure no.2 to this writ petition).

(ii) issue a writ order or direction in the nature of mandamus commanding the respondents to return / issue the arm licence no.A.B. 13832017 of the petitioner.

(iii) issue a writ order or direction which this Hon'ble Court may deem fit and proper under the circumstances of the case.

(iv) Award the cost to the petitioner."

3. Brief facts of the case as stated in the writ petition are that petitioner was granted an arms licence for rifle bearing no. A-B 13832017 after due enquiry. A criminal case bearing Case No.1189 of 2010, under Sections 452, 323 504, 506 and 427 I.P.C. was lodged against the petitioner by his brother which was pending at that time. The above mentioned rifle was robbed from the petitioner by the elder brother- Munish Chandra Gupta hence F.I.R. was also lodged by petitioner on 21.02.2012, under Section 395, 397 I.P.C. Petitioner was issued show cause notice as to why his licence be not cancelled under Section 17 (3) (b) of the Arms Act, petitioner replied the notice but respondent no.2- District Magistrate, Moradabad cancelled the petitioner's firearm licence by order dated 11.01.2013 in view of pendency of criminal case against the petitioner as well as on the ground that petitioner can misuse his firearm in future.

4. Aggrieved from the order dated 11.01.2013 petitioner filed an appeal under Section 18 of the Arms Act before respondent no.3- Commissioner Moradabad, District- Moradabad, which was registered as Appeal No. 25 of 2012-13 (*Umesh Chandra Gupta Vs. State of U.P.),* the appeal filed by petitioner was also dismissed by cryptic order dated 05.09.2013 hence this writ petition.

5. During pendency of the writ petition before this Hon'ble Court petitioner was acquitted by judgment dated 04.04.2015 passed by Chief Judicial Magistrate, Moradabad in Case Crime No. 1189 of 2010, under Sections 452, 323, 504, 506 & 427 I.P.C., P.S. Civil Lines, District- Moradabad. The copy of the judgment has been annexed as Annexure No. RA-1 to the rejoinder affidavit filed by petitioner on 01.05.2019.

6. Learned counsel for the petitioner has submitted that petitioner was implicated in a false criminal case in which he was acquitted by judgment dated 04.04.2015 and from the judgment, it reveals that firearm of the petitioner has not been used at all. He further submits that mere involvement in criminal case cannot in any way affect the public security or public safety, as such, firearm licence of the petitioner could not be cancelled. He further submits that at the time of cancellation of firearm licence of the petitioner i.e. 11.01.2013, criminal case was pending but during pendency of the writ petition before this Hon'ble Court, petitioner was acquitted in the criminal case. Learned counsel for the petitioner finally submits that ground for issue of show cause notice, suspension and ultimately cancellation of the petitioner's firearm licence is that one and precisely one criminal case which was registered against the petitioner and in view of the provisions contained under Section 17 of the Arms Act, petitioner's firearm licence cannot be cancelled. Learned counsel for the petitioner placed reliance upon the five judgments of this Hon'ble Court in which it has been held that firearm licence cannot be

cancelled on the ground of mere involvement in criminal case, Honb'le Court has also noticed that the licensee have been subsequently acquitted in the criminal case lodged against him. The reference of above judgements are given hereunder:

(I) **2020 (113) ACC 1 (Suneel Vs. State of U.P. and Others).**

(ii) **2020 (113) ACC 571 (Ram Prasad Vs. Commissioner & Others).**

(iii) **1972 AIR (Allahabad) 510 (Masiuddin Naimuddin Vs. Commissioner, Allahabad and Others).**

(iv) **2002 (44) ALL Cri Cases 783 (Habib Vs. State of Uttar Pradesh).**

(v) **1978 AWC 122 (Sheo Prasad Misra Vs. District Magistrate, Basti and Others).**

7. Per contra, learned Standing Counsel has supported the impugned orders and submitted that even after acquittal petitioner can misuse his firearm if the firearm licence of the petitioner is restored, so impugned orders deserve to be maintained.

8. I have considered the submissions made by the parties and perused the record.

9. Section 17 of the Act empowers the licensing Authority to vary, suspend or revoke any firearm licence. Section 17 is reproduced as under:

"17. ***Variation, suspension and revocation of licences.—***

(1) The licensing authority may vary the conditions subject to which a licence has been granted except such of them as have been prescribed and may for that purpose require the licence-holder by notice in writing to deliver-up the licence to it within such time as may specified in the notice.

(2) The licensing authority may, on the application of the holder of a licence, also vary the conditions of the licence except such of them as have been prescribed.

(3) The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence,—

(a) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or

(b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or

(c) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) if any of the conditions of the licence has been contravened; or

(e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence.

(4) The licensing authority may also revoke a licence on the application of the holder thereof.

(5) Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

(6) The authority to whom the licensing authority is subordinate may by order in writing suspend or revoke a licence on any ground on which it may be suspended or revoked by the licensing authority; and the foregoing provisions of this section shall, as far as may be, apply in relation to the suspension or revocation of a licence by such authority.

(7) A court convicting the holder of a licence of any offence under this Act or the rules made thereunder may also suspend or revoke the licence: Provided that if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void.

(8) An order of suspension or revocation under sub-section (7) may also be made by an appellate court or by the High Court when exercising its powers of revision.

(9) The Central Government may, by order in the Official Gazette, suspend or revoke or direct any licensing authority to suspend or revoke all or any licences granted under this Act throughout India or any part thereof.

(10) On the suspension or revocation of a licence under this section the holder thereof shall without delay surrender the licence to the authority by whom it has been suspended or revoked or to such other authority as may be specified in this behalf in the order of suspension or revocation."

10. A perusal of sub-section (3) of Section 17 of the Act would show that firearm could be suspended or revoked by the licencing authority on the ground that it was necessary for public peace or for the public safety and if any of the condition of the licence has been contravened.

11. Now it will be appropriate to refer to the law bearing on the matter.

12. In ***Dr. Ram Manohar Lohia Vs. State of Bihar AIR 1966 SC 740,*** it was observed that the contravention of law always affects order but before it could be said to affect "public order" it must affect the community or the public at large. One has to imagine three concentric circles, the largest representing "law and order", the next representing "public orders" and the smallest representing "security of state". An act may affect "law and order" but not "public order", just as an act may affect "public order" but not "security of state".

13. In ***Sheo Prasad Mishra Vs. District Magistrate, Basti & Others*** reported in ***1978 AWC 122***, a Division Bench of this Hon'ble Court relaying upon the earlier decision in ***Masiuddin Vs. Commissioner Allahabad*** reported in ***1972 AIR Allahabad 510*** held that mere involvement in criminal case cannot in any way affect the public security or public interest and hence an order cancelling or revoking a firearm licence only on the ground of licensee's involvement in a criminal case cannot be sustained.

14. In the matter of ***Harprasad Vs. State of U.P. and Others*** reported in ***2005 (52) ACC 226 (Alld)*** this Court after considering the law already pronounced on this point has finally allowed the petition and quashed the impugned order passed by the appellate Authority. Relevant paragraph of this judgment are being quoted here:-

*"In full Bench decision of this Court rendered in **Channga Prasad Sahu Vs. State of Uttar Pradesh 1984 (10) AIR 223 and Kailash Nath and Others Vs. Sate of U.P. and Others 1985 (22) ACC 353 and in the case of Rana Pratap Singh Vs. State of U.P. 1985 (Supp) ACC 235**, it has been held that mere pendency of the Criminal case(s) is no ground for cancellation of arms licence. The full Bench decision of Channga Prasad Sahu was also considered in **Sadri Ram Vs. District Magistrate Azamgarh and Others 1998 (37) ACC 830**".*

15. In ***Vishal Varshney Vs. State of U.P. and Others*** reported in ***2009 (75) ALR 593***, this Court held that cancellation of the firearm licence only on the ground of apprehension or likelihood of misuse of firearm by the licence is illegal.

16. In a recent decision which was cited by counsel for the petitioner in the case of ***Suneel***

Vs. State of U.P. and Others reported in ***2020 (113) ACC 1 and Ram Prasad Vs. Commissioner and Others*** reported in ***2020 (113) 571***, this Court held that mere involvement in criminal case is no ground for cancellation of licensee's firearm as well as apprehension of abuse of arms is not a sufficient ground for passing of an order of cancellation of licence under Section 17 of the Act. It has also been held that in a pending criminal case against the licence if acquittal has been ordered by criminal Court then the very basis of the cancellation of arm licence will vanish.

17. In ***Ashiq Hussain Vs. Commissioner, Moradabad & Others*** reported in ***2009 (10) ADJ 635***, this Court has held as under:

"6. The mere involvement in a solitary criminal case cannot be a ground for cancellation of a firearm license as held by this Court in case of Mohd. Haroon Vs. The District Magistrate, Siddharth Nagar reported in 2003 (1) ACJ 124, unless and until it is shown on the basis of material on record that there was grave danger to public law and order. In the instant case it is only a solitary incident, which was not arising out of any disturbance of law and order, that has been made the basis for ordering cancellation."

18. This Court after considering the contention raised by learned counsel for the parties, perusal of record and considering the case laws mentioned above observed here that in the present case, petitioner was involved in sole criminal case and has been acquitted also by criminal Court by judgment dated 04.04.2015, a perusal of acquittal order does not show the use of firearm. The reason for cancellation of the petitioner's firearm licence mentioned in the order dated 11.01.2013 has been wiped out. Respondent no.2 and 3 have failed to consider the provisions of Section 17 of the Act regarding revocation of the licence, accordingly, impugned orders passed by respondent nos.2 and 3 cannot be sustained.

19. In view of the settled legal position mentioned above, the writ petition is ***allowed***. The order dated 11.01.2013 passed by respondent no. 2- District Magistrate-Moradabad and appellate order dated 05.09.2013 passed by respondent no.3- Commissioner Moradabad, District- Moradabad, are hereby set aside. The matter is remitted back before respondent no.2 to pass a reasoned and speaking order afresh for restoring the arms licence of the petitioner after calling a fresh report in accordance with law preferably within a period of two months from the date of production of certified copy of this order before him.

20. Writ petition is ***allowed***. No orders as to costs.

(2021)12ILR A562
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

U/S 482/378/407 No. 5312 of 2021

Smt. Tanveer Fatima ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Syed Azizul Hasan Rizvi

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860 - Section 420-challenge to-summoning order and non-bailable warrant-husband of the petitioner transferred a shop to her wife by registered sale deed-petitioner was in physical possession

of the said property while the husband of the petitioner was a tenant since long-complainant came to know about the transfer of property when he stopped paying rent to the complainant and on due enquiry from neighbours and also the office of Sub-registrar-learned trial court on the basis of statements u/s 200 and 202 Cr.P.C. expressed a prima facie case is made out-Trial court rightly observed the matter-no interference requires.(Para 1 to 16)

The application is rejected. (E-6)

List of Cases cited:

Randheer Singh Vs The St. of U.P. & ors. CRLA No. 932 of 2021

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. This petition has been filed praying for quashing of the summoning order dated 23.09.2019 passed by the opposite party no.2 as well as the order issuing non-bailable warrant against the petitioner dated 03.12.2021.

2. It is the case of the petitioner that her husband Mohd. Gulshan Kashmiri transferred a commercial property/shop, which formed part of house no. 439/167/05, Khasra No. 215 at Mohalla Tahseenganj, District Lucknow, measuring area about 9.293 square meters in the name of the petitioner, it being his ancestral abadi property in his ownership and physical possession. A registered sale deed was executed on 02.03.2016 for a consideration of Rs.5,00,000/-. The receipts/bills issued by the Jalkal Vibhag, Nagar Nigam, Lucknow and the electricity bill in respect of the property all showed the name of Mohd. Gulshan Kashmiri, the husband of the petitioner. The petitioner is in physical possession of the said property now after its transfer from her husband. The opposite party no.4 is a hardened criminal and at least five FIRs have been registered against him as he was indulging in extortion of several persons. The applicant and her husband were also made victims of such extortion. The husband of the petitioner refused to pay, therefore, the opposite party no.4 filed a false complaint case before the opposite party no.2 bearing complaint no. 2283/2018, through an application under Section 156 (3) Cr.P.C. in which he recorded a false statement under Section 200 Cr.P.C. Summoning order was, thereafter, issued by the learned trial court on 23.09.2019 and the order of non-bailable warrant was also issued on 03.12.2021 against the applicant and three others. On the basis of such orders passed by the learned trial court the police are harassing the petitioner and her husband.

3. It has been submitted by the learned counsel for the petitioner that the opposite party no.4 has not filed any civil suit for cancellation of sale deed of the applicant in any competent court, but has adopted the criminal proceedings through filing an application under Section 156 (3) Cr.P.C. only to overcome limitation prescribed under the Limitation Act. He has referred to Article 59 of the Scheduled attached to the Limitation Act given period of limitation for cancellation or setting aside of an instrument or decree or a contract being three years from the date when the facts entitling the plaintiff to have the instrument or the decree canceled or set aside or first become known to him.

4. It has been submitted that the sale deed was executed in the year 2016 and become known to the opposite party no.3 much before he filed the application before the learned trial court under Section 156 Cr.P.C. The subject matter in question is purely civil in nature. Learned trial court without application of judicial mind has entertained the application and treated it as a complaint case and issued summoning orders and also non-bailable warrant thus threatening the liberty of the applicant.

5. Learned counsel for the petitioner has placed reliance upon the judgement rendered by

the Hon'ble Supreme Court in Criminal Appeal No. 932 of 2021, ***'Randheer Singh vs. The State of U.P. & Others*** decided on 02.09.2021 to say that the Hon'ble Supreme Court has repeatedly deprecated the practice of initiating criminal proceedings where the dispute was purely civil in nature.

6. This Court has perused a copy of the application filed under Section 156 (3) Cr.P.C. by the opposite party no. 4 which is 'Waqf Sajjadia Kadeem va Jadeed, situated at Sajjadia Nagar Colony, Alam Nagar va Tahsinganj, District Lucknow, Registration No. 941-42, "arrayed through" its Daroga/Care Taker, one Mohammad Askari Ali S/o Late Mirza Mohammad Taki, resident of 439/41, Tehseenganj, P.S. Thakurganj, Hardoi Road, Lucknow. In the said application the opposite party no.4 i.e. Waqf Sajjadia Kadeem vs Jadeed through its Daroga/Care Taker had arrayed husband of the petitioner as respondent no.1, the petitioner as respondent no.2 and two other persons the alleged witnesses of the sale deed as respondent no.3 and respondent no.4, respectively. In the said case explanation was given of the locus of the complainant, Waqf Sajjadia Kadeem vs Jadeed registered at 941 and 942 of the registration of Waqf and also the fact that it was the owner and the landlord of the house no. 439/167/05, and Landlord of shop Gulshan Motors, Tehseenganj where the respondent no.1, Mohd. Gulshan Kashmiri, the husband of the petitioner no.1 herein, was a tenant since long. The receipt of rent being paid by Mohd. Gulshan Kashmiri were also filed with the application. It was stated in the complaint that Mohd. Gulshan Kashmiri all of a sudden stopped paying rent to the complainant. On due enquiry from neighbors as also from the office of the Sub-Registrar, it came out that Mohd. Gulshan Kashmiri has sold the shop in question to his wife on 02.03.2016. The respondent no.3, namely, Anish Hakim Rizvi and respondent no.4, namely, Sayed Mohd. Naki Ali, had put there signatures as witnesees on the sale deed although they knew since long that Mohd. Gulshan Kashmiri was a tenant of the shop in question, which belonged to the Waqf Sajjadia Kadeem vs Jadeed as aforesaid. The opposite party no.4 had sent applications/representations to the Chairman of the Uttar Pradesh Shia Central Waqf Board on 17.06.2016, and the Waqf Board had directed him to initiate proceedings against Mohd. Gulshan Kashmiri by filing FIR also. Thereafter, requisition was sent to the District Magistrate and the Senior Superintendent of Police, Lucknow on 24.10.2016, on which no heed was paid. Reminders were sent in September, 2017 also, but no head was paid. On 18.06.2018 the complainant/its Care Taker saw the respondents making construction on the property in question, he tried to stop them from raising such construction as the property belongs to the Waqf but they did not listen and therefore, the complaint was being filed before the learned Magistrate.

7. The date of institution of the complainant case is 23.07.2018, the documentary evidence i.e. rent receipts dated 23.03.2016, 22.05.2016 and 21.10.2016 were attachted alongwith such complaint relate to letters sent by the Care Taker on 24.10.2016 and 04.09.2017 to the Uttar Pradesh Shia Central Waqf Board and to Senior Superintendent of Police to take action and letter sent by the Uttar Pradesh Shia Central Waqf Board to the District Magistrate dated 04.10.2016 and the reminders sent thereafter. A copy of the sale deed was also filed alongwith said application duly supported by the affidavit. The Rent Receipts have also been made annexures to the complaint.

8. Learned trial court on the basis of statements taken under Sections 200 and 202 of the Cr.P.C. issued the summoning order on 23.09.2019, expressing a prima facie satisfaction that a case under Section 420 IPC has been made out by the complainant.

9. It appears that after summons were issued, the petitioner and her husband did not appear, and therefore, the learned trial court was

forced to issue process in the form of non-bailable warrant on 03.12.2021.

10. Learned counsel for the petitioner has placed reliance upon the judgement rendered by the Hon'ble Supreme Court in the case of **Randheer Singh (Supra)**. This Court has carefully perused the judgement rendered by the Hon'ble Supreme Court wherein the High Court had dismissed the application of the appellant under Section 482 Cr.P.C. in which he had prayed for quashing of the proceedings in Case Crime No. 5973 of 2020, "State Vs. Rajan Kumar' under Section 420, 467, 468, 471 IPC, and the charge sheet and the summoning order. The facts of the case as mentioned in the judgement are that one Arjun Dev and his wife, namely, Bela Rani were recorded tenure holders of certain plots of land and they executed a registered Power of Attorney in favour of the applicant no.1, Rajan Kumar (who had since died). Rajan Kumar executed sale deed in favour of the the appellants, Randheer Singh and his family members on various dates in between July or August, 2014. The name of the appellant and others were mutated in the revenue records. Smt. Beena Srivastava had filed objections before the Naib Tehsildar which were rejected. Smt. Beena Srivatava also filed Original Suit No. 971 of 2014 for cancellation of the Power of Attorney and sale deed executed by Rajan Kumar. The suit was dismissed under Order VII Rule 11 of the Code of Civil Procedure by learned trial court which order was challenged in the First Appeal which was partly allowed and the matter remanded to the learned trial court with a direction that it should be returned to the plaintiff for presentation before the appropriate court. Aggrieved by such order of the High Court Smt. Beena Srivastava had approached the Hon'ble Supreme Court also which Special Leave Petition was dismissed by the Hon'ble Supreme Court on 08.09.2016. In the application under Section 482 of the Cr.P.C. filed by the appellant before the High Court, it has also been submitted that Smt. Beena Srivastava and her husband had also filed a Contempt Application, which was also dismissed by the High Court in February, 2016.

When Smt. Beena Srivastava could not get any relief from the trial court right up to the Hon'ble Supreme Court, she filed Writ Petition No. 12275 of 2016, which was dismissed on 28.03.2016. Smt. Beena Srivastava's son, Dr. Virat Swaroop Saxena also filed a Contempt Application which had been dismissed in July, 2006.

Pursuant to the order of the High Court dated 28.03.2016 passed in Writ Petition No. 12275 of 2016, The appellant, Randheer Singh instituted an Original Suit No. 608 of 2016 praying for permanent injunction in respect of the plot in question, and a temporary injunction was also granted by the learned trial court on 12.04.2016.

Having failed to get relief from various courts, Smt. Beena Srivastava brought in other persons into the picture to harass the appellant, thereafter. The Power of Attorney holder of Bela Rani, namely, Rajan Kumar (since deceased) had executed as sale deed in June, 2017 in favour of the appellant after receiving the sale consideration. A supplementary sale deed was also executed thereafter on 16.09.2017 and the appellant's name was mutated in the revenue record. The respondent No.2 filed an FIR wherein he stated that the applicant had purchased one house alongwith courtyard in which shops were also present from certain persons by way of registered sale deed and after such sale deed was executed he came to know that in the meantime another person, namely, Rajan Kumar (since deceased) on the basis of a false Power of Attorney of Bela Rani executed a sale deed to Randheer Singh(the appellant), whereas Bela Rani had no right to sell the said house which

belonged to Afroz Athar and on the basis of the same false sale deed, Randheer Singh and Rajan Kumar were attempting to trespass the house of the applicant and had broken open the lock, of which knowledge was drived by the applicant/informant on the following morning and therefore, the FIR was lodged. Such FIR was lodged on 16.09.2017.

The Hon'ble Supreme Court after considering the arguments raised by the counsel for the appellant and counsel for the respondent with regard to the scope of interference under Section 482 of the Cr.P.C. by the High Court, observed that the underlying civil dispute between the parties was subject matters of diverse civil proceedings which were pending between the appellant and the private respondent in the concerned civil court and the same shall obviously be decided on their own merits. The Hon'ble Supreme Court considered the question "whether any criminal offence was disclosed in the FIR so far as the appellant was concerned'; it observed that Rajan Kumar (since deceased) the Power of Attorney holder was also an appellant before the Hon'ble Supreme Court, but he had since died and therefore proceedings had abated against him. The only allegation against the appellant was that he had purchased the property on the basis of a false Power of Attorney executed by the alleged owner of the property also in question.

11. The Hon'ble Supreme Court, considered the entire history of the civil litigations that were carried up to the Hon'ble Supreme Court also by Smt. Beena Srivastava and her husband on the allegation that Bela Rani had no title, and that the Power of Attorney in itself was a false document. The Hon'ble Supreme Court thereafter referred to several judgements in paragaraph 26 of its order, where the Court had considered the meaning of Section 420 of the Cr.P.C. as also Sections 417, 418, 419 and the meaning of fraud, deliberate deception, "dishonestly" and it came to the conclusion on the basis thereof, as also judgements rendered on the scope of interference under Section 482 Cr.P.C. by the High Court, that Section 482 Cr.P.C. is designed to achieve the purpose of ensuring that criminal proceedings are not permitted to generate into a weapon of harassment. It came to the conclusion, on the facts of the case pleaded before it that the FIR had not disclosed any offence insofar as appellant was concerned there was no whisper of how and in what manner the appellant was involved in any criminal offence. The charge sheet was basically vague. It observed that the High Court should have considered whether the complaint disclosed a criminal offence insofar as a nature of the allegation made against the appellant was concerned, and whether essential ingredients of the criminal offence were actually made out? Then, the Hon'ble Supreme Court observed in the said case before it that the dispute was purely of civil nature, which was given the colour of criminal offence.

12. However, it clarified in pargraph 34 that in a given set of facts a civil or as well as the criminal offence can be made out simultaneously and, only because a civil remedy is available may not be a ground to quash criminal proceedings.

13. It is clear from the consideration of facts in the case of Randheer Singh vs. State of U.P. (Supra) that the Supreme Court has clarified that only because Civil proceedings or remedy are available against the particular transaction, it cannot be said that Criminal proceedings cannot be initiated if the essential ingredients and dishonesty are made out under Section 420 of the Cr.P.C.

14. Insofar as the learned counsel for the petitioners arguments regarding civil proceedings being barred by limitation having been expired and therefore, the FIR was lodged

is concerned, this Court has gone through the Schedule and Article 59 of the Scheduled attached to Limitation Act relied upon, which is mentioned under part IV "Suits relating to Decree or an instrument" and it finds that the limitation of three years is only from the date of knowledge. In this case knowledge was drived by the opposite party no.4, Waqf Sajjadia Kadeem va Jadeed sometime in 2016, and the application under Section 156(3) of the Cr.P.C. was lodged on 23.07.2018 after the U.P. Shia Central Waqf Board sent letter to the Senior Superintendent of Police and the District Magistrate on 24.10.2016 for taking appropriate action for protecting the property of the Waqf Board.

15. No case has been made by the learned counsel for petitioner to show interference in the summoning order or the bailable warrant issued against her.

16. Accordingly, this petition stands **rejected.**

(2021)12ILR A567
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

U/S 482/378/407 No. 5605 of 2021

Satyendra Kesharwani ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Virendra Kumar Tripathi, Alok Kumar Gupta

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 420, 272, 273-quashing of charge-sheet-Several persons including the petitioner was made accused as in the Godown several bags of broom seeds were found to have been mixed with cumin seeds-as per opinion given by the Analyst sample of Phool Jhadoo seeds was not a food item, and it was noxious for human consumption as per section 3.1(zz) 11 of the Food Safety and Standards Act, 2006-arguments made by the petitioner that only because the Food Safety and Standard Act, 2006 was applicable and wrong section has been applied in the Charge-sheet, the offence committed by the accused would not washed away.(Para 1 to 14)

The application is rejected. (E-6)

List of Cases cited:

1. M/s Pepsico India Holdings Pvt. Ltd. & anr. Vs St. of U.P. & ors., WP No. 8254 of 2010

2. Jeewan Kumar Raut & anr. Vs C.B.I. (2009) 7 UJ SC 3135

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

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

(2) This petition has been filed for the following main prayer:-

" Wherefore, It is most respectfully prayed that Hon'ble Court may kindly be pleased to:

(a) To quash the charge sheet filed by I. O. against the petitioner in case Case Crime No. 551 of 2019, Under Sections 420, 272, 273 I.P.C. Police Station : Maharajganj, District: Raibareily, Which is annexed as Annexure No. 7."

(3) It has been submitted by the learned counsel for the petitioner that the petitioner had earlier filed a Petition No. 415 (M/B) of 2020 challenging the FIR which has been dismissed as infructuous by this Court on 07.12.2021 as

Charge sheet has been filed against the petitioner by the opposite party no.2 i.e. Station House Officer, Police Station Maharajganj, District Rae Bareli. In the FIR it was alleged that the Station House Officer has apprehended several persons involved in adulteration of cumin seeds (Jeera) on the basis of information received from informer in Maharajganj Qasba. Several persons including the petitioner was made accused as in the Godown several bags of broom seeds (Phool Jhadoo) were found to have been mixed with cumin seeds.

(4) It has been submitted by the learned counsel for the petitioner that the Investigating Officer did not conduct a proper investigation and submitted Charge-sheet. The learned Trial Court without application of judicial mind has taken cognizance and issued summoning order. It has been submitted that the FIR has been filed under Sections 272, 273 of the IPC whereas the cases of adulteration are now governed by Special Act that is the Food Safety Act. The Investigating Officer recorded the statement of the Incharge Chief Food Safety Officer, Rae Bareli, and his subordinates who were working as Food Safety Officer that they had accompanied the police personnel on the raid conducted on the Godown where 150 bags of broom seeds (Fake cumin seeds) approximately 75 quintals of Jeera mixed with Phool Jhadoo seeds were found. The Phool Jhadoo seeds/Jhadoo seeds were found noxious for human consumption as per the report of the Public Analyst Laboratory, U.P., Lucknow under Sections 3.1 (ZZ) (xi) of Food Safety and Standard Act, 2006. The Charge sheet having been submitted wrongly under various sections of the IPC. The cognizance was initiated and the summoning order issued without application of mind.

(5) Learned counsel for the petitioner has placed reliance upon the Division Bench judgment of this Court in Writ Petition No.8254 (M/B) of 2010 **[M/s Pepsico India Holdings (Pvt) Limited and Another Vs. State of U.P. and Others]** and connected matters all filed by Pepsico India Holdings, the petitioner therein had questioned the validity of the Government Order dated 11.05.2010 directing the Police to register cases or initiate action under Sections 272/273 IPC and one of the grounds taken was that after coming into force of the Food Safety and Standard Act, 2009 action could be taken only under the Special Act, in case of any offence relating to adulteration /mis-branding of food articles. The Division Bench has considered Section 89 of the Food Safety and Standard Act which gave overriding effect to the Act over other food related laws, and Section 97 of the Act which sought to repeal other food laws in case of the offences specified in the Second schedule of the Act immediately with effect from the date of which the Act came into force. Sub Section (4) thereof stated that notwithstanding anything contained in any other law for the time being in force, no Court shall take cognizance of an offence under the repealed Act or orders after the expiry of a period of three years from the date of the commencement of this Act.

(6) This Court has carefully perused the judgment cited by the learned counsel for the petitioner. It was argued before the Division Bench that after the aforesaid Act came into force the Food Safety Standards Act is the only law relating to and dealing with the offences regarding adulteration of food. The Government Order directing the Divisional Commissioners, District Magistrates, Deputy Inspector Generals of Police, Senior Superintendent of Police and Superintendent of Police to lodge FIR under Sections 272/273 IPC in case of adulteration of any article of food or drink was therefore issued without jurisdiction, and in violation of the provisions of Food Safety and Standards Act. It was argued before the Court that Section 272 is attracted if any person adulterates an article of

food with the intention to sell such an article or knowing that it is likely that the article will be sold as food or drink. However, there was no allegation in the FIR that the petitioner-company or its employees or agents had kept its products with the intention to sell the same, or knowing that the products are likely to be sold as food or drink or that the said products were exposed or offered for sale. The definite stand of the company was the articles seized were kept in the godown where even a board "not for sale" was hanging at the time when the search was conducted.

(7) The Court observed that the IPC is a general Penal Code for India. Section 2 IPC deals with the punishment of offences committed within India and provides that every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India. Section 5 thereof specifically excludes its application in a case where there is a Special Act. Since the Prevention of Food Adulteration Act, the pre-cursor of the Food Safety & Standards Act was a Special Act it overrides Sections 272 & 273 IPC. The Division Bench referred to a judgment of the Guwahati High Court also relating to Food Adulteration matters and also to a judgment of the Supreme Court in **Jeewan Kumar Raut and Another Vs. Central Bureau of Investigation reported in [2009 (7) UJ SC 3135],** where the Supreme was considering the provisions of Transplantation of Human Organs Act, 1994, and held that if a Special statute lays down procedures, the ones laid down under the general statutes shall not be followed.

(8) The Division Bench came to the conclusion that after coming into force of the provision of the Food Safety and Standards Act by a Notification dated 29.07.2010 the Authorities can take action only in the Food Safety and Standard Act, as it has over riding effect over all other laws relating to food and its sale, therefore, if an article is seized it has to be treated as per the procedure to be followed for drawing a sample as given in the said Act, and it is necessary for the Authorities to follow mandatory requirements as provided under Section 41-42 of the said Act, and police have no Authority to investigate the matter.

Under Section 42 of the Food Safety and Standards Act, The Food Safety Officer shall be responsible for inspection of food business, drawing samples and sending them to Food Analyst for analysis. The Designated Officer after scrutiny of the report of Food Analyst shall decide as to whether the contravention is punishable with imprisonment or fine only, and in the case of contravention punishable with imprisonment, he shall send his recommendations within fourteen days to the Commissioner of Food Safety for sanctioning prosecution. The Court therefore, held that invoking Sections 272-273 IPC in matters relating to adulteration of food pursuant to the impugned Government Order was wholly and justified and by issuing such order, the State Government had transgressed its jurisdiction. It therefore, set aside the impugned Government order dated 11.05.2010 and consequently, the FIR registered in the case in pursuance of such Government Order and the criminal proceedings initiated against the Company.

(9) It has been submitted by the learned counsel for the petitioner that the law settled by the Division Bench, clearly applies in his case as the investigation, drawing of samples, sending them for Analyst etc. was not done as per the procedure prescribed under the Food Safety and Standards Act.

(10) Shri S.P. Tiwari, learned A.G.A. on the other hand, has pointed out that the statement taken by the Investigating Officer clearly reveals that the Food Safety Officers had accompanied

the Inspection Team, and therefore the procedure that was followed for inspection of the godown of the petitioner was under the Food Safety and Standards Act. The sample was sent to the Government Public Analyst Laboratory, Lucknow and Dr. Rajesh Kumar duly appointed as Food Analyst under the provisions of Food Safety and Standards Act, 2006 for U.P. received the samples from the Food Safety Officer Laboratory. The condition of the seal on the samples and outer covering of such sample was found intact and unbroken. Dr. Rajesh Kumar, the Analyst found the sample of Phool Jhadoo seeds unfit for human consumption under Regulations 2.9.8 (1) of the Food Safety and Standards (Food Products and Food) Regulation 2011. The method of testing of the sample was as per the prescribed standards in the Regulations of 2011 and it was an analyzed as per the Food Safety and Standards Manual of 2016. It was found on the basis of test performed as per the Manual, that the extraneous material exceeds the prescribed limit 3.0 in the sample and the sample was found as sub standard by the Food Analyst and noxious for human consumption. The opinion given was that the sample of Phul Jhadoo seeds was not a food item, and it was noxious for human consumption, and the sample was declared 'noxious' as per the Section 3.1 (zz) 11 of the Food Safety and Standards Act, 2006.

(11) It has been submitted by the learned A.G.A. that only because the Food Safety and Standards Act would apply in such matter, the offence of cheating as described under Section 420 of the I.P.C. cannot be said to have become rebundant. It was open for the Authorities to take action only under the Food Safety and Standards Act or take action also under the IPC as Section 272 and 273 relates to addictions of noxious substance in a food item Phul Jhadoo seeds were found to be noxious enough for human consumption and therefore action could have been taken under Sections 272-273 also.

(12) After considering the arguments of the learned counsel for the petitioner and the learned A.G.A. and going through the judgment of the Division Bench in Pepsico (Supra), this Court is of the opinion that it is still open for the Investigating Officer to file supplementary charge sheet under various provisions of Food Safety and Standards Act. The Charge sheet may have been submitted under the provisions of IPC and cognizance may have been taken but that does not exclude the application of the Food Safety and Standards Act in the case of the petitioner.

(13) This Court is not convinced with the arguments made by the learned counsel or the petitioner that only because the Food Safety and Standard Act, 2006 was applicable and wrong section has been applied in the Charge sheet upon the petitioner, the offence committed by the accused would not stand washed away.

(14) There being no good ground to show interference at this stage in the Charge-sheet or the summoning order because the ends of justice would not be served in case this Court shows interference in such a gross misconduct of the accused, this petition stands **dismissed.**

(2021)12ILR A570
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

U/S 482/378/407 No. 5635 of 2021

Manoj Kumar Jaiswal ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Anil Kumar Tripathi

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 419, 420, 467, 468, 471 & Excise Act, 1910-Section 72(2) -quashing of order passed by the Collector for releasing vehicle-Petitioners application u/s 72(2) has been allowed by the Collector subject to the condition of payment of 30% of the market value of the vehicle which has been seized carrying illicit liquor-the Proviso, under the Act, gives power to the Collector to release the vehicle to the owner thereof by giving a bond to pay in lieu of its confiscation such fine at the Collector thinks appropriate but not exceeding on the date of its seizure-Petitioner could have appealed against the order u/s 72(7) under the Act-Hence, there is no abuse of process of Court.(Para 1 to 18)

The application is rejected. (E-6)

List of Cases cited:

1. Sunderbhai Ambalal Desai Vs St. of Guj. (2002) 10 SCC 283

2. Nand Vs St. of U.P. (1997) 1 AWC 41

3. Rajiv Kumar Singh Vs St. of U.P. & ors. (2017) 5 ADJ 351

4. Ved Prakash Vs St. of U.P. (1982) AWC 167 Alld.

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. This petition has been filed with the following main prayer:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to set aside the impugned judgement and order dated 17.12.2020 passed by the Uppr Collector/Upper District Magistrate, Hardoi in Case No. 01087/2020 (Computerized Case No. D202010330001087 (State vs. Anuj Jaiswal @ Lachchhu) U/s 72 of the U.P. Excise Act in the respect of the petitioner in the interest of jusice.

It is further prayed that this Hon'ble Court may kindly be pleased to direct the respondents to release the Vehicle No. U.P. 32/HH-5155 in favour of the Petitioner without imposing any fine which has been illegally seized by the Police Authority of District Hardoi in Case Crime No. 398/2020 Under Section 60/63 of the U.P. Excise Act, 1910 & under Sections 419/420/467/468/471 IPC Police Station, Beniganj, District Hardoi, in the interest of justice."

2. It has been submitted that a Criminal Case had been registered against the five persons including the petitioner by the police as Case Crime No. 398 of 2020 under Section 60/63 of the U.P. Excise Act, 1910 & under Sections 419, 420, 467, 468, 471 IPC Police Station Beniganj, District Hardoi. It was alleged by the police that on the basis of information given by the informer, a white coloured car (Swift) was seized with illicit liquor. Two persons were arrested from the car and they informed of the name of the petitioner as owner of the car. The petitioner was arrested, thereafter.

3. It has been submitted by the learned counsel for the petitioner that the petitioner is the registered owner of Vehicle No. UP 32 HH 5155 (Swift Desire) and his vehicle was not used. A false FIR was registered against him.

4. The petitioner was issued a show cause notice to which the petitioner replied that his car was not involved and has been seized improperly by the police. The petitioner appeared before the District Magistrate/Additional Collector, Hardoi in pursuance of the show cause notice and the reply submitted by him on 16.10.2020, praying for release of his vehicle under Section 72(2) of the U.P. Excise Act, 1910. The learned Additional District Magistrate asked for comments from the police and has accepted the application for release with the condition that the petitioner may

deposit 30% of the value of the vehicle and also given an undertaking that he shall not sell of the vehicle or change its condition in any manner and would produce the same before the learned trial court as and when it is so summoned. The copy of the order was directed to be sent by the police to the Assistant Regional Transport Officer, Hardoi.

5. It is the case of the petitioner that the Additional District Magistrate exceeded his jurisdiction when he passed an order of depositing of 30% percent of the value of the car. It has been submitted that in view of the law settled by a Co-ordinate Bench of this Court in Criminal Revision No. 2177 of 2018, 'Devendra Gupta vs. State of U.P. and others decided on 31.08.2018, and in Criminal Revision No. 1568 of 2018, 'Rajiv Kumar Singh vs. State of U.P. and others decided on 23.11.2016. The District Magistrate should have directed the release of the vehicle by taking Bank Gurantee instead of asking for 30% of the value of the vehicle.

6. It has been submitted by the learned counsel for the petitioner that he had earlier approached this Court by filing a writ petition under Article 226 of the Constitution of India, namely, Writ Petition No. 23997 (MB) of 2021, 'Manoj Kumar Jaiswal vs. State of U.P. and Anothers'. This Court had directed the petitioner to avail the remedy as available to him under law and dismissed the writ petition as withdrawn.

7. Sri S. P. Tiwari, learned AGA for the State has raised a preliminary objection regarding the maintainability of this petition under Section 482 of the Cr.P.C. by referring to Section 72 (2) of the U.P. Excise Act, and thereafter, Sub-Section (7) of the same Section 72 where it has been provided that any person aggrieved by an order of confiscation under Section 72 (2) to (6) may within one month from the date of the order file an appeal to the judicial authority nominated by the State Government in this behalf.

8. It has been submitted that the order having been passed by the Additional District Magistrate/Collector remedy lies in filing an appeal Section 72 (2) before the District Judge on the civil side under the Excise Act.

9. It has been submitted by the learned counsel for the petitioner that since there is an abuse of process of Court by the Collector, therefore, a petition under Section 482 of the Cr.P.C. will be maintainable before this Court. It has been submitted by the learned counsel for petitioner on the basis of orders passed in the aforementioned two judgements that the Collector was bound to release the vehicle during pendency of the proceedings for confiscation and he could not have passed the order directing the petitioner to deposit 30% of the value of the car/seized vehicle.

10. This Court has carefully perused the judgement in the case of Virendra Gupta vs. State of U.P. (Supra) and finds that it has been passed in a Criminal Revision against the order passed by the Chief Judicial Magistrate, Mau rejecting the application for release of a vehicle seized under Section 451 (1) of the Cr.P.C., in connection with Case Crime No. 50 of 2018, under Sections 60, 63, 72 of the U.P. Excise Act, and Sections 272, 273, 419, 420, 467, 468, 471 IPC. The vehicle was found transporting country-made adulterated liquor. The revisionist application had been rejected on the ground that since confiscation proceedings in relation to the vehicle were in progress, it would not be appropriate in the interest of justice to release the vehicle in favour of the revisionist.

11. This Court in ***Virendera Gupta (Supra)*** has placed reliance upon the observations made by Hon'ble Supreme Court in the case of "***Sunderbhai Ambalal Desai vs. State of Gujarat, 2002 (10) SCC 283***, to say that a vehicle seized in a crime and parked at police station should be immediately released by taking appropriate Bond and Guarantee as well as the

Security for return of the said vehicle, if required at any point of time. This can be done pending hearing of applications for return of such vehicle. The Co-ordinate Bench has also placed reliance upon the judgement rendered in case of ***Nand vs. State of U.P. 1997 (1) AWC 41*** where the jurisdiction of the Magistrate under Section 451 Cr.P.C. to release the seized vehicle pending investigation or trial notwithstanding the pending of the confiscation proceedings before the Collector was dealt with by this Court. The Court had observed in ***Nand (Supra)*** that since the ownership of the seized vehicle was not disputed the revisionist could give a bank guarantee of Rs. 2,00,000/- before the Chief Judicial Magistrate, Kanpur Dehat and file a bond that he shall be producing the truck as and when needed by the criminal courts or the District Magistrate, Kanpur Dehat, and he shall not make any variation in the truck.

12. The Court relied upon the observations made in another judgement in the case of ***Rajiv Kumar Singh vs. State of U.P. and others, 2017 (5) ADJ, 351***, where the Court observed that the vehicle from which country-made liquor had been recovered and was seized could be released under Section 72 of the Excise Act, if the revisionist therein was ready to furnish the sureties before the Court concerned. The Court dealt with Section 451 to 457 of the Cr.P.C. and the general principles governing release pending investigation or trial, and had observed that vehicle seized in connection with a crime should not be left to deteriorate at the police station. The Court observed that the U.P. Excise Act is related to seizure and confiscation of vehicles, but still the power under Section 451 or 457 of the Cr.P.C. would be available to the Magistrate pending confiscation proceedings under the special or the local law. The judgement rendered in the case of ***Sunderbhai Ambalal Desai(supra)*** was distinguished by this Court and the law laid down by this Court in ***Ved Prakash vs. State of U.P., 1982 AWC 167*** Allahabad was followed where it was observed that the apprehension of vehicle carrying liquor in contravention of the law be dealt with in proceedings under Section 457 of the Cr.P.C.

13. This Court has carefully considered the judgement rendered in the case of ***Virendra Gupta (Supra)*** that it was rendered in Criminal Revision arising out of an order of the Chief Judicial Magistrate, Mau dated 13.06.2018 rejecting an application for release under Section 451 of the Cr.P.C., on the ground that confiscation proceedings under Section 72 of the Excise Act were pending before the Collector. The Court had referred the matter in its order dated 31.08.2018 to the Hon'ble Chief Justice for constitution of a larger Bench to decide the question:-

"Whether pending confiscation proceedings under Section 72 of the U.P. Excise Act before the Collector, the Magistrate/Court has jurisdiction to release any property subject matter of confiscation proceedings, in the exercise of powers under Sections 451, 452 or 457 of the Code of Criminal Procedure?"

14. The judgement cited by the learned counsel for the petitioner does not help him insofar as no definite opinion had been expressed with regard to applicability of the Section 72 of the U.P. Excise Act or that of Section 451 or 457 of the Cr.P.C. The other judgement cited by the learned counsel for the petitioner in ***Rajiv Kumar Singh vs. State of U.P. & Another*** also was a judgement rendered in a Criminal Revision where the Additional Chief Judicial Magistrate had rejected the application of the revisionist for release of vehicle under Section 60 of the Excise Act on the ground that confiscation proceedings under Section 72 of the U.P. Excise Act, were pending before the Collector, and it would complicate the matter.

15. In this case, the petitioners application under Section 72 Sub-Section 2 has been

allowed by the Collector subject to the condition of payment of 30% of the market value of the vehicle which has been seized carrying illicit liquor. The very language of Section 72 of the Excise Act, and its Proviso, gives power to the Collector to release the vehicle to the owner thereof by giving a bond to pay in lieu of its confiscation such fine at the Collector thinks appropriate but not exceeding on the date of its seizure.

16. It is apparent from the language of the Act that the Collector can impose a fine up to the extent of entire market value of the seized vehicle. In the instant case obviously thirty percent of the value of the seized car have been directed to be paid.

17. Under Sub-Section (7) of Section 72, the petitioner could have appealed against such an order as it has a statutory remedy provided under the Act, which could not be bye passed.

18. There is no abuse of process of Court as alleged by the counsel for the petitioner for this Court to exercise its inherent jurisdiction under Section 482 of the Cr.P.C.

18. Accordingly, the petition stands ***rejected.***

19. No order as to costs.

(2021)12ILR A574
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.12.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Application U/S 482 No. 17336 of 2021

Gangaram & Ors. ...Applicants
Versus
The State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Anil Kumar Bind

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860 - Sections 325, 120-B -quashing of entire proceeding-a litigation was going on between the parties, later on having been lost the said litigation, a false FIR was lodged-applicants have been summoned on total non-application of mind on a cyclostyled format-the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated-the summoning of accused in a criminal cases is a serious matter and order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto-Learned court below failed to exercise the jurisdiction vested in him resulting in miscarriage of justice-The order cannot be legally sustained.(Para 1 to 30)

The application is allowed. (E-6)

List of Cases cited:

1. R.R. Chari Vs St. of U.P. (1951) AIR SC 207

2. Ajit Kumat Palit Vs St. of W. B. & ors. (1963) AIR SC 765

3. Tularam & ors. Vs Kishore Singh (1977) 4 SCC 459

4. Hareram Satpathy Vs Tikaram Agarwala & ors. (1978) 4 SCC 58

5. Chandra Deo Singh Vs Prokar Chandra Bose(3)

6. S.K Sinha Chief Informant Vs Videocon International CRLA No. 175 of 2007

7. Sunil Bharti Mittal Vs C.B.I. (2015) AIR SC 1923

8. Sunil Todi & ors. Vs St. of Guj. & anr. CRLA No.1446 of 2021

9. Bhushan Kumar & anr. Vs State (NCT of Delhi) & Anr (2012) 5 SCC 424

10. Ankit Vs St. of U.P. & anr, Appl. u/s 482 No. 19647 of 2009

11. Abdul Rasheed & ors. Vs St. of U.P. & anr, Appl. u/s 482 No. 7279 of 2006

12. Qavi Ahmad Vs St. of U.P. & anr. CRLR No. 3209 of 2010

13. Vineet Agarwal & 2 ors. Vs St. of U.P. & anr., Appl. u/s 482 No. 15450 of 2020

14. Ved Krishna Vs St. of U.P. & anr. Appl. u/s 482 No. 683 of 2021

15. Deepak Yadav @ Lalla & anr. Vs St. of U.P. & anr, Appl. u/s 482 No. 6932 of 2021

16. Smt. Rubina Khan Vs St. of U.P. & anr., Appl. u/s 482 No. 7854 of 2021

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Whether summons issued on cyclostyled and printed proforma, qualifies the litmus test of being the real intent of the word "cognizance" is a question which falls for determination before this Court in the present proceeding.

2. Heard Sri Anil Kumar Bind, learned counsel for the applicants and Sri K.K. Rajbhar, who appears for opposite party nos. 1 and 2.

3. In view of the order which is being proposed to be passed today, there is no need to issue notice to the opposite party no. 2 as the learned counsel for the applicants as well as the learned A.G.A. have consented for disposal of the present application at the admission stage, particularly in view of the peculiar facts of the case, wherein only the order summoning applicants dated 06.11.2020 is subject matter of scrutiny on a technical issue as demonstrated in the latter part of the judgment.

4. This application u/s 482 Cr.P.C. has been filed for quashing of the charge sheet no. 03/2019 dated 05.01.2019 and cognizance order dated 06.11.2020 as well as entire criminal proceeding of Case No. 3649 of 2020 (State Vs. Nanne and others) pending before Additional Civil Judge (Senior Division) Shahjahanpur arising out of Case Crime No. 247 of 2018, u/s 325, 120-B IPC, P.S. Allahganj, District Shahjahanpur.

5. Factual matrix of the case as worded in the present application are that a FIR was lodged by the opposite party no. 2 against one Laxman S/o Shankar, Prithiviraj S/o Lalla Singh and Kallu S/o Chakrapal before P.S. Allahganj, District Shahjahanpur on 27.06.2018, u/s 307, 504, 506 IPC with an allegation that the opposite party no. 2 as aged about 50 years, belonging to Kushwaha community R/o Village Chauki, Azampur P.S. Allahganj, Shahjahanpur and a litigation was going on between the opposite party no. 2 and Laxman S/o Shankar and later on having been lost the said litigation, Laxman came to the house of opposite party no. 2 on 26.06.2018 at about 11 p.m. armed with a pistol 312 bore along with Prithiviraj S/o Lalla Singh and Kallu S/o Chakrapal and at that point of time the brother of the opposite party no. 2 being Gangaram was sleeping on the cot out side the house and the aforesaid accused pounced upon him and hurled abuses and threatening them to withdraw the case and when the brother of opposite party no. 2 started shouting seeking help then the villagers who were present within the close vicinity came and then the accused took out their pistol shot and also threatened the brother as well as the opposite party no. 2 and brother of the opposite party no. 2 sustained injuries. A copy of the injury report of the brother of the opposite party no. 2 on record. The statement of the brother of the opposite party no. 2 was also obtained consequently, after investigation the Investigating Officer submitted a charge sheet on 05.01.2019 against the applicants alleging that the FIR so lodged against Laxman S/o Shankar, Prithiviraj S/o Lalla Singh and Kallu S/o Chakrapal was false

and no case u/s 307, 504, 506 IPC were made out against them and on the contrary cases u/s325 and 120-B IPC are made against the applicants.

6. Accordingly on the 06.11.2020 the court of Additional Civil Judge (Senior Division) Shahjahanpur in the proceedings in case no. 3649 of 2020 (State Vs. Nanhe and others) in case crime no. Case Crime No. 247 of 2018 have issued summons against the applicants u/s 325, 120-B IPC. Challenging the charge sheet dated 05.01.2019 emanating from the criminal proceedings of case crime no. 3649 of 2020 (State Vs. Nanhe and others) in case crime no. Case Crime No. 247 of 2018, u/s 325, 120-B IPC, P.S. Allahganj, District Shahjahanpur as well as the cognizance order dated 06.11.2020 summoning the applicants pending before the Additional Civil Judge (Senior Division) Shahjahanpur, the present application has been preferred.

7. The word 'Cognizance' roots from an old French word "Conoisance" based on Latin word "Cognoscere" the word cognizance has not been deciphered and defined in procedural law being the Code of Criminal Procedure 1973.

8. The learned counsel for the applicants has sought to argue that the present application is being confined to the challenge so made to the order dated 06.11.2020 summoning the applicants u/s 325, 120-B IPC as the applicants have been summoned on total non-application of mind on a cyclostyled format. In nutshell the argument of the learned counsel for the applicants is to the extent that summoning is a serious matter and the same cannot be restored without application of mind particularly when the order in question is cyclostyled wherein the blanks have been filled.

9. Countering the said submission the learned counsel for the opposite party no. 1 has argued that though the order under challenge being a summoning order is cyclostyled but it cannot said to be passed by total non application of mind as the order though it does not contain any discussion but it is a case wherein the court below has applied his mind.

10. I have gone through the argument so raised by the learned counsel for the applicants as well as learned A.G.A. who appear for opposite party no. 1 and perused the record.

11. Before adverting to the factual as well as legal position this Court finds necessary to extract the relevant statutory provisions which are germane to the issue in question.

Code of Criminal Procedure 1898 (Old Code)

"190. Cognizance of offence by Magistrate. - (1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence -

(a) upon receiving a complaint of facts which constitute such offence :

(b) upon a report in writing of such facts made by any police-officer;]

(c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.

(2) The [State Government], or the District Magistrate subject to the general or

special orders of the [State Government], may empower any Magistrate to take cognizance under sub-section (1), clause (a) or clause (b), of offences for which he may try or commit for trial.

(3) The [State Government] may empower any Magistrate of the first or second class to take cognizance under sub-section (1), clause (c), of offences for which he may try or commit for trial."

Code of Criminal Procedure 1973 (New Code)

Section 2 (c) " cognizable offence" means an offence for which, and" cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

(l) " non- cognizable offence" means an offence for which, and" non- cognizable case" means a case in which, a police officer has no authority to arrest without warrant;"

190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

12. It is noteworthy to mention here that the word cognizance has not been employed either in the Old Code or the New Code but in the new code the word "cognizable offence" and "non cognizable offence" are defined. In nutshell, taking cognizane means cognizance of an offence and not of offender. Once, the Magistrate takes the cognizance of an offence then it is the duty to find who is the real offender. The aforesaid process itself personifies taking cognizance is a serious matter which presupposes a condition whereby wherein the Magistrate has to apply its mind. Parliament has deliberately engrafted Section 190 under Chapter (XIV) containing the heading "Condition Requisite For Initiation Of Proceedings", providing that subject to the provisions of Chapter (XIV) any Magistrate of the first class, any Magistrate of the second class specially empowered in that behalf under sub-section (2) may take cognizance of an offence upon receiving the complaint of facts which constitute the offence, upon a police report of said facts, upon information received from any person other than the police officer or upon his own knowledge that said offence has been committed. Sub-Section (2) itself authorises Chief Judicial Magistrate to empower any Magistrate of second class to take cognizance under sub-section (1) of said offence as are within its competence to enquire into or trial. The procedure contemplated under section 190 of the New Code is an act to be committed judicially. The discretion has been casted upon the Magistrate concerned to act judicially keeping in account the facts of a particular case

as well as law on the said subject. Section 190 of the New Code of Cr.P.C. itself is a starting point for taking appropriate judicial action as the Magistrate under the said sections has to apply its mind on the motion so set up in sub-clause (a)(b)(c) of Sub-Section (1) of Section 190 of the New Code.

13. To simplify the same it can be safely said that the Magistrate has to apply his independent mind so as to find out whether the material collected by Investigating Officer is sufficient to proceed further and whether the same constitutes violation of law so as to call a person to appear before criminal court to face trial. Logically the word cognizable and non-cognizable offence have been employed in the New Code so as to suggest that it is the Magistrate who exercises its powers u/s 190 to proceed against a person while summoning him for the purpose of investigation into two categories being cognizable and non-cognizable. The New Code no where contemplates the situation whereby wherein under the Magistrate concerned is to act as a post office. Whenever, any information of a cognizable offence is received or the same is suspected, the police authority so available with the police officer authorizes him to enter into the investigation of the same but wherein the information relates to non cognizable offence he has no power to investigate it without the order of the competent Magistrate. The said provision itself finds place in Section 155 of the New Code.

14. The word cognizance has also been defined in well known dictionaries which are often referred in legal fraternity being...

The Black's Law Dictionary Seventh Edition has defined the word which is as under:-

Cognizance (Kog-ni-zens), n. 1. The right and power to try and determine cases; JURISDICTION. 2. The taking of judicial or authoritative notice. 3. Acknowledgement or admission of an alleged fact; esp. (hist), acknowledgement of a fine. See FINE (1); FINE SUR COGNIZANCE DE DROIT. 4. Common-law pleading. In a replevin action, a plea by the defendant that the goods are held in bailment for another. Cf. AVOWRY.

Similarly, the **P RAMANATHA AIYAR Law Lexicon Dictionary 1997 Edition** has defined cognizance as under:-

Cognizance. Judicial notice or knowledge; the judicial recognition or hearing of a cause; jurisdiction, or right to try and determine causes. It is a word of the largest omport : embracing all power, authority and jurisdiction. The word "Cognizance" is used in the sense of "the right to take notice of and determine a cause." Taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind of the suspected commission of an offence. (37 Cal 412=14 CWN 512-6 IC 8=11 Cr LJ 217.)

15. The word cognizance has defined in the dictionaries as referred to above does not involve any formal action but the same embraces to which the application of mind while proceeding judicially.

16. The word "taking cognizance" has being often matter of judicial interpretation and it has been held to be a positive act of application of mind.

17. The Hon'ble Apex Court in the case of **R.R. Chari V. State of Uttar Pradesh** reported in **AIR 1951 SC 207** has held as under:-

"taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a. magistrate as such applies his mind to the suspected commission of an offence"

18. Following the judgment in the case of **R.R. Chari (Supra)** the Hon'ble Apex court in the case of **Ajit Kumat Palit Vs. State of West Bengal and Others AIR 1963 SC 765** has held as under:-

19. The provisions of s. 190 (1) being obviously, and on its own terms, inapplicable, the next question to be. considered is whether it is the requirement of any principle of general jurisprudence that there should be some additional material to entitle the Court to take cognizance of the offence. The word " cognizance" has no esoteric or mystic significance in criminal law or procedure. It merely means become aware of and when used with reference to a Court or judge, to take notice of judicially. It was stated in Gopal Marwari v. Emperor A.I.R. (1943) Pat. 245 by the learned judges of the Patna High Court in a passage quoted with approval by this Court in R. R. Chari v. State of Uttar Pradesh [1951] S.C.R. 312, 320 that the word, "cognizance' was used in the Code to indicate the point when the Magistrate or judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the same sense. As observed in Emperor v. Sourindra Mohan Chuckerbutty I.L.R. 37 Cal. 412, 416 "taking cognizance does not involve any formal action ; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence." Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled. Thus, a sessions judge cannot exercise that original jurisdiction which magistrates specified in s. 190(1) can, but the material on which alone he can apply his judicial mind and proceed under the Code is an order of commitment. But statutory provision apart, there is no set material which must exist before the judicial mind can operate. It appears to us therefore that as soon as a special judge receives the orders of allotment of the case passed by the State Government it becomes vested with jurisdiction to try the case and when it receives the record from the Government it can apply its mind and issue notice to the accused and thus start the trial of the proceedings assigned to it by the State Government.

19. In the case of **Tularam And Others Vs. Kishore Singh 1977 4 SCC 459** the Hon'ble Apex Court has observed as under:-

7. The question as to what is meant by taking cognizance is no longer res integra as it has been decided by several decisions of this Court. As far back as 1951 this Court in the case of R. R. Chari v. State of Uttar Pradesh [1951] S.C.R. 312 observed as follows -

"Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence".

While considering the question in greater detail this Court endorsed the observations of Justice Das Gupta in the case of Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee A.I.R. 1950 Cal. 347 which was to the following effect (1) [1951] S.C.R. 312. (2) A.I.R. 1950 Cal. 347.

"It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under section 190(1)

(a), Criminal Procedure Code, he must not only have applied Ms mind to the contents of

the petition but he must have done so far the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter-proceeding under section 200 and thereafter sending it for inquiry 'and report under section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence".

8. Section 190 of the Code runs thus "190.(1) Subject to the provisions of this Chapter, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf under subsection (2) may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed".

It seems to us that there is no special charm or any magical formula in the expression "taking cognizance" which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to, taking further action. Thus what section 190 contemplates is that the Magistrate takes cognizance once he makes himself fully conscious and aware of the allegations made. in the complaint and decides to examine or test the validity of the said allegations The Court prescribes several modes in which a complaint can be disposed of after taking cognizance. In the first place. cognizance can be taken on the basis of three circumstances : (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts; and (c) upon information received from any person other than the police officer or upon his own knowledge, that an offence has been committed. These are the three grounds on the basis of which a Magistrate can take cognizance and decide to. act accordingly. It would further appear that this Court in the case of Narayandas Bhagwandas Madhavdas v. The State of West Bengal(1) observed the mode in which a Magistrate could take cognizance of an offence and observed as follows:-

"It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under section 19(1)

(a), Criminal Procedure Code, he, (1) [1960] 1 S.C.R. 93,106.

3-951SCI/77 must not only have applied his mind to the contents of the petition but must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter-proceeding under- section 200 and thereafter sending it for inquiry and report under section 202".

20. In the case of **Hareram Satpathy Vs. Tikaram Agarwala And Others 1978 4 SCC 58** the Hon'ble Apex Court has observed as under:-

6.To the same effect is the decision of this court in Chandra Deo Singh v. Prokar Chandra Bose(3) where after a full discussion of the matter it was held that at the time of taking a decision whether a process should issue against the accused or not what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant so as to justify the

issue of process and commencement of proceedings against the accused, and not whether the evidence is sufficient to warrant his conviction.

7. From the foregoing it is crystal clear that under section 190 of the Code of Criminal Procedure the Magistrate takes cognizance of an offence made out in the police report or in the complaint and there is nothing like taking cognizance of the offenders at that stage. As to who actually the offenders involved in the case might have been has to be decided by the Magistrate after taking cognizance of the offence.

8. In the instant case the Sub-Divisional Magistrate took cognizance of the offence on the police report, after taking cognizance of the offence and perusal of the record he appears to have satisfied himself that there were prima facie grounds for issuing process against the respondents. In so doing the Magistrate did not ill our Judgment exceed the power vested in him under law.

10. This second point does not present any difficulty. lt is well settled that once the Magistrate has after satisfying himself prima facie that there is sufficient material for proceeding against the accused issued process against him, the High Court cannot go into the matter in exercise of its revisional jurisdiction which is very limited. The following observations made in Smt. Nagwwa v. Veeranna Shivalingappa Konjalai & ors (supra) are apposite in this connection:

"It is true that in coming to a decision as to whether a process would be issued the Magistrate can tale into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court or even this Court to substitute its own discretion for that of the Magistrate or to examine the case on merits with-a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction o the accused. These considerations, in our opinion. are totally foreign to the scope and ambit of an inquiry under s. 202 of the Code of Criminal Procedure."

21. In the case of **S.K. Sinha Chief Informant Vs. Videocon International Ltd. In Appeal (Criminal) 175 of 2007** decided on 25.01.2008 the Hon'ble Apex Court has observed as under:-

18. R.R. Chari v. State of Uttar Pradesh, 1951 SCR 312 was probably the first leading decision of this Court on the point. There, the police, having suspected the appellant-accused to be guilty of offences punishable under Section 161 and 165 of the Indian Penal Code (IPC) as also under the Prevention of Corruption Act, 1947, applied to the District Magistrate, Kanpur to issue warrant of arrest on October 22, 1947. Warrant was issued on the next day and the accused was arrested on October 27, 1947. On March 25, 1949, the accused was produced before the Magistrate to answer the charge-sheet submitted by the prosecution. According to the accused, on October 22, 1947, when warrant for his arrest was issued by the Magistrate, the Magistrate was said to have taken cognizance of offence and since no sanction of the Government had been obtained before that date, initiation of proceedings against him was unlawful. The question before the Court was as to when

cognizance of the offence could be said to have been taken by the Magistrate under Section 190 of the Code. Considering the circumstances under which cognizance of offence under sub-section (1) of Section 190 of the Code can be taken by a Magistrate and referring to Abani Kumar Banerjee, the Court, speaking through Kania, C.J. stated:

It is clear from the wording of the section that the initiation of the proceedings against a person commences on the cognizance of the offence by the Magistrate under one of the three contingencies mentioned in the section. The first contingency evidently is in respect of non-

cognizable offences as defined in the Criminal Procedure Code on the complaint of an aggrieved person. The second is on a police report, which evidently is the case of a cognizable offence when the police have completed their investigation and come to the Magistrate for the issue of a process. The third is when the Magistrate himself takes notice of an offence and issues the process. It is important to remember that in respect of any cognizable offence, the police, at the initial stage when they are investigating the matter, can arrest a person without obtaining an order from the Magistrate. Under section 167(b) of the Criminal Procedure Code the police have of course to put up the person so arrested before a Magistrate within 24 hours and obtain an order of remand to police custody for the purpose of further investigation, if they so desire. But they have the power to arrest a person for the purpose of investigation without approaching the Magistrate first. Therefore in cases of cognizable offence before proceedings are initiated and while the matter is under investigation by the police the suspected person is liable to be arrested by the police without an order by the Magistrate.

19. Approving the observations of Das Gupta, J. in Abani Kumar Banerjee, this Court held that it was on March 25, 1949 when the Magistrate issued a notice under Section 190 of the Code against the accused that he took cognizance of the offence. Since before that day, sanction had been granted by the Government, the proceedings could not be said to have been initiated without authority of law.

20. Again in Narayandas Bhagwandas Madhavdas v. State of West Bengal, (1960) 1 SCR 93, this Court observed that when cognizance is taken of an offence depends upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuance of a search warrant for the purpose of an investigation or a warrant of arrest of accused cannot by itself be regarded as an act of taking cognizance of an offence. It is only when a Magistrate applies his mind for proceeding under Section 200 and subsequent sections of Chapter XV or under Section 204 of Chapter XVI of the Code that it can be positively stated that he had applied his mind and thereby had taken cognizance of an offence [see also Ajit Kumar Palit v. State of W.B. & Anr., (1963) Supp (1) SCR 953; Hareram Satpathy v. Tikaram Agarwala & Anr., (1978) 4 SCC 58].

21. In Gopal Das Sindhi & Ors. v. State of Assam & Anr., AIR 1961 SC 986, referring to earlier judgments, this Court said: We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word may in Section 190 to mean must. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and

take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner provided by Chapter XVI of the Code.

23. In Darshan Singh Ram Kishan v. State of Maharashtra, (1972) 1 SCR 571, speaking for the Court, Shelat, J. stated that under Section 190 of the Code, a Magistrate may take cognizance of an offence either (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been said, taking cognizance does not involve any formal action or indeed action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, thus, takes place at a point when a Magistrate first takes judicial notice of an offence.

24. In Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors., (1976) 3 SCC 252, this Court said:

It is well settled that when a Magistrate receives a complaint, he is not bound to take cognizance if the facts alleged in the complaint, disclose the commission of an offence. This is clear from the use of the words "may take cognizance" which in the context in which they occur cannot be equated with must take cognizance". The word "may" gives a discretion to the Magistrate in the matter. If on a reading of the complaint he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from, being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence, himself.

This raises the incidental question : What is meant by "taking cognizance of an offence" by a Magistrate within the contemplation of Section 190?. This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in Clauses (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If, instead of proceeding under Chapter XV, he has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence. [see also M.L. Sethi v. R.P. Kapur & Anr., (1967) 1 SCR 520].

25. In the case on hand, it is amply clear that cognizance of the offence was taken by the Chief Metropolitan Magistrate, Mumbai on May 24, 2002, i.e., the day on which the complaint was filed, the Magistrate, after hearing the counsel for the department, took cognizance of the offence and passed the following order: Mr. S.A.A. Naqvi, counsel for the department is present. Complainant is public servant. Cognizance is taken. Issue summons to

accused under Section 18(2)(3) of FERA, 73 read with Central Notification and r/w Section 68(1) of the said Act and r/w 56 (1)(i) and r/w Section 49(3) (4) of FEMA, 1999. Summons returnable on 7.2.2003 at 3 p.m. (emphasis supplied)

26. Undoubtedly, the process was issued on February 3, 2003. In our judgment, however, it was in pursuance of the cognizance taken by the Court on May 24, 2002 that a subsequent action was taken under Section 204 under Chapter XVI. Taking cognizance of offence was entirely different from initiating proceedings; rather it was the condition precedent to the initiation of the proceedings. Order of issuance of process on February 3, 2003 by the Court was in pursuance of and consequent to taking cognizance of an offence on May 24, 2002. The High Court, in our view, therefore, was not right in equating taking cognizance with issuance of process and in holding that the complaint was barred by law and criminal proceedings were liable to be quashed. The order passed by the High Court, thus, deserves to be quashed and set aside.

27. It was also contended by the learned counsel for the appellant that the relevant date for considering the question of limitation is the date of filing of complaint and not taking cognizance or issuance of process by a Court of law. In this connection, our attention was invited by the counsel to Bharat Damodar Kale & Anr. v. State of A.P., (2003) 8 SCC 559 and a recent decision of this Court in Japani Sahoo v. Chandra Sekhar Mohanty, (2007) 7 SCC

394. In Japani Sahoo, one of us (C.K. Thakker, J.), after considering decisions of various High Courts as also Bharat Damodar Kale, stated:

52. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of litera legis. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution.

22. In the case of **Sunil Bharti Mittal Vs. Central Bureau of Investigation AIR 2015 SC 1923** the Hon'ble Apex Court has observed as under:-

"46. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.

48. However, there has to be a proper satisfaction in this behalf which should be duly recorded by the Special Judge on the basis of material on record. No such exercise is done. In this scenario, having regard to the aforesaid aspects coupled with the legal position explained above, it is difficult to sustain the impugned order dated 19.03.2013 in its present form insofar as it relates to implicating the appellants and summoning them as accused persons. The appeals arising out of SLP (Crl.) No. 2961 of 2013 and SLP (Crl.) No. 3161 of 2013 filed by Mr. Sunil Bharti Mittal and Ravi Ruia respectively are, accordingly, allowed and order summoning these appellants is set aside. The appeals arising out of SLP (Crl.) Nos. 3326-3327 of 2013 filed by Telecom Watchdog are dismissed. "

23. Recently, in the case of **Sunil Todi And Others Vs. State of Gujrat and Another in Criminal Appeal No. 1446 of 2021** decided on **03.12.2021** the Hon'ble Supreme Court has held as under:-

"33. The provisions of Section 202 which mandate the Magistrate, in a case where the accused is residing at a place beyond the area of its jurisdiction, to postpone the issuance of process so as to enquire into the case himself or direct an investigation by police officer or by another person were introduced by Act 25 of 2005 with effect from 23 June 2006. The rationale for the amendment is based on the recognition by Parliament that false complaints are filed against persons residing at far off places as an instrument of harassment. In Vijay Dhanuka v. Najima Mamtaj20, this Court dwelt on the purpose of the amendment to Section 202, observing:

"11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction' and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction' were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far-off places in order to harass them. The note for the amendment reads as follows:

"False complaints are filed against persons residing at far-off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused

residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.'

The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate."

34. This Court has held that the Magistrate is duty bound to apply his mind to the allegations in the complaint together with the statements which are recorded in the enquiry while determining whether there is a prima facie sufficient ground for proceeding. In Mehmood UI Rehman v. Khazir Mohammad Tunda21, this Court followed the dictum in Pepsi Foods Ltd. v. Special Judicial Magistrate, and observed that setting the criminal law in motion against a person is a serious matter. Hence, there must be an application of mind by the Magistrate to whether the allegations in the complaint together with the statements recorded or the enquiry conducted constitute a violation of law. The Court observed:

"20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in Pepsi Foods Ltd. v. Judicial Magistrate [Pepsi Foods Ltd. v. Judicial Magistrate, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400] to set in motion the process of criminal law against a person is a serious matter."

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"22. The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 CrPC when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint

constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."

These decisions were cited with approval in Abhijit Pawar v. Hemant Madhukar Nimbalkar23. After referring to the purpose underlying the amendment of Section 202, the Court observed:

"25. ... the amended provision casts an obligation on the Magistrate to apply his mind carefully and satisfy himself that the allegations in the complaint, when considered along with the statements recorded or the enquiry conducted thereon, would prima facie constitute the offence for which the complaint is filed. This requirement is emphasised by this Court in a recent judgment Mehmood Ul Rehman v. Khazir Mohammad Tunda [Mehmood Ul Rehman v. Khazir Mohammad Tunda, (2015) 12 SCC 420 : (2016) 1 SCC (Cri) 124]..."

35. While noting that the requirement of conducting an enquiry or directing an investigation before issuing process is not an empty formality, the Court relied on the decision in Vijay Dhanuka which had held that the exercise by the Magistrate for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused is nothing but an enquiry envisaged under Section 202 of the Code.

36. In Birla Corporation Ltd. v. Adventz Investments and Holdings24, the earlier decisions which have been referred to above were cited in the course of the judgment. The Court noted:

"26. The scope of enquiry under this section is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not under Section 204 CrPC or whether the complaint should be dismissed by resorting to Section 203 CrPC on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. At the stage of enquiry under Section 202 CrPC, the Magistrate is only concerned with the allegations made in the complaint or the evidence in support of the averments in the complaint to satisfy himself that there is sufficient ground for proceeding against the accused."

Hence, the Court held:

"33. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The application of mind has to be indicated by disclosure of mind on the satisfaction. Considering the duties on the part of the Magistrate for issuance of summons to the accused in a complaint case and that there must be sufficient indication as to the application of mind and observing that the Magistrate is not to act as a post office in taking cognizance of the complaint, in Mehmood Ul Rehman [Mehmood Ul Rehman v. Khazir Mohammad Tunda, (2015) 12 SCC 420 : (2016) 1 SCC (Cri) 124]..."

The above principles have been reiterated in the judgment in Krishna Lal Chawla v. State of U.P."

24. However, the Hon'ble Apex Court in the case of **Bhushan Kumar And Another vs. State (Nct Of Delhi) And Another** reported in **2012 5 SCC 424** has observed as under;-

"12. A summon is a process issued by a Court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person must appear in Court. A person who is summoned is legally bound to appear before the Court on the given date and time. Willful disobedience is liable to be punished under Section 174 IPC. It is a ground for contempt of court.

13. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

14. Time and again it has been stated by this Court that the summoning order under Section 204 of the Code requires no explicit reasons to be stated because it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the materials filed therewith.

19. This being the settled legal position, the order passed by the Magistrate could not be faulted with only on the ground that the summoning order was not a reasoned order."

25. Though in the case of **Bhushan Kumar (Supra)** it has been held that it is not mandate that Magistrate is to explicitly state reasons for issuances of summons but the said judgment cannot be said to have endorsed the principles of law that there should not be any independent application of mind while issuing summons.

26. Coming back to the case at hand it will clearly reveal that the order under challenge summoning the applicants is nothing but on a printed proforma wherein the blanks have been filled by the pen. The said procedure so adopted by the court below is no where either provided under or contemplated in New Code. Nonetheless, in case such type of order are allowed to be made a part of the process of criminal jurisprudence it will tantamount to be a situation whereby wherein under the order of summoning the accused would be said to be final as no superior court of law can find out as to what contemplated in the mind of the Magistrate who passed the order.

27. Even otherwise, the complete set of procedure has been earmarked in the New Code for the cases arising out of the FIR as well as complaint cases. The only safeguard which is available in criminal jurisprudence at the stage of ordering for investigation is to find out as to whether offence either cognizable or non-cognizable are made out or not. The Magistrate have been empowered under law to pass orders which are not only the legal but also must contain any of the material so as to show that

there has been application of mind by the Magistrate. Particularly, when the orders for summoning the individuals is a serious matter which is prone to challenge in appropriate court of law.

28. This Hon'ble Court has eventually not subscribed to the practice of summoning the accused in printed proforma in cyclostyled manner wherein the blanks are to be filled by pen in the following decisions:-

(a). In the case of **Ankit Vs. State of U.P. And Another** passed in **Application U/S 482 No.19647 of 2009** decided on **15.10.2009**, this Court has observed as under:-

"7.Paper No. 31 is the certified copy of the impugned order, which has been initialed by Sri Talevar Singh, the then judicial magistrate-III, Saharanpur. This order has been prepared by filling up the blank on the printed proforma. The blanks in the printed proforma appear to have been filled up by some employee of the court and the learned magistrate has only put his short signature (initial) above the seal of the court containing his name. All the details of the case including the name, section, P.S., district, case number and address of the applicant have been filled up by some employee of the court on the printed proforma. Therefore, this type of the order shows non- application of judicial mind on the part of the learned magistrate passing the same. After mentioning the name, parentage, address, case number, section and name of P.S. by filling up the blanks on the printed proforma, the following matter is also printed :-

"मैने आरोप पत्र, केस डायरी व अन्य प्रपत्रों का परिशीलन किया। अभियुक्त के विरूद्घ उक्त धाराओं के अपराध के विचारण का पर्याप्त प्रथम दृष्टया साक्ष्य है। अभियुक्त के विरूद्घ उक्त धाराओं के अपराध का प्रसंज्ञान लिया जाता है। आदेश हुआ कि आरोप पत्र दर्ज रजिष्टर होवे तथा अभियुक्त को द्वारा सम्मन दिनांक .....के लिए तलब किया जावे।"

8. In the beginning, the name of the court, case number, state vs. ..... under section ..... P.S. ..... District ..... case crime No. ..... /2009 also have been printed and blanks have been filled up by mentioning the case number, name of the accused, section, P.S. District etc. by some employee. Below afore cited printed matter, the following sentence has been mentioned in handwriting "अभियुक्त अंकित की गिरफ्तारी मा0 उच्च न्यायायल द्वारा Crl. Writ No. 19559/08 अंकित बनाम राज्य में पारित आदेश दिनांक 5.11.08 द्वारा आरोप पत्र प्राप्त होने तक स्थगित थी।"

Below aforesaid sentence, the seal of the court containing name of Sri Talevar Singh, the then Judicial Magistrate-III, has been affixed and the learned magistrate has put his short signature (initial) over his name. The manner in which the impugned order has been prepared shows that the learned magistrate did not at all apply his judicial mind at the time of passing this order and after the blanks were filled up by some employee of the court, he has put his initial on the seal of the court. This method of passing judicial order is wholly illegal. If for the shake of argument, it is assumed that the blanks on the printed proforma were filled up in the handwriting of learned magistrate, even then the impugned order would be illegal and invalid, because order of taking cognizance of any other judicial order cannot be passed by filling up blanks on the printed proforma. Although as held by this Court in the case of Megh Nath Guptas & Anr V State of U.P. And Anr, 2008 (62) ACC 826, in which reference has been made to the cases of Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs

State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC), the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."

(b). In the case of **Abdul Rasheed and Others Vs. State of U.P. and Another** passed in **Application U/S 482 No. 7279 of 2006** decided on **06.09.2010** this Court has observed as under:-

"6. Whenever any police report or complaint is filed before the Magistrate, he has to apply his mind to the facts stated in the report or complaint before taking cognizance. If after applying his mind to the facts of the case, the Magistrate comes to the conclusion that there is sufficient material to proceed with the matter, he may take cognizance. In the present case, the summoning order has been passed by affixing a ready made seal of the summoning order on a plain paper and the learned Chief Judicial Magistrate had merely entered the next date fixed in the case in the blank portion of the ready made order. Apparently the learned Magistrate had not applied his mind to the facts of the case before passing the order dated 20.12.2018, therefore, the impugned order cannot be upheld.

7. Judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. Such tendency must be deprecated and cannot be allowed to perpetuate. This reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms. Therefore, this practice must be stopped forthwith."

(c). In the case of **Qavi Ahmad Vs. State of U.P. and Another** passed in **Criminal Revision No. 3209 of 2010** decided on **14.10.2011** this Court has observed as under:-

"Learned counsel for the revisionist has inter alia contended that the order taking cognizance and issuing process has been passed by the learned Magistrate on a printed proforma, which establishes that he has not applied his mind to the evidence on record in order to take cognizance of the offence concerned. He has relied on case laws like Harishchandra Prasad Mani and others Vs. State of Jharkhand and another (2007) 15 Supreme Court Cases 494, Fakhruddin Ahmad vs. State of Uttaranchal and another (2008) 17 Supreme Court Cases 157 and Ankit Vs. State of U.P. and others U.P. Criminal Report 2009 (3) 427.

Per contra, learned A.G.A. has argued that there are sufficient materials collected by the Investigating Officer making out a prima facie case against the accused and, therefore, the order impugned is neither incorrect nor illegal nor improper and revision lacks merit, but he has not challenged the fact that the order impugned is on printed proforma.

I have applied my judicial mind to the facts, circumstances and the order impugned.

In the case of Fakhruddin Ahmad (supra), the Hon'ble Supreme Court has observed that being an expression of indefinite import, it is neither practicable nor desirable to precisely define as to what is meant by "taking

cognizance". Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs title emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender.

In the case of Harishchandra Prasad Mani and others (supra), it was held in para 12 that it is well settled by a series of decisions of this Court that cognizance cannot be taken unless there is at least some material indicating the guilt of the accused vide R.P. Kapur v. State of Punjab AIR 1960 SC 866: (1960) 3 SCR 388: 1960 Cri LJ 1239, State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335: 1992 SCC (Cri) 426, Janata Dal v. H.S. Chowdhary (1992) 4 SCC 305: 1993 SCC (Cri) 36, Raghubir Saran (Dr.) v. State of Bihar AIR 1964 SC 1:(1964) 2 SCR 336:(1964) 1 CRi LJ 1, State of Karnataka v. M Devendrappa (2002) 3 SCC 89: 2002 SCC (Cri) 539 and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque (2005) 1 SCC 122: 2005 SCC (Cri) 283.

The bare perusal of the order impugned depicts that learned Magistrate does not appear to have applied his judicial mind towards the material collected by the Investigating Officer against the revisionist in this case.

On similar ground, this Court has already held that the impugned order being prepared and passed by filling up the blanks on the printed proforma is wholly illegal and invalid.

The result is that order impugned dated 17.7.2010, which has been prepared and passed by filling the blanks on the printed proforma, is illegal, incorrect and improper."

(d). In the case of **Vineet Agarwal And 2 Others Vs. State of U.P. and Another** passed in **Application U/S 482 No. 15450 of 2020** decided on **11.11.2020** this Court has observed as under:-

"5. It has been further submitted that the impugned summonig order dated 11.09.2019 is not a judicial order as it has been passed on a printed proforma without recording any reasons in support of satisfaction for taking cognizance against the applicants and merely the case, Section, date of the order and date of the summon have been filled.

17. In the case of Harishchandra Prasad Mani and others (supra), it was held in para 12 that it is well settled by a series of decisions of this Court that cognizance cannot be taken unless there is at least some material indicating the guilt of the accused vide R.P. Kapur v. State of Punjab AIR 1960 SC 866: (1960) 3 SCR 388: 1960 Cri LJ 1239, State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335: 1992 SCC (Cri) 426, Janata Dal v. H.S. Chowdhary (1992) 4 SCC 305: 1993 SCC (Cri) 36, Raghubir Saran (Dr.) v. State of Bihar AIR 1964 SC 1:(1964) 2 SCR 336:(1964) 1 CRi LJ 1, State of Karnataka v. M Devendrappa (2002) 3 SCC 89: 2002 SCC (Cri) 539 and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque (2005) 1 SCC 122: 2005 SCC (Cri) 283.

18. This type of order has already been held unsustainable by this Court in the case of Ankit (supra) relying on in a number of

decisions of the Apex Court. The relevant portion of the said decision, is extracted below:

"Although as held by this Court in the case of Megh Nath Guptas & Anr V State of U.P. And Anr, 2008 (62) ACC 826, in which reference has been made to the cases of Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4^) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC), the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."(Emphasis supplied)

19. In view of the above, the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto.

20. In light of the judgments referred to above, it is explicitly clear that the order dated 11.09.2019 passed by Additional Chief Judicial Magistrate, Chhibramau, Kannauj is cryptic and does not stand the test of the law laid down by the Apex Court. Consequently, the order dated 11.09.2019 cannot be legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him/her resulting in miscarriage of justice."

(e). In the case of **Ved Krishna Vs. State of U.P. and Another** passed in **Application U/S 482 No. 683 of 2021** decided on **11.02.2021** this Court has observed as under:-

"The learned counsel for the petitioner has given much emphasis that if the cognizance has been taken on the printed proforma, the same is not sustainable in the eye of law. In this regard, he has placed reliance on the following decisions of this Court.

Learned counsel for the petitioner contends that such a proforma order could not have been passed as the same has to necessary involve application of mind by the Magistrate concerned.

Learned AGA did not dispute the correctness of the submissions of the learned counsel for the petitioner.

Taking into consideration the aforesaid, this petition is allowed and the impugned summoning order dated 24.6.2019 passed by the Chief Judicial Magistrate,Faizabad in Criminal Case No. 6951 of 2019, State Vs. Ved Krishna and another, arising out of case crime no. 639 of 2018, under sections 494,498A,323,504 and 506 IPC, Police Station Kotwali Ayodhya, District Faizabad is set aside. The learned Magistrate concerned is directed to pass a fresh order in accordance with law within a period of one month from the date of production of a certified copy of this order before him."

(f). In the case of **Deepak Yadav @ Lalla And Another Vs. State of U.P. and Another** passed in **Application U/S 482 No.**

6932 of 2021 decided on **14.06.2012** this Court has observed as under:-

"Learned counsel for the applicants has submitted that in the instant case the order taking cognizance has been passed in a printed proforma by filling in the blanks and as such, the same cannot be sustained in the eyes of law being based on non application of mind and passed in a routine manner.

Per contra, learned AGA has submitted that necessary sections and the name of the applicants has been mentioned by filling in the blanks.

Considering the submissions of counsel for the parties and perusing the order, it is evident that the impugned order has been passed by filling in the blanks, which is not sustainable in the eyes of law and, therefore, the impugned order dated 5.12.2019 is liable to be set aside.

In view of the above, the impugned order dated 5.12.2019, which has been passed on a printed proforma, is set aside with a direction to the court below to pass fresh speaking and reasoned order in accordance with law preferably within two months from the date of production of a certified copy of this order."

(g). In the case of **Smt Rubina Khan Vs. State of U.P. and Another** passed in **Application U/S 482 No. 7854 of 2021** decided on **10.08.2021** this Court has observed as under:-

"It is vehemently urged by learned counsel for the applicant that the impugned summoning order dated 08.11.2019 is not sustainable in the eye of law, as the same has been passed in mechanical manner without applying the judicial mind, because on the face of record itself it is apparent that impugned summoning order dated 08.11.2019 has been passed by the Magistrate concerned on printed proforma by filling up the gaps, therefore the same is liable to be quashed by this Court.

In view of the above, the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto, whereas the impugned summoning order was passed in mechanical manner without application of judicial mind.

In light of the judgments referred to above, it is explicitly clear that the order dated 5.5.2019 passed by learned Chief Judicial Magistrate, Rampur is cryptic and does not stand the test of the law laid down by the Hon'ble Apex Court. Consequently, the cognizance order dated 08.11.2019 cannot be legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him resulting in miscarriage of justice."

29. In the light of the judgment so referred to above inescapable conclusion is drawn that the order dated 06.11.2020 passed by Additional Civil Judge (Senior Division) Shahjahanpur, does not stand the test of the law laid down by the Hon'ble Apex Court as referrd to above. Consequently, the cognizance order dated 06.11.2020 cannot be legally sustained and the same is liable to be set aside.

30. Accordingly, the present Criminal Misc. Application under Section 482 Cr.P.C is **allowed.** The impugned cognizance order dated 06.11.2020 passed by Additional Civil Judge (Senior Division) Shahjahanpur in Case No. 3649 of 2020, Case Crime No. 247 of 2018, under section 325, 120B I.P.C. registered at Police Station Allahganj, District Shahjahanpur is, hereby, quashed and the matter is remanded back to Additional Civil Judge (Senior Division) Shahjahanpur with a direction to decide afresh

the issue for taking cognizance and summoning the applicants and pass appropriate orders in accordance with law keeping in view the observations made by this Court as well as the direction contained in the judgments referred to above within a period of two months from the date of production of a certified/computer generated copy of this order.

(2021)12ILR A594
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Application U/S 482 No. 17844 of 2021

Jeeshan @ Jeeshan Ansari ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Mohammad Waseem, Sri M.P. Singh Yadav

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

A. Criminal matter - Code of Criminal Procedure, 1973-Section 482, 311 - Indian Penal Code, 1860-Sections 363, 366, 376 (2) - Protection of Children from Sexual Offences Act, 2012-Section 3/4- challenge to-dismissal of application u/s 311 seeking recall of the witness-examination of chief and cross-examination of the victim was recorded on the same date-application filed only with a view to delay the proceedings despite the proceedings being under the POCSO Act, requires to be concluded expeditiously-the power to summon material witnesses u/s 311 Cr.P.C. confer a very wide power on the courts for summoning witnesses and accordingly the discretion conferred is to be exercised judiciously –The determinative factor in this regard would be whether the summoning or recalling of the witness is in fact, essential to the just decision of the case keeping in view that fair trial which entails the interests of the accused, victim, and of the society-No material error or illegality is found in the exercise of the aforesaid discretion by the court below.(Para 1 to 27)

The application is dismissed. (E-6)

List of Cases cited:

1. Ajmer Vs St. of U.P. (2021) 115 ACC 409

2. Manish Vs St. of U.P. & anr., Appl. u/s 482 No. 23428 of 2021

3. Mohanlal Shamji Soni Vs U.O.I . & anr, (1991) SCC (Cri) 595

4. U.T. of Dadra & Nagar Haveli Vs Fatehsinh Mohansinh Chauhan (2006) 7 SCC 529

5. Zahira Habibullah Shelkha (5) & anr. Vs St. of Guj. & ors. (2006) 3 SCC 374

6. P. Sanjeeva Rao Vs St. of A.P.(2012) 7 SCC 56

7. Hoffman Andreas Vs Inspector of Customs (2000) 10 SCC 430

8. Maria Margarida Sequeria Fernandes Vs Erasmo Jack de Sequeria (2012) 5 SCC 370

9. Natasha Singh Vs C.B.I .(2013) 5 SCC 741

10. Rajaram Prasad Yadav Vs St. of Bih. & anr.(2013) 14 SCC 461

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

1. Heard Sri M.P. Singh Yadav, holding brief of Sri Mohammad Waseem, learned counsel for the applicant and Sri Vinod Kant, learned Additional Advocate General along with Sri Arvind Kumar, learned Additional Government Advocate appearing for the State-opposite party.

2. The present application under Section 482 Cr.P.C. has been filed seeking to quash the

order dated 12.08.2021 passed by the Additional Sessions Judge/Special Judge (POCSO Act) Court No.1, District Bareilly in Special Case No. 10 of 2020, arising out of Case Crime No. 154 of 2018 (State vs. Jeeshan) under Sections 363, 366, 376 (2) N IPC and Section 3/4 of Protection of Children from Sexual Offences Act, 20121, Police Station Hafizganj, District Bareilly on the application filed by the applicant under Section 311 Cr.P.C. dated 10.08.2021 and also to direct the court below to re-consider the application filed by the applicant under Section 311 Cr.P.C. dated 10.08.2021.

3. The order dated 12.08.2021 dismissing the application filed by the applicant herein under Section 311 Cr.P.C. has taken notice of the fact that the examination-in-chief of PW-2 (victim) was recorded on 21.01.2021 and on the same date the counsel for the accused-applicant had cross-examined her. The court has also recorded that the accused-applicant has sought recall of the witness who has been already examined on the earlier date as PW-2. It has also been taken note that the cross-examination of the other witnesses is continuing and information regarding the questions which are sought to be put to PW-2, can be elicited from the other witnesses. Considering that the matter is pending since the year 2018 an inference has been drawn that the application filed under Section 311 Cr.P.C. is only to delay the proceedings. The court below further taking note that the trial is under POCSO Act which contains a provision for concluding the proceedings expeditiously, has concluded that there was no reason to allow the application under Section 311 Cr.P.C. seeking recall of the witness and accordingly the same has been rejected.

4. Learned Additional Advocate General supporting the order passed by the court below has pointed out that the testimony of the PW-2 having already been recorded long back and no plausible ground having been made out by the accused-applicant for recall of the witness, the application under Section 311 Cr.P.C. has rightly been turned down. Learned Additional Advocate General also points out that the POCSO Act is a special Act which contains a specific provision for expeditious disposal of trial.

5. On the scope of powers to be exercised under Section 311 Cr.P.C., reliance has been placed on the decision of this Court in **Ajmer vs. State of U.P.2**, and also a recent decision dated 22.11.2021 in **Manish vs. State of U.P. and another3.**

6. The facts as noticed by the court below in the order dated 12.08.2021 whereunder the application under Section 311 has been rejected, indicate that the examination-in-chief of the victim PW-2 was recorded on 29.01.2021 and her cross-examination was also completed by the counsel for the accused-applicant on the same date. The court below has also noticed that the questions which are proposed to put to the aforesaid witness, as stated in the application under Section 311, have already been put to the witness earlier on behalf of the defence counsel. Further, the fact that the cross-examination of the other witnesses was still continuing and that the information with regard to the age of the brothers and sisters and other family members of the victim could be elicited from them, has also been taken into consideration to draw a conclusion that the application under Section 311 had been filed only with a view to delay the proceedings.

7. Another fact which has been taken note of is that the matter is pending since the year 2018 and the proceedings being under the POCSO Act, the same were required to be concluded expeditiously.

8. In this regard, it would be relevant to take notice of the fact that the POCSO Act has been

enacted as a self contained comprehensive legislation interalia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Court for speedy trial of such offences.

9. The relevant provisions of the POCSO Act, which shall shortly be referred to, are being extracted below:-

"28. Designation of Special Courts.- (1) For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act:

Provided that if a Court of Session is notified as a children's court under the Commissions for Protection of Child Rights Act, 2005 or a Special Court designated for similar purposes under any other law for the time being in force, then, such court shall be deemed to be a Special Court under this section.

(2) While trying an offence under this Act, a Special Court shall also try an offence other than the offence referred to in sub-section (1)], with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

(3) The Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000 (21 of 2000), shall have jurisdiction to try offences under section 67-B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any act, or conduct or manner or facilitates abuse of children online.

33. Procedure and powers of Special Court.- (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.- For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973(2 of 1974) for trial before a Court of Session.

35. Period for recording of evidence of child and disposal of case.- (1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence." (emphasis supplied)

10. The POCSO Act, which is a special enactment, contains provisions for designation of Special Courts under Chapter VII, and sub-section (1) of Section 28 provides for designation of a Court of Session to be a Special Court for each district to try the offences under the Act, for the purposes of providing a speedy trial.

11. The procedure and powers of Special Courts and recording of evidence is contained under Chapter VIII of the POCSO Act. Section 33 (1) empowers the Special Court to take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

12. Section 35 is with regard to the period for recording of evidence of child and disposal of case, and sub-section (1) thereof mandates that the evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court. Sub-section (2) of Section 35 provides that the Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

13. It would be seen that the POCSO Act has been enacted as a self contained comprehensive legislation to provide for protecting of children from the sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and also provision for establishment of Special Courts for speedy trial of such offences.

14. One of the principal objectives of enactment of the POCSO Act as a special Act being for providing a special procedure to ensure speedy trial so as to protect the children in respect of certain specified offences, the provisions of the enactment would have to be interpreted in a manner so as to effectuate the object of the enactment and not to frustrate the same.

15. Having regard to the aforesaid, the conclusion drawn by the court below with regard to the application under Section 311 having been filed so as to delay the proceedings, cannot be said to be without basis in view of the object of ensuring the speedy trial under the special Act.

16. As regards, the nature and scope of the power of the court to summon, examine, recall and re-examine any witness in the context of Section 311 Cr.P.C., the said provision (and also the corresponding provision as contained in Section 540 of the Old Code of 1898) was subject matter of consideration in **Mohanlal Shamji Soni v Union of India and another4**, and it was held that the power in this regard is in the widest terms exercisable at any stage so long as the court is in seisin of the proceeding as may be considered essential for a just decision of the case.

17. In **U.T. of Dadra and Nagar Haveli v Fatehsinh Mohansinh Chauhan5**, while considering the power of the court to summon material witnesses under Section 311 Cr.P.C., it was opined that the said power can be exercised only with the object of finding out the truth or obtaining proper proof of facts which may lead to a just and correct decision.

18. The nature, scope and object of Section 311 Cr.P.C. came to be extensively discussed in **Zahira Habibullah Sheikh (5) and another v State of Gujarat and others6**, and a view was taken that the underlying object of the provision is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side.

19. A similar view was reiterated in **P. Sanjeeva Rao v State of A.P.7**, after referring to the earlier decisions in **Hoffman Andreas v Inspector of Customs8, Mohanlal Shamji Soni v Union of India4** and **Maria Margarida Sequeria Fernandes v Erasmo Jack de Sequeria9.**

20. Considering the scope and object of Section 311 Cr.P.C. in **Natasha Singh v CBI10**, it was held that the power conferred is to 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.

21. The nature and scope of the powers to be exercised by the court under Section 311 Cr.P.C. was elaborately considered in the case of **Rajaram Prasad Yadav v State of Bihar and another11** and after considering the earlier precedents, the principles to be followed by the courts with regard to exercise of powers under the said section have been explained and enumerated. It has been stated thus:-

"14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case...It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under

the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

x x x

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC...we feel the following principles will have to be borne in mind by the courts:

17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant

material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 CrPC 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 care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

22. The power to summon material witnesses under Section 311 Cr.P.C. which falls under Chapter XXIV containing the general provisions as to inquiries and trials has been held to confer a very wide power on the courts for summoning witnesses and accordingly the discretion conferred is to be exercised judiciously as wider the power the greater is the necessity for application of judicial mind.

23. The power conferred has been held to be discretionary and is to enable the court to determine the truth after discovering all relevant facts and obtaining proper proof thereof to arrive at a just decision in the case. The power conferred under Section 311 is to be invoked by the court to meet the ends of justice, for strong and valid reasons and it is to be exercised with great caution and circumspection. The determinative factor in this regard would be whether the summoning or recalling of the witness is in fact, essential to the just decision of the case keeping in view that fair trial - which entails the interests of the accused, the victim and of the society - is the main object of the criminal procedure and the court is to ensure that such fairness is not hampered or threatened in any manner.

24. The aforementioned legal position has been discussed in detail in a recent decision of this court in **Ajmer vs. State of U.P.2 and Manish Vs. State of U.P.** and **another3.**

25. Counsel for the applicant has not been able to dispute the aforestated legal position with regard to the scope of the powers of the court under Section 311 Cr.P.C. and has not been able to point out any material error or illegality in the exercise of the aforesaid discretion by the court below, which may warrant interference.

26. Having regard to the aforesaid, this Court is not inclined to exercise its inherent jurisdiction under Section 482 Cr.P.C. in the facts of the case.

27. The application stands accordingly **dismissed.**

(2021)12ILR A601
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2021

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Application U/S 482 No. 19058 of 2021
AND
Application U/S 482 No. 20723 of 2021

Mohit Srivastava ...Applicant
Versus
The State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vinayak Mithal, Sri Sagar Mehrotra, Sri Dileep Kumar (senior Adv.)

Counsel for the Opposite Parties:
A.G.A., Sri Ishwar Kumar Upadhyay, Sri G.S. Chaturvedi (Senior Adv.)

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 120, 120-B 427, 436 - quashing of entire proceeding-AC was fitted in the hotel and it got disturbed again and again and the same was guaranteed by the Company-mechanic was sent by the company to get it repaired-it is stated that it got short circuit due to supply of oxygen instead of nitrogen-but after examination of all witnesses it is found that there was no error committed by the applicants in repairing AC nor the fire ablazed in the hotel due to inadvertant mistake of the company's mechanic-Learned court below committed material error or illegality while passing the summoning order-the same is set aside.(Para 1 to 22)

The application is allowed. (E-6)

List of Cases cited:

1. Vijay Dhanuka & ors. Vs Najima Mamtaj & ors. (2014) 14 SCC 638

2. Abhijit Pawar Vs Hemant Madhukar Nimbalkar & anr. (2017) 3 SCC 528

3. National Bank of Oman Vs Barakara Abdul Aziz & anr. (2013) 2 SCC 488

4. Mehmood Ul Rehman Vs Khazir Mohammad Tunda & ors. (2015) 12 SCC 420

(Delivered by Hon'ble Gautam Chowdhary, J.)

1– आवेदक मोहित श्रीवास्तव की ओर से धारा 482 दं0प्र0सं0 के अन्तर्गत आवेदन पत्र सं0 19058 सन 2021, परिवाद वाद सं0 2264 सन 2019, अन्तर्गत धारा 120, 427, 436 भा0दं0वि0, थाना फेफना, जिला बलिया में मुख्य न्यायिक मजिस्ट्रेट, बलिया द्वारा पारित तलबी आदेश दि0 18–8–2021 की कार्यवाही तथा परिवाद वाद की संपूर्ण कार्यवाही को अपास्त करने हेतु दायर किया गया है।

2– आवेदक राहुल सिंह की ओर से धारा 482 दं0प्र0सं0 के अन्तर्गत आवेदन पत्र सं0 20723 सन 2021, परिवाद वाद सं0 2264 सन 2019, अन्तर्गत धारा 120–बी, 427, 436 भा0दं0वि0, थाना फेफना, जिला बलिया में मुख्य न्यायिक मजिस्ट्रेट,बलिया द्वारा पारित तलबी आदेश दि0 18–8–2021 की कार्यवाही तथा परिवाद वाद की संपूर्ण कार्यवाही को अपास्त करने हेतु दायर किया गया है।

3– दोनों वादों में उभय पक्ष के विद्वान अधिवक्ताओं का कथन है कि उपरोक्त दोनों वादों की घटना, परिवाद वाद तथा प्रसंज्ञान/तलबी आदेश समान हैं, इसलिए दोनों वादों को एक साथ संबद्ध करते हुए उनकी सुनवाई एवं निस्तारण एक साथ कर दिया जाय।

4– उभय पक्ष के विद्वान अधिवक्ताओं के कथनों एवं मामले के तथ्यों को देखते हुए इन दोनों वादों को एक साथ संबद्ध किया जाता है तथा उनकी सुनवाई एवं निस्तारण एक साथ किया जा रहा है।

5– आवेदकगण के विद्वान अधिवक्तागण ने अपना–अपना पूरक शपथपत्र प्रस्तुत किया, उन्हें उनके पत्रावलियों पर रखा जाय।

6– आवेदन पत्र सं0 19058 सन 2021 में आवेदक मोहित श्रीवास्तव के विद्वान अधिवक्तागण सर्वश्री विनायक मित्थल एवं सागर मेहरोत्रा तथा उनके वरिष्ठ अधिवक्ता श्री दिलीप कुमार, विपक्षी सं0 2 के विद्वान वरिष्ठ अधिवक्ता श्री गोपाल चतुर्वेदी तथा विपक्षी सं0 1 उ0 प्र0 राज्य की ओर से श्री अमित सिंह चौहान विद्वान अपर शासकीय अधिवक्ता को सुना तथा पत्रावली का परिशीलन किया।

7— आवेदन पत्र सं0 20723 सन 2021 में आवेदक राहुल सिंह के विद्वान अधिवक्ता श्री अजीत कुमार सिंह, विपक्षी सं0 2 के विद्वान अधिवक्ता श्री ईश्वर कुमार उपाध्याय तथा विपक्षी सं0 1 उ0 प्र0 की ओर से श्री मयंक अवस्थी विद्वान अपर शासकीय अधिवक्ता को सुना तथा पत्रावली का परिशीलन किया।

8— वाद के तथ्य संक्षेप में इस प्रकार है कि परिवादी द्वारा मुलजिमान/आवेदकगण के विरूद्ध अवर न्यायालय में इस आशय का परिवाद दाखिल किया गया कि परिवादी का एक प्रतिष्ठान होटल बैलियंस के नाम से फेफना में स्थित है, जिसमें परिवादी ने डेफिन कम्पनी का ए0सी0 बी0आर0बी0 तकनीक लगवाया है। ए0 सी0 गारन्टी समय में खराब हो गया, जिसकी सूचना होटल बैलियंस के प्रबन्धक द्वारा डेकिन कम्पनी के यू0पी0 प्रमुख श्री मोहित श्रीवास्तव, कार्यालय शालीमार टाइटेनियम बिल्डिंग नियर इन्दिरा प्रतिष्ठाान गोमती नगर, लखनउ एवं डेकिन कम्पनी के अधिकृत सर्विस प्रोवाइडर एवं डीलर इलेक्ट्रो वर्ल्ड के श्री राहुल सिंह को दी गयी, परन्तु ए0सी0 ठीक न हो पाने के कारण व्यवसायिक क्षति होने पर पुनः संबंधित डीलर गोरखपुर एवं डेकिन यू0पी0 प्रमुख को ई—मेल आई0डी0 पर ए0सी0 ठीक करने हेतु कई बार मेल किया गया, फिर भी प्रतिष्ठान की ए0सी0 ठीक नहीं कराये। तब उन दोनों के मोबाइल पर वार्ता किया गया तो श्री राहुल सिंह ने धमकी देते हुए कहा कि ज्यादा जल्दबाजी करोगे तो ए0सी0 को ऐसा ठीक कर दूँगा कि फिर होटल चलाने लायक भी नहीं रह जाओगे। तब दोनों को पुनः बताया गया कि ए0सी0 वर्तमान समय में गारन्टी में है और उसे ठीक कराने की सम्पूर्ण जिम्मेदारी आप लोगों की है। ए0सी0 खराब होने के कारण परिवादी के होटल की क्षति हो रही है, जिसकी सूचना होटल बैलियंस के प्रबन्धक द्वारा सम्बन्धितों को ई—मेल आई0डी0 पर ए0सी0 ठीक करने हेतु कई बार मेल एवं फोन से रूष्ट होकर डेकिंग कम्पनी के यू0पी0 प्रमुख श्री मोहित श्रीवास्तव एवं राहुल सिंह जानबूझकर षडयन्त्र करके, विद्वेषपूर्ण आशय से तथा जन धन की क्षति पहुॅचाने के उद्देश्य से दि0 20—7—2019 को प्रार्थी के होटल में ए0सी0 ठीक कराने हेतु यह कहे कि अधिकृत प्रशिक्षित कर्मचारियों को भेज रहा हूँ, कुछ कर्मचारी आए और ए0सी0 ठीक करने लगे और दि0 21—7—2019 को ए0सी0 में नाईट्रोजन गैस भरने की जगह आक्सीजन गैस कम्पनी के अधिकृत कर्मचारियों द्वारा भर दिया गया, जिसके कारण करीब एक बजे दिन में होटल में बहुत तेज धमाका हुआ और आग लग गयी, किसी तरह से होटल के कर्मचारीगण एवं ग्राहक अफरा—तफरी में भागकर अपनी जान बचाये। होटल को काफी क्षति हुयी। इसके पूर्व भी डेकिन कम्पनी के यू0पी0 प्रमुख श्री मोहित श्रीवास्तव अपने अधिकृत डिस्ट्रीब्यूटर सहज प्रताप सिंह नन्दा, फर्म व देदर प्वाइन्ट दुकान सं0 1, आदि में आग लगवा चुके हैं। इससे स्पष्ट है कि डेकिंग कम्पनी के श्री मोहित श्रीवास्तव एवं राहुल सिंह ने साजिश के तहत व जनहानि के उद्देश्य से अप्रशिक्षित लोगों को भेजकर यह पूरी घटना षडयन्त्र के तहत किये व कराये हैं। आवेदकगण के इस कार्य से होटल बैलियंस का 30—35 लाख रूपये का नुकसान हुआ है।

9— विद्वान अवर न्यायालय द्वारा, परिवाद में किये गये अभिकथनों, परिवादी के बयान अन्तर्गत धारा 200 दं0प्र0सं0, परिवादी की ओर से प्रस्तुत साक्षियों के बयान अन्तर्गत धारा 202 दं0प्र0सं0 तथा परिवादी द्वारा प्रस्तुत दस्तावेजी साक्ष्यों के आधार पर अभियुक्तगण/आवेदकगण के विरूद्ध अपराध अन्तर्गत धारा 436, 120—बी, 427 भा.0दं0वि0 में विचारण हेतु आहूत किया।

10— आवेदकगण के विद्वान अधिवक्तागण का कथन है कि आवेदकगण निर्दोष हैं, उनके विरूद्ध उपरोक्त धाराओं का कोई अपराध गठित नहीं होता है विद्वान मुख्य न्यायिक मजिस्ट्रेट, बलिया द्वारा वाद सं0 2264 सन 2019 में पारित तलबी आदेश विधि विरूद्ध है, प्रश्नगत आदेश पारित करते समय साक्ष्यों का उचित मूल्यांकन नहीं किया गया है, इसलिए प्रश्नगत आदेश अपास्त किए जाने योग्य हैं।

11— आवेदकगण के विद्वान अधिवक्तागण ने यह भी तर्क प्रस्तुत किया कि प्रभारी अग्नि शमन अधिकारी, बलिया ने तथाकथित अग्नि दुर्घटना के बारे में अपने आख्या क्रम सं0 227, मासिक सं0—7, दिनांक 21—7—19 प्रस्तुत की है, जो इस प्रकार है :—

ष्अग्नि काण्ड की सूचना प्राप्त होते ही टी0 एस0 यूनिट तत्काल घटना स्थल पर पहुॅचकर देखा गया कि आग **बैलियन्स होटल के कमरा नं0 206 एवं 207 में ए0सी0 में लगी थी,** जिसको होटल के कर्मियों द्वारा प्राथमिक उपकरण से आग को बुझा दिया। बाद समाप्त निरीक्षण करके, टी0 एस0 यूनिट वापस आयी।ष

इस प्रकार प्रभारी अग्नि शमन अधिकारी बलिया की आख्या से स्पष्ट होता है कि उक्त आग **बैलियन्स होटल के कमरा नं0 206 एवं 207 में ए0सी0 में लगी थी,** जो किसी के द्वारा लगायी नहीं गयी, बल्कि आग ए0सी0 में स्वयं लगी थी।

12— आवेदकगण के विद्वान अधिवक्तागण ने पूरक शपथपत्र के साथ संलग्न, साक्षी धीरेन्द्र सिंह यादव, मुख्य अग्निशमन अधिकारी, बलिया द्वारा अवर न्यायालय के समक्ष धारा 202 दं0प्र0सं0 के अन्तर्गत दिए गए बयान की ओर न्यायालय का ध्यान आकृष्ट किया, जो इस प्रकार है :—

ष्होटल बलियांस, थाना फेफना में दि0 21—7—2019 को समय 13.10 बजे पर अग्नि कांड की सूचना प्राप्त हुयी। सूचना प्राप्त होने के उपरान्त अग्नि शमन यूनिट घटना स्थल में उपलब्ध हुआ। होटल बलियांस के कमरा नं0 206, 207 में अग्नि कांड की घटना घटित हुयी थी। जिसे वहॉ पर उपलब्ध उपकरण अग्नि शमन के द्वारा बुझा दिया गया था। आग **ए0सी0 में शार्ट सर्किट से लगी थी**, जिसमें कोई भी हताहत नहीं हुआ था और न ही कोई मरा था। होटल में

उपस्थित ग्राहक व कर्मचारियों की जान बच गयी। आर्थिक रूप से लगभग 1,90,000/– की क्षति आंकी गयी थी। बाद आवश्यक कार्यवाही अग्नि शमन यूनिट वापस आयी तथा यही मेरा बयान है। फायर रिपोर्ट की असल की फोटो कापी दाखिल किया गया जिस पर मेरा हस्ताक्षर है जिसकी मैं पहचान करता हूँ जिस पर प्रदर्श क–1 डाला गया।

13– आवेदकगण के विद्वान अधिवक्ता ने यह भी तर्क प्रस्तुत किया कि उक्त धीरेन्द्र सिंह यादव विपक्षी का ही गवाह है, जिसने कहा है कि ए0 सी0 में शार्ट सर्किट से आग लगी थी। इस गवाह ने जब विपक्षी विपक्षी का विरोध करते हुए सत्य बात कह दी तो विपक्षी सं0 2 ने अन्य कहानी बनाने हेतु ए0 सी0 मैकेनिक मै0 राज इण्टरप्राइजेज का लेटर दि0 5–8–2021 लगा दिया, जो इस प्रकार है :–

ष्मैं अमित कुमार पुत्र श्री राज किशोर प्रसाद निवासी माल्देपुर ;हैबतपुरद्ध बलिया का निवासी हूँ। मैं L.G. Electronic Pvt. Ltd. का 12 साल तक ए0सी0 इंजीनियर था व Samsung India Pt. Ltd. में 3 साल का म्ाचमतपमदबम है। वर्तमान में Blu Star Authorised Partner व इंजीनियर हूँ। जो वहॉ आगजनी हुई उसके बाद हमें वहॉ बुलाया गया क्योंकि हम लोकल मैकेनिक हैं, ए0सी0 के आग का कारण पता जानने के लिए बैलियंस होटल के मालिक द्वारा सूचना देने पर मैं वहॉ गया था। बार बार ए0सी0 खराब होने के कारण मैकेनिक आये गोरखपुर इलेक्ट्रोवर्ल्ड से जिसका नाम **मकसूद** था। साजिश के तहत उसने नाइट्रोजन की जगह ऑक्सीजन गैस डाल दी जिससे विस्फोट हुआ और आग लग गई द्वितीय तल पर। आग लगने का कारण यह था कि R4 10 गैस हाई प्रेसर गैस है और 02 का मिश्रण होने के कारण विस्फोट होने की रासायनिक प्रक्रिया पाई जाती है।ष

उक्त **अमित कुमार** का न्यायालय में परीक्षण नहीं कराया गया तथा अमित कुमार ने जिस **मकसूद** नामक मैकेनिक का उल्लेख अपने पत्र में किया है, उसका भी न्यायालय में परीक्षण नहीं किया गया, जबकि इन्हें परीक्षित किया जाना आवश्यक था, इसके अभाव में प्रश्नगत आदेश पारित कर दिया गया।

14– इस संबंध में विद्वान अधिवक्तागण ने अपने तर्क के समर्थन में धारा 68 भारतीय साक्ष्य अधिनियम की ओर न्यायालय का ध्यान आकृष्ट किया, जो इस प्रकार है :–

"68. Proof of execution of document required by law to be attested. -- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

15– आवेदकगण के विद्वान अधिवक्तागण ने अपने तर्क के समर्थन में Birla Corporation Limited Vs. Adventiz Investments and Holdings Limited and Other (2019) 16 Supreme Court Cases 610 में माननीय उच्चतम न्यायालय द्वारा प्रतिपादित विधि व्यवस्था के प्रस्तर 27, 28 एवं 32 पर विश्वास व्यक्त किया। जो निम्नवत् हैः–

27. In National Bank of Oman v. Barakara Abdul Aziz, the Supreme Court explained the scope of enquiry and held as under:-

"9. The duty of a Magistrate receiving a complaint is set out in Section 202 CrPC and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation under Section 202 CrPC is different from the investigation contemplated in Section 156as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry under Section 202 CrPC is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:

(i) on the materials placed by the complainant before the court;

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and

(iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have."

28. In Mehmood Ul Rehman v. Khazir Mohammad Tunda and Others (2015) 12 SCC 420, the scope of enquiry under Section 202 Cr.P.C. and the satisfaction of the Magistrate for issuance of process has been considered and held as under:-

"2. Chapter XV Cr.P.C. deals with the further procedure for dealing with "Complaints to Magistrate". Under Section 200 Cr.P.C, the Magistrate, taking cognizance of an offence on a complaint, shall examine upon oath the complainant and the witnesses, if any, present and the substance of such examination should be reduced to writing and the same shall be signed by the complainant, the witnesses and the Magistrate. Under Section 202 Cr.P.C, the Magistrate, if required, is empowered to either inquire into the case himself or direct an investigation to be made by a competent person "for the purpose of deciding whether or not there is sufficient ground for proceeding". If, after considering the statements recorded under Section 200 Cr.P.C and the result of the inquiry or investigation under Section 202 Cr.P.C, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he should dismiss the complaint, after briefly recording the reasons for doing so.

3. Chapter XVI Cr.P.C deals with "Commencement of Proceedings before Magistrate". If, in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, the Magistrate has to issue process under Section 204(1) Cr.P.C for attendance of the accused."

32. Considering the scope of amendment to Section 202 Cr.P.C., in Vijay Dhanuka and Others v. Najima Mamtaj and Others (2014) 14 SCC 638, it was held as under:-

"12. ....The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate."

Since the amendment is aimed to prevent persons residing outside the jurisdiction of the court from being harassed, it was reiterated that holding of enquiry is mandatory. The purpose or objective behind the amendment was also considered by this Court in Abhijit Pawar v. Hemant Madhukar Nimbalkar and Another (2017) 3 SCC 528 and National Bank of Oman v. Barakara Abdul Aziz and Another (2013) 2 SCC 488.

16– विपक्षी सं0 2 के विद्वान अधिवक्तागण एवं विद्वान अपर शासकीय अधिवक्तागण ने आवेदकगण के विद्वान अधिवक्तागण के तर्को का खण्डन किया।श्श

17– विपक्षी सं0 2 के विद्वान अधिवक्तागण का कथन है कि परिवादी के होटल में लगाए गए ए0सी0 गारन्टी समय में खराब हो गए, जिसकी सूचना डेकिन कम्पनी के यू0पी0 प्रमुख मोहित श्रीवास्तव एवं डेकिन कम्पनी के अधिकृत सर्विस प्रोवाइडर एवं डीलर इलेक्ट्रो वर्ल्ड के राहुल सिंह को देना स्वाभाविक था तथा उनके द्वारा उक्त ए0सी0 शीघ्र ठीक न कराने पर परिवादी द्वारा अपनी व्यवसायिक क्षति को देखते हुए बार बार उन्हें उनके ई–मेल आई0डी0 पर मेल करना एवं उनके मोबाइल पर वार्ता करना भी आवश्यक था, किन्तु इस पर अभियुक्तगण द्वारा नाराज होकर परिवादी को धमकी दी गयी कि जल्दीबाजी करोगे तो ए0सी0 को ऐसा ठीक कर दूँगा कि फिर होटल चलाने लायक भी नहीं रही जाओगे, इससे ही स्पष्ट हो जाता है कि उन्होंने द्वेषवश परिवादी के होटल में ए0सी0 के माध्यम से आगजनी की घटना को अंजाम दिया है।

18– विपक्षी सं0 2 के विद्वान अधिवक्तागण ने यह भी तर्क प्रस्तुत किया कि घटना के पूर्व विपक्षी सं0 2 से आवेदगण का विवाद एवं झगड़ा हुआ था जिसके द्वेषवश होटल में लगे ए0सी0 में नाइट्रोजन की जगह आक्सीजन भर दी गयी, इस कारण आग लगी। उनका यह भी तर्क है कि जैसा कि आवेदकगण के विद्वान अधिवक्ता ने तर्क प्रस्तुत किया है, इस बारे में उनका कथन है कि शार्ट सर्किट की बात सार्टीफिकेट में नहीं कही गयी, बल्कि अवर न्यायालय में धारा 202 दं0प्र0सं0 के बयान में कही गयी है, इसलिए उनका यह कथन नहीं माना जाना चाहिए।

19– मैंने उभय पक्ष के विद्वान अधिवक्ताओं के तर्को के परिप्रेक्ष्य में पत्रावली पर उपलब्ध साक्ष्य एवं उनके द्वारा, माननीय उच्चतम न्यायालय पारित निर्णयों एवं विधि व्यवस्थाओं का अवलोकन किया।

20– मेरे विचार से आवेदकगण के विद्वान अधिवक्तागण के तकों के प्रकाश में संबंधित विद्वान मुख्य न्यायिक मजिस्ट्रेट को **अमित कुमार** एवं **मकसूद** आदि का बयान लेने तथा सभी परीक्षित गवाहों का उनके द्वारा दिए गए सार्टीफिकेट/पत्रों एवं न्यायालय में दिए गए बयान में विरोधाभाष आदि की समुचित जॉच करानी चाहिए तथा संबंधित मजिस्ट्रेट को इस बात से संतुष्ट होकर प्रश्नगत आदेश पारित करना चाहिए कि प्रथम दृष्टया आवेदकगण के विरूद्ध मामला बन रहा है अथवा नहीं, उपरोक्त साक्षियों द्वारा निर्गत सार्टीफिकेट/पत्र एवं उनके बयानों से यह स्पष्ट नहीं हो पाया है कि होटल के ए0सी0 में आग लगने का कारण, उनमें गलत गैस डालना था। इस प्रकार विद्वान मजिस्ट्रेट को प्रकरण पर समुचित विचारोरान्त तलबी आदेश पारित करना चाहिए था, विद्वान मजिस्ट्रेट ने तलबी आदेश पारित करते समय सुसंगत साक्ष्यों एवं प्राविधानों का समुचित अनुपालन नहीं किया। इस प्रकार प्रश्नगत तलबी आदेश त्रुटिपूर्ण है।

21– तद्नुसार धारा 482 दं0प्र0सं0 के अन्तर्गत दायर यह आवेदन पत्र **स्वीकार** किए जाते हैं तथा परिवाद वाद सं0 2264 सन 2019, अन्तर्गत धारा 120, 427, 436 भा0दं0वि0, थाना फेफना, जिला बलिया में मुख्य न्यायिक मजिस्ट्रेट, बलिया द्वारा पारित तलबी आदेश दि0 18–8–2021 की कार्यवाही तथा परिवाद वाद की संपूर्ण कार्यवाही **अपास्त** की जाती है।

22– कार्यालय को निर्देश दिया जाता है कि इस आदेश की एक प्रतिलिपि संबंधित अवर न्यायालय को अविलम्ब भेजना सुनिश्चित किया जाय।

(2021)12ILR A605
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Application U/S 482 No. 20815 of 2021

Anil ...Applicant

Versus

The State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Arvind Nath Agarwal

Counsel for the Opposite Parties:
A.G.A., Sri K.K. Rajbhar

A. Criminal Law - ode of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 419,420, 466, 471, 120B, 34, 406-challenge to-dismissal of revision-opposite parties illegally encroached the pokhar and constructed Panchayat Bhawan over it-applicant moved application u/s 156(3) in this regard which was rejected and revision of the same also rejected-it is not a case wherein the land is being alienated or transferred in favour of any private person but it is for a public purpose-certain resolution was passed for the purpose of construction which implies that they are the subject-matter of the civil proceedings-learned court below committed no illegality in passing the order.(Para 1 to 28)

B. Power u/s 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. (Para 13 to 15)

The application is dismissed. (E-6)

List of Cases cited:

1. Priyanka Srivastava & ors.. Vs St. of U.P. & ors.. (2015) AIR SC 1758

2. Rambabu Gupta Vs St. of U.P., Cr.MWP NO.3672 Of 2000

3. Sukhbali Vs St. of U.P. (2007) 59 ACC 739

4. Rajendra Singh Gurjer & ors. Vs St. of U.P. & anr, CRLR No. 4787 of 2005

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Arvind Nath Agrawal, learned counsel for the applicant and Sri K.K. Rajbhar, learned counsel, who appears for the opposite party No.1.

2. The applicant has filed present application purported to be under Section 482 Cr.P.C. challenging the order dated 7.6.2019 passed in Complaint Case No.519 of 2019, Anil Kumar Vs. Akram Guddu Mistri and others, under Sections 419, 420, 466, 467, 471, 120(B), 34, 406 I.P.C. against opposite parties no. 2, 3 & 4 as well as the order dated 20.8.2019 passed in Criminal Revision No.115 of 2019, Anil Kumar Vs. Akram Guddu Mistri and others, under Section 397 Cr.P.C. passed by Additional District and Sessions Judge, Court No.8, Jhansi.

3. According to the applicant Gata No.313 Rakba 0.24 hectare situate in Village Mau, Tehsil Mauranipur, which is recorded as Pokhar in the revenue records. However, the opposite parties have illegally encroached the said Pokhar and have constructed Panchyat Bhawan over it.

4. In the nutshell, according to the applicant, opposite party no.2 is a Gram Prdhan, opposite party no.3 is a Lekhpal and opposite party no.4 is a Gram Panchayat Adhikari, who convinced each-other, have illegally encroached the said piece of land which has been recorded as Pokhar for the purposes of construction of Panchayat Bhawan after passing illegal and unwarranted resolution in this regard.

5. As per the case set forth by the applicant, the applicant preferred an application under Section 156(3) Cr.P.C. before the C.J.M. Jhansi for issuance of an appropriate direction for lodging an FIR under Sections 419, 420, 466, 467, 471, 120(B), 34, 406 I.P.C. which was numbered as Case No.519 of 2013, Anil Kumar Vs. Akram Guddu Mistri and others. The application so preferred by the applicant before C.J.M. Jhansi came to be rejected by virtue of passing an order dated 7.6.2019.

6. The applicant being aggrieved against the order dated 7.6.2019 preferred a revision which was numbered as Criminal Revision No.115 of 2019, Anil Kumar Vs. Akram Guddu Mistri and others. A copy of memo of revision has been annexed as annexure-5 to the application. That the court of Additional District and Sessions Judge, Court No.8, Jhansi has now passed an order dated 20.8.2019 rejecting the revision so preferred by the applicant upholding and affirming the order dated 7.6.2019.

7. The applicant now is before this Court challenging the aforesaid both orders.

8. Before proceeding further this Court finds necessary to quote provisions contained under Section 154 and Section 156 of the Code of Criminal Procedure which reads as under:

"154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

"156. Police officer' s power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2)No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

9 Sub-section (1) of Section 154 Cr.P.C. itself provides that every information relating to commission of cognizable offence, if given orally to an officer-in-charge of a police station shall be reduced to writing by him or under his direction and to read over to the informant and every such information whether given in writing or reduced to writing shall be signed by a person giving it and the substance thereof shall be entered in the book to be kept by the officer.

10. Further Sub-section (3) of Section 154 itself mandates that any person aggrieved by a refusal on the part of an officer-in-charge of police station to record the information referred to in Sub-section (1) may send the substance of the information in writing and by post to Senior Superintendent of Police concerned, who have satisfied that such information discloses the commission of cognizable offence shall either investigate case himself and direct an investigation to be done by a police officer subordinate to it.

11. Thus two opportunities have been provided under Section 154 of the Cr.P.C. at first instance before the concerned police authorities at the concerned police station and secondly before the Senior Superintendent of Police.

12. In case the officer-in-charge of the police station and also the Senior Superintendent of Police does not register the FIR on the basis of the information of the informant regarding

commission of cognizable offence then under Section 156(3) of the Cr.P.C. Magistrate may direct for lodging of the FIR.

13. The issue with respect to exercise of powers under Section 156(3) of the Code of Criminal Procedure has also been taken note in the case of **Priyanka Srivastava and Ors. vs. State of U.P. and Ors**. reported in **AIR 2015 SC 1758** wherein para 26 and 27 following has observed:-

"26. 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.

27. 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. We have already indicated that there has to be prior applications Under Section 154(1) and 154(3) while filing a petition Under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application Under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate Under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

14. The Full Bench of this Hon'ble Court in **Criminal Misc. Writ Petition No.3672 of 2000 decided on 27.4.2001**, ***Rambabu Gupta Vs. State of U.P***. in para 17 observed as under:-

"17. In view of the aforesaid discussion on the legal provisions and decisions of the Supreme Court as on date, it is hereby held that on receiving a complaint, the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to the police station for being registered and investigated. The Magistrate's

order must indicate application of mind. If the Magistrate takes cognizance, he proceeds to follow the procedure provided in Chapter XV of Cr P.C. The first question stands answered thus."

15. Yet a Division Bench of this Court in Criminal Misc. Application No.9297 of 2007 decided on 18.9.2007. A Division Bench of this Court in the case of ***Sukhbali Vs. State of Uttar Pradesh*** reported in ***2007 (59) ACC 739*** in para 22 has observed as under:-

"22. Applications under Section 156(3) Cr. P.C. are now coming in torrents. Provisions under Section 156(3) Cr.P.C. should be used sparingly. They should not be used unless there is something unusual and extra ordinary like miscarriage of justice, which warrants a direction to the Police to register a case. Such applications should not be allowed because the law provides them with an alternative remedy of filing a complaint, therefore, recourse should not normally be permitted for availing the provisions of Section 156(3) Cr.P.C."

16. A judicial notice has been taken by this Court in the case of ***Sukhbali (Supra)*** that applications under Section 156(3) Cr.P.C. are now coming in torrent and thus exercise of the powers under Section 156(3) Cr.P.C. should be used sparingly and not in routine manner.

17. Admittedly, in the present case, the applicant had preferred an application under Section 156(3) Cr.P.C. for the purposes of issuance of a direction for lodging an FIR against opposite parties no. 2 to 4. The application so preferred by the applicant came to be rejected by virtue of order dated 7.6.2019. The applicant being aggrieved against the same, preferred a revision no. 115 of 2019 which ultimately may be with the same fate.

18. Both the courts below have recorded a categorically findings of fact that the land in question which is being sought to be allotted by the applicant to be a Pokhar and which is being used by the opposite party nos. 2 to 4 for the purposes of construction of Panchayat Bhawan is a matter within realm and purview of civil proceedings. Even in fact both the courts below have also taken notice of the provisions contained under the U.P. Land Revenue Code, 2006 (In short 'Code, 2006') which is containing the provision with respect to dealing with those contingencies whereat the public land is being sought to be encroached or misappropriated by any person.

19. The issue in the present case can also be seen from another point of angle that here the land is being used for construction of a Panchayat Bhawan over a public land. It is not a case wherein the land is being alienated or transferred in favour of any private person but it is for a public purpose.

20. Needless to point out that it is admitted case of the applicant himself that certain resolutions have been passed for the purposes of construction of Panchayat Bhawan which implies that they are the subject matter of civil proceedings which cannot be given tinch.

21. Nevertheless, it is not a case wherein the applicant is remedyless as the entire mechanism as contained under the Code, 2006 is also available to him.

22. As already observed held by the Apex Court and this Court that an order under Section 156(3) Cr.P.C. for lodging an FIR cannot be granted or mere asking as in a given case whenever an application is filed for lodging an FIR under Section 156(3) Cr.P.C. then the Magistrate concerned has to apply his mind and accord a prima facie satisfaction as to whether

the case warrants direction that order for lodging FIR.

23. Learned counsel for the applicant has relied upon a judgment in **Criminal Revision No.4787 of 2005, Rajendra Singh Gurjer & others Vs. State of U.P. & another** decided on 7.12.2017 so as to contend that in the disputes of the same nature, criminal proceedings can be instituted.

24. This Court after going through the judgement in the case of **Rajendra Singh Gurje (Supra)** does not find that the said case is applicable in the present facts of the case. As the facts of the said case are entirely different and no proposition of law so convinced by the applicant has been laid down.

25. Lastly, learned counsel for the applicant has drawn the attention of the court towards order dated 3.8.2021 passed in Application Under Section 482 No.13414 of 2021, Srikant Vs. State of Uttar Pradesh but the said judgment emanates from the issuance of notice, under Section 107/116 Cr.P.C.

26. Looking to the facts of the circumstances of the case as pleaded and canvassed by the learned counsel for the applicant, this Court does not find any legal infirmity in the orders passed dated 7.6.2019 and 20.8.2019 under challenge and hence the present application under Section 482 Cr.P.C is liable to be dismissed.

27. No other point has been raised by learned counsel for the applicant.

28. Accordingly, the application is **dismissed.**

(2021)12ILR A610
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Application U/S 482 No. 21881 of 2021

Rajesh & Ors. ...Applicants
Versus
The State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ajay Kumar, Sri Chandrama Singh

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

A. Criminal Law - Code of Criminal Procedure,1973-Section 482 - Indian Penal Code,1860-Sections 147, 148, 452, 427, 323, 354-Kha, 506-quashing of charge-sheet and summoning order-opposite party lodged the FIR against the applicants that the applicants tried to grab her land-they had torn her clothes and also started beating her sons-learned court below committed no illegality-no ground to quash the chargesheet and summoning order as the applicants failed to show any jurisdictional error-the factual issues cannot be gone into and no roving inquiry can be made at this stage.(Para 1 to 26)

B. The powers so exercised cannot be put in straitjacket formula as the same has to be exercised as per facts and circumstances of individual cases in hand. the purpose for insertion of section 482 Cr.P.C. is to secure justice and eliminate the chances of any accused being allowed to walk away.the inherent power is alos engrafted just in order to wriggle out an innocent person, who has been falsely implicated in a criminal cases.(Para 8 to 14)

The application is dismissed. (E-6)

List of Cases cited:

1. R.P. Kapoor Vs St. of Punj. (1960) AIR SC 866

2. St. of Har. Vs Bhajan Lal (1992) Supp (1) SCC 335

3. St. of A. P. Vs Golconda Linga Swami (2004) 6 SCC 522

4. Zandu Pharmaceutical Works Ltd. Vs Mohd. Sharaful Haque (2005) 1 SCC 122

5. Sanapareday Maheedhar Seshagiri Vs St. of A.P. (2007) 13 SCC 165

6. St. of Telangana Vs Habib Abdullah Jeelani (2017) 2 SCC 779

7. M/S Neeharika Infras. Pvt. Ltd. Vs St. of Mah. & ors. (2021) AIR SC 192

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Ajay Kumar, learned counsel for the applicants and Sri K.K. Rajbhar, learned A.G.A. for the State.

2. The applicant herein has filed the present application u/s 482 Cr.P.C. for quashing of the entire criminal proceeding against the applicants arising out of Criminal Case No. 8326 of 2020, State Vs. Ravikant & Others, relating to case crime no. 1363 of 2018, u/s 147,148, 452, 427, 323, 354-Kha & 506 IPC, P.S. Kotwali Nagar, District Etah, pending in the court of learned Chief Judicial Magistrate Etah as well as quash the charge sheet no. 345 of 2019 dated 10.06.2019 submitted by the Investigating Officer.

3. Briefly stated facts shorn off unnecessary details are that the opposite party no. 2 lodged the FIR no. 1363 of 2018 on 22.11.2018 before the Police Station Kotwali Nagar, District Etah u/s 147,148, 452, 427, 323, 307, 354-Kha & 506 IPC alleging therein that the opposite party no. 2 is the legally wedded wife of the Amar Singh, R/o Uddaitpur, P.S. Kotwali Nagar, District Etah and she has her own house at Uddaitpur and the opposite party no. 2 was tying her cattle in that house but one Rajesh who happens to be the owner of the small plot just behind the plot of opposite party no. 2, attempted to illegally occupy the property of the opposite party no. 2. According to the opposite party no. 2, she had made a complaint before the police authority regarding the illegal and forcible attempts for taking possession of the land of the opposite party no. 2 in question. However, on 20.11.2018 at about 3 O' clock when the opposite party no. 2 was preparing the feed of the cattle then Rajesh along with Ravikant S/o Charan Singh, Charan Singh S/o unknown, Shushila W/o Rajesh, Ramnath S/o unknown, Pappu S/o Ramnath, Ramsewak S/o Ajvir Singh gathered on a particular point and after discussion, came before the opposite party no. 2 along with the wooden stick and pistol. It is also alleged in the FIR that Pappu was in possession of a pistol and the other accomplishes were having wooden sticks and they wanted to encroach upon the property of the opposite party no. 2 and when the opposite party no. 2 resisted the aforesaid, they started beating her with wooden stick and also humiliated her and further it has been alleged that the they had torn her clothes on account whereof she became semi naked and she started screaming then, the neighbours came in rescue of the opposite party no. 2. At the relevant point of time, Pappu started firing in the air and the aforesaid accused started beating with intention to kill the sons of opposite party no. 2 being Shivam and Veerpal and they also fired upon them and when the aforesaid accused were being resisted by the persons who are standing over there, they ran away.

4. It appears that the Investigating Officer thereafter submitted the charge sheet dated 10.06.2019 against the applicants u/s 147,148, 452, 427, 323, 354-Kha & 506 IPC and the cognizance thereof was taken on 11.09.2020.

5. Aggrieved by the same, the applicants are now before this Court and seeking to challenge the charge sheet dated 10.06.2019.

6. In order to appreciate the controversy between the parties it is apt to refer to section 482 Cr.P.C. which reads as under:-

"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."

7. A plain reading u/s 482 Cr.P.C. itself shows that the same starts with notwithstanding clause and the same confers inherent power upon the High Court to make such order as may be necessary to give effect to any order under the code or to prevent abuse of process of Court or otherwise to ensure the ends of justice.

8. The Hon'ble Apex Court in the case of **R.P. Kapoor Vs. State of Punjab** reported in **AIR 1960 SC 866** has the occasion to consider the parameter provisions contained under section 561-A of the Cr.P.C. 1898 viz a viz the provisions contained under section 482 of the Cr.P.C. 1973 and the Hon'ble Supreme Court has carved out the same exceptions which relating to exercise of inherent power as conferred under section 482 Cr.P.C. referable to quash all the criminal proceeding at the behest of the accused.

"(i) Where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged. Absence of the requisite sanction may, for instance, furnish cases under this category.

(ii) Where the allegations in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the first information report to decide whether the offence alleged is disclosed or not.

(iii) Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561- A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial Magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained."

9. The following judgment in the case of **R.P. Kapoor (supra)** the Hon'ble Apex Court in the case of S***tate of Haryana Vs. Bhajan Lal, 1992 Supp (1) SCC 335*** held as under:-

"102.(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 Act concerned (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 Act concerned, 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."

10. The law laid down in the case of **R.P. Kapoor (Supra)** and **Bhajan Lal (Supra)** was also reiterated in the case of **State of Andhra Pradesh Vs. Golconda Linga Swami (2004) 6 SCC 522** wherein the Hon'ble Apex Court has observed as under:-

"5. Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely: (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognises and preserves inherent powers of the High Courts. All courts, whether civil or criminal, possess in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle quando lex aliquid alique concedit, conceditur et id sine quo res ipsa esse non potest (when the law gives a person anything, it gives him that without which it cannot exist). While exercising powers under the section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide 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. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of the process of the court to allow any action which would result in injustice and prevent promotion of justice. In

exercise of the powers court would be justified to quash any proceeding if it finds that initiation or continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

7. In dealing with the last category, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When 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 appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process, no doubt should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death.....

8. As noted above, 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. Court must be careful to see 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. High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire 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 magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. [See Janata Dal v. H.S. Chowdhary [(1992) 4 SCC 305 : 1993 SCC (Cri) 36 : AIR 1993 SC 892] and Raghubir Saran (Dr.) v. State of Bihar [AIR 1964 SC 1 : (1964) 1 Cri LJ 1] .] It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognisance 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 Code. It is not, however, 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. The complaint/FIR has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant or disclosed in the FIR that the ingredients of

the offence or offences are disclosed and there is no material to show that the complaint/FIR is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceeding."

11. Yet, the Hon'ble Apex Court in the case of **Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque (2005) 1 SCC 122** has observed as under:-

"11. ... 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. Court must be careful to see 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 being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire 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 magnitude and cannot be seen in their true perspective without sufficient material. of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premise arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the 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 Code. It is not, however, 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. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings."

12. Further, in the case of Sanapareday Maheedhar Seshagiri v. State of Andhra Pradesh **(2007) 13 SCC 165** the Hon'ble Apex Court has in pare 31 has further observed as under:-

"31. A careful reading of the abovenoted judgments makes it clear that the High Court should be extremely cautious and slow to interfere with the investigation and/or

trial of criminal cases and should not stall the investigation and/or prosecution except when it is convinced beyond any manner of doubt that FIR does not disclose commission of any offence or that the allegations contained in FIR do not constitute any cognizable offence or that the prosecution is barred by law or the High Court is convinced that it is necessary to interfere to prevent abuse of the process of the Court. In dealing with such cases, the High Court has to bear in mind that judicial intervention at the threshold of the legal process initiated against a person accused of committing offence is highly detrimental to the larger public and societal interest. The people and the society have a legitimate expectation that those committing offences either against an individual or the society are expeditiously brought to trial and, if found guilty, adequately punished. Therefore, while deciding a petition filed for quashing FIR or complaint or restraining the competent authority from investigating the allegations contained in FIR or complaint or for stalling the trial of the case, the High Court should be extremely careful and circumspect. If the allegations contained in FIR or complaint disclose commission of some crime, then the High Court must keep its hands off and allow the investigating agency to complete the investigation without any fetter and also refrain from passing order which may impede the trial. The High Court should not go into the merits and demerits of the allegations simply because the petitioner alleges malus animus against the author of FIR or the complainant. The High Court must also refrain from making imaginary journey in the realm of possible harassment which may be caused to the petitioner on account of investigation of FIR or complaint. Such a course will result in miscarriage of justice and would encourage those accused of committing crimes to repeat the same. However, if the High Court is satisfied that the complaint does not disclose commission of any offence or prosecution is barred by limitation or that the proceedings of criminal case would result in failure of justice, then it may exercise inherent power under Section 482 CrPC."

13. Further in the case of State of Telangana v. Habib Abdullah Jeelani, (2017) 2 SCC 779 the Supreme Court has held in categorically terms that the inherent powers so conferred u/s 482 Cr.P.C. can only be exercised in an appropriate case where no cognizable offence is disclosed in the FIR.

14. Recently, the Hon'ble Supreme Court has reiterated the principles of law as enumerated right from the decision in the case of **R. P. Kapoor (Supra)** and in the case of **M/S Neeharika, Infrastructure Pvt. Ltd. vs. State Of Maharashtra and others** reported in **AIR 2021 SC 192** and the paragraph no. 23 culled the following propositions of law which is enumerated hereinunder:-

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the "rarest of rare cases (not to be confused with the formation in the context of death penalty).

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or

genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

iii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere;

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of

justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;

xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;

xvi) The aforesaid parameters would be applicable and/or the aforesaid aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely, casually and/or mechanically. Normally, when the investigation is in progress and the facts are

hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or "no coercive steps to be adopted" and the accused should be relegated to apply for anticipatory bail under Section 438 Cr.P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or "no coercive steps" either during the investigation or till the investigation is completed and/or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of the quashing petition under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India.

xvii) Even in a case where the High Court is prima facie of the opinion that an exceptional case is made out for grant of interim stay of further investigation, after considering the broad parameters while exercising the powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that it can demonstrate the application of mind by the Court and the higher forum can consider what was weighed with the High Court while passing such an interim order.

xviii) Whenever an interim order is passed by the High Court of "no coercive steps to be adopted" within the aforesaid parameters, the High Court must clarify what does it mean by "no coercive steps to be adopted" as the term "no coercive steps to be adopted" can be said to be too vague and/or broad which can be misunderstood and/or misapplied.

15. In nutshell, it can be safely said that while exercising the powers under section 482 Cr.P.C. the courts of law have to be cautious in exercising of power as extent and the limit of the power is nowhere codified or defined anywhere. The exercise of inherent power is to done in a manner in which there is no scope of injustice as the powers so exercised under the said provisions is to prevent injustice and to secure the ends of justice. However, the powers so conferred under section 482 Cr.P.C. as interpreted by the Hon'ble Supreme Court while defining the scope and the ambit as well as also extent is to be in such a manner there should be prevention of judicial process being exercised by vindictive litigants.

16. Though, obviously the powers so exercised cannot be put in straitjacket formula as the same has to be exercised as per the facts and circumstances of individual cases in hand. Needless to point out that in an appropriate case and in the light of mandate of the Hon'ble Apex Court as referred to above the High courts are not helpless in undoing any wrong or injustice as the only purpose for insertion of section 482 Cr.P.C. is to secure justice and eliminate the chances of any accused being allowed to walk away. Nonetheless, the inherent powers so exercised under section 482 Cr.P.C. is also engrafted just in order to wriggle out an innocent person, who has been falsely implicated in a criminal case. In other words, section 482 Cr.P.C. is a devise in eliminating injustice.

17. On the touch stone of the aforesaid proposition of law as culled out by the Hon'ble Apex court the present case is to be decided.

18. Learned counsel for the applicant has sought to argue that he has not committed any offence as alleged in the FIR culminating into submission of charge sheet. In other words the principal submission of the learned counsel for the applicant is to the extent that he is innocent and the entire allegation so sought to be levelled against him are false and mala fide act. The learned counsel for the applicant has argued on factual score.

19. The learned A.G.A. has argued that at a pre-trial stage, the factual issues cannot be gone into and no roving inquiry can be made at this stage in exercise of inherent jurisdiction contained under sectio 482 Cr.P.C. According to the learned A.G.A., the factual issues so sought to be canvassed by the applicant is to be dealt with at the stage of trial as it might be a defence of the applicant who as a named accused.

20. Having gone through the rival submission of the contesting parties, this Court finds that admittedly FIR was lodged on 22.11.2018 by the opposite party no 2 against the applicant being FIR No. 1363 of 2018 pursuant thereto the proceedings as contemplated under section Cr.P.C. 1973 was followed and charge sheet was submitted on 10.06.2019 by the Investigating Officer and on 11.09.2020 cognizance whereof was taken.

21. On a pointed repeated query being made to the counsel for the applicant as to whether there was any jurisdictional error committed by the court below while issuing summoning order dated 11.09.2020, the learned counsel for the applicant could not point out any jurisdictional error. However, the learned counsel for the applicant has sought to argue on the factual aspects of the matter so as to contend that the allegations which are false and incorrect and further an argument was also sought to be made to such an extent that no cognizable offence is being made out from the bare perusal of the FIR.

22. As noticed above, this Court under inherent power under section 482 Cr.P.C. cannot embark any roving inquiry at pre-trial stage.

23. The Hon'ble Apex Court has repeatedly cautioned the High Court while exercising the power under section 482 Cr.P.C. being inherent powers that it should be exercised sparingly and in circumspection in the rarest of rare case as inherent powers cannot be exercised to scuttle the investigation at pre-trial stage.

24. This Court while going through the FIR as well as charge sheet and the pleadings set forth by the learned counsel for the applicant, finds inability to accept the argument so sought to be raised by the counsel for the applicant.

25. Resultantly, in absence of any infirmity or illegality pointed out by the learned counsel for the applicant, no good ground is made to quash the charge sheet as well as the summoning order, as even otherwise, this Court find that this is not a fit case wherein inherit jurisdiction power under section 482 Cr.P.C. 1973, be invoked.

26. Accordingly, there is no merit in the present application under section 482 Cr.P.C. accordingly, it is liable to be **dismissed.**

27. However, needless to point out that it is always open for the applicant to prefer appropriate application before the court below seeking bail.

(2021)12ILR A619
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.11.2021

BEFORE

THE HON'BLE DR YOGENDRA KUMAR SRIVASTAVA, J.

Application U/S 482 No. 23428 of 2021

Manish ...Applicant
Versus
The State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Sanjay Mishra

Counsel for the Opposite Parties:

A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 452, 302, 364, 201, 34- Challenge to-application u/s 311 seeking recall of witness-PW-1 had duly appeared as witness and was cross-examined by the accused-applicant at length-At the stage of final arguments, seeking recall of witness was only to cause delay in disposal of the case-the power conferred u/s 311 Cr.P.C. has been held to be discretionary and is to enable the court to determine the truth, to meet the ends of justice and valid reasons and it is to be exercised with great caution and circumspection-Hence, trial court committed no material error or illegality in the exercise of the said discretion-no interference requires.(Para 1 to 17)

The application is dismissed. (E-6)

List of Cases cited:

1. Ajmer Vs St. of U.P. (2021) 115 ACC 409

2. Mohanlal Shamji Soni Vs U.O.I. & anr, (1991) SCC (Cri) 595

3. U.T. of Dadra & Nagar Haveli Vs Fatehsinh Mohansinh Chauhan (2006) 7 SCC 529

4. Zahira Habibullah Shelkha (5) & anr. Vs St. of Guj. & ors. (2006) 3 SCC 374

5. P. Sanjeeva Rao Vs St. of A.P.(2012) 7 SCC 56

6. Hoffman Andreas Vs Inspector of Customs (2000) 10 SCC 430

7. Maria Margarida Sequeria Fernandes Vs Erasmo Jack de Sequeria (2012) 5 SCC 370

8. Natasha Singh Vs C.B.I. (2013) 5 SCC 741

9. Rajaram Prasad Yadav Vs St. of Bih. & anr.(2013) 14 SCC 461

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

1. Heard Sri Sanjay Mishra, learned counsel for the applicant and Ms. Sushma Soni, learned Additional Government Advocate appearing for the State-respondents.

2. The present application under section 482 Cr.P.C. has been filed seeking to quash the order dated 21.09.2021 passed by the Additional Sessions Judge/FTC Court No.2, Mainpuri in S.T. No. 393 of 2013 (State vs. Manish and another) arising out of Case Crime No. 407 of 2012, under Sections 452, 302, 364, 201, 34 IPC, P.S. Karhal, District Mainpuri, whereby the application under Section 311 Cr.P.C. moved by the applicant has been rejected.

3. While considering the application filed by the accused-applicant under Section 311 Cr.P.C. the learned trial court has taken notice of the fact that the case was at the stage of final arguments and the witness (PW-1) who was sought to be summoned in terms of the said application had already appeared and had been cross-examined at length by the counsel of the accused-applicant. The trial court on the basis of the aforestated facts has taken a view that in case the accused-applicant wished to impeach the testimony of the PW-1 it would be open for him to do so during the course of final arguments and the application under Section 311 Cr.P.C. at this advanced stage of proceedings was only with a view to cause delay in disposal of the case. The application under section 311 Cr.P.C. seeking recall of the witness was accordingly rejected.

4. Learned Additional Government Advocate has submitted that the power to summon witnesses under Section 311 Cr.P.C. is purely discretionary and in the present case the trial being at the stage of final arguments, the application filed by the applicant/informant could not be said to be *bona fide* and the court below having exercised its discretionary jurisdiction in the matter no interference was called for.

5. The nature and scope of the power of the court to summon, examine, recall and re-examine any witness in the context of Section 311 Cr.P.C. (and also the corresponding provision as contained in Section 540 of the Old Code of 1898) was subject matter of consideration in **Mohanlal Shamji Soni v Union of India and another1,** and it was held that the power in this regard is in the widest terms exercisable at any stage so long as the court is in seisin of the proceeding as may be considered essential for a just decision of the case.

6. In **U.T. of Dadra and Nagar Haveli v Fatehsinh Mohansinh Chauhan2**, while considering the power of the court to summon material witnesses under Section 311 Cr.P.C., it was opined that the said power can be exercised only with the object of finding out the truth or obtaining proper proof of facts which may lead to a just and correct decision.

7. The nature, scope and object of Section 311 Cr.P.C. came to be extensively discussed in **Zahira Habibullah Sheikh (5) and another v State of Gujarat and others3,** and a view was taken that the underlying object of the provision is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side.

8. A similar view was reiterated in **P. Sanjeeva Rao v State of A.P.4,** after referring to the earlier decisions in **Hoffman Andreas v Inspector of Customs5, Mohanlal Shamji Soni v Union of India4** and **Maria Margarida Sequeria Fernandes v Erasmo Jack de Sequeria6.**

9. Considering the scope and object of Section 311 Cr.P.C. in **Natasha Singh v CBI7**, it was held that the power conferred is to 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.

10. The nature and scope of the powers to be exercised by the court under Section 311 Cr.P.C. was elaborately considered in the case of **Rajaram Prasad Yadav v State of Bihar and another8** and after considering the earlier precedents, the principles to be followed by the courts with regard to exercise of powers under the said section have been explained and enumerated. It has been stated thus:-

"14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only

by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

x x x

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 CrPC 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 care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

11. The power to summon material witnesses under Section 311 Cr.P.C. which falls under Chapter XXIV containing the general provisions as to inquiries and trials has been held to confer a very wide power on the courts for summoning witnesses and accordingly the discretion conferred is to be exercised judiciously as wider the power the greater is the necessity for application of judicial mind.

12. The power conferred has been held to be discretionary and is to enable the court to determine the truth after discovering all relevant facts and obtaining proper proof thereof to arrive at a just decision in the case. The power conferred under Section 311 is to be invoked by the court to meet the ends of justice, for strong and valid reasons and it is to be exercised with great caution and circumspection. The determinative factor in this regard would be whether the summoning or recalling of the witness is in fact, essential to the just decision of the case keeping in view that fair trial - which entails the interests of the accused, the victim and of the society - is the main object of the criminal procedure and the court is to ensure that such fairness is not hampered or threatened in any manner.

13. The aforementioned legal position has been discussed in detail in a recent decision of this court in **Ajmer vs. State of U.P.9.**

14. Learned counsel for the applicant has not disputed the fact that the trial is at the stage of final arguments. It is also not disputed that the PW-1 had duly appeared as witness and was cross-examined by the counsel for the accused-applicant at length.

15. Counsel for the applicant has not been able to dispute the aforestated legal position with regard to the exercise of power of the court under Section 311 Cr.P.C. and has not been able to point out any material error or illegality in the

exercise of the aforesaid discretion by the court below so as to warrant interference.

16. Having regard to the aforesaid, this court is not inclined to exercise its inherent jurisdiction under Section 482 Cr.P.C. to interfere in the matter.

17. The application stands accordingly **dismissed.**

(2021)12ILR A624
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.12.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Criminal Revision No. 870 of 2021

Om Prakash ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Babita Verma, Amitabh Singh Raikwar, Gyan Singh Chauhan, Jagjeet Singh

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Family Courts Act, 1984 - Sections 14 & 19(4) - revision - The Code of criminal procedure, 1973 - Section 125 - maintenance, section 362 - No court can alter or review a judgement or a final order once it has been signed, except to correct a clerical or arithmetical error - Power of a magistrate to alter its orders passed under section 125 of the code of criminal procedure for maintenance are not hit by the embargo entailed in section 362 , which bars criminal courts from altering their orders (*Sanjeev Kapoor vs. Chandana Kapoor and Others (2020) 13 SCC 172)* (Para - 8,9)

Application of revisionist paper no. C-45 for forensic examination of the handwriting and photographs in the documentary evidence - Revisionist filed an application C-53 supported by an affidavit - praying for review and modification of the order - trial court rejected the application - ground - under Criminal Procedure Code an order cannot be modified or reviewed by any trial court - hence revision.(Para - 7)

HELD:-Trial court rejected the modification application paper no.C-53 as also the application paper no. C- 45 of the revisionist without looking into the law settled by the Hon'ble Supreme Court in the case of *Sanjeev Kapoor vs. Chandana Kapoor and Others* although the same was cited before it.(Para - 10)

Criminal Revision disposed off.(E-7)

List of Cases cited:-

1. Lakshmi & anr. Vs Chinnammal @ Rayyammal & ors, Civil No. 2243 of 2009

2. Sanjeev Kapoor Vs Chandana Kapoor & ors., Criminal Appeal No. 286 of 2020

3. Sanjeev Kapoor Vs Chandana Kapoor & ors., (2020) 13 SCC 172

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. This Criminal Revision has been filed under Section 19 (4) of the Family Courts Act, 1984 against the impugned Orders dated 07.10.2021 & 26.10.2021 passed by the Additional Principal Judge, Court No.-10, Family Court, Lucknow in Criminal Misc. Case No. 1024 of 2006 in Re: Smt. Rajrani and 2 others vs. Om Prakash, on an application filed under Section 125 Cr.P.C. relating to Police Station Malihabad, District Lucknow.

2. At the outset, learned counsel for the revisionist has stated that he had earlier filed Revision No. 838 of 2021, which was dismissed as withdrawn with liberty to file a fresh revision by this Court vide its order dated 07.12.2021. The application under Section 125 Cr.P.C. was filed by the opposite party no.2 alongwith her two children, who were minors at that time and have now become major and arrayed as opposite

party no. 3 and 4. Such application was filed on 27.11.2006 stating, therein, that she was constantly being harassed with the demand of more dowry ever since the time of her marriage she was also thrown out from the matrimonial home. Later on a compromise occurred between the parties due to the intervention of family and friends. She came back to the matrimonial house where a son was born to her, later on a daughter was also born to her and at the time of making such application they were aged four years and two and a half years, respectively. After the daughter was born, the relationship between the applicant and the revisionist soured to such extent that she had to leave her matrimonial home again and is now residing in her parental house. Since September 2006 till the date of filing of application, no maintenance was given to her by her husband.

3. The applicant was uneducated and unskilled woman and it has been difficult for her to raise her two children, therefore, the maintenance application was filed. On the other hand, the revisionist owned five bighas of land, where he grew vegetables and earned round about Rs.15,000/- per month, also, he was doing wholesale business in Kanpur from which he earned around Rs.15,000/- to Rs. 20,000/- per month. The income of the revisionist being more than 30,000/- per month, a prayer was made that the applicant and her two children be granted Rs. 20,000/- per month as maintenance.

4. The revisionist after issuance of notice filed written statement objection. Thereafter documentary and oral evidence were taken. Thereafter, learned trial court passed the order impugned by which the application of the revisionist paper no. C-45 for forensic examination of the handwriting and photographs in the documentary evidence that were produced by the revisionist was prayed to be got done. The revisionist had argued that in the cross-examination of the applicant on 17.10.2019, she had admitted that the two children who were shown in the photograph were not that of the revisionist, and the handwriting and signatures on paper no. C-32/5 and C-32/6 were not her's.

5. Learned trial court placed reliance upon Section 14 of the Family Courts Act with regard to the power of the Family Court to take documentary evidence into account for a proper adjudication of the case. Even such documentary evidence could be looked into which under the Evidence Act, 1972 was otherwise not admissible. Learned trial court observed that the opposite party who was merely delaying the decision on the application under Section 125 of the Cr.P.C. by moving such an application for getting forensic examination done. In the written statement that were filed by him and the objections paper no. A-3, he had not taken any such objections that were now being raised at the time of arguments that the applicant had married some other person and that the children were not his. The application no.C-45 was rejected and a direction was issued that the matter be listed on 16.10.2021 as the High Court had already passed an order saying that the application of maintenance be decided within three months.

6. The revisionist, thereafter, filed another application C-53, supported by an affidavit praying for review and modification of the order dated 07.10.2021. It was stated that paper no. C32/5 and C-32/6 have been referred to in the order dated 07.10.2021 to be photocopies of original document, however, they were actually the original documents which had been submitted in a sealed cover and were attached alongwith the paper book in its record. This showed that the learned trial court had not even opened the sealed cover and taken a look at paper no. C-32/5 and C-32/6. It was on these papers that his whole defence regarding application for maintenance filed by the applicant were based. Such documents would

show that the applicant was living outside the matrimonial home alongwith her children, out of her own sweet will.

7. It was also argued by the learned counsel for the revisionist that a reference had been made during the course of the argument to the judgement rendered by the Hon'ble Supreme Court in Civil No. 2243 of 2009, ***Lakshmi & Another vs. Chinnammal @ Rayyammal & Ors;*** and another judgement rendered in ***Sanjeev Kapoor vs. Chandana Kapoor and Others*** in Criminal Appeal No. 286 of 2020, but the learned trial court failed to appreciate the law settled by the Hon'ble Supreme Court correctly and rejected the application by saying that under the Criminal Procedure Code an order cannot be modified or reviewed by any trial court.

8. It has been submitted by the learned counsel for the revisionist that the perusal of the judgements rendered by the Hon'ble Supreme Court in the case of ***Sanjeev Kapoor vs. Chandana Kapoor and Others (2020) 13 SCC 172*** in Criminal Appeal No. 286 of 2020 decided on 19.02.2020, which was cited before the trial court would show that the Court had considered the arguments regarding Section 362 Cr.P.C. and the bar mentioned therein for review/modification of order passed by the Criminal Court. The Hon'ble Supreme Court had observed that orders passed under Section 125 Cr.P.C. can be modified on subsequent events taking place for example, when an application for enhancement of maintenance is filed by the applicant. The Hon'ble Supreme Court had observed in paragraph 21 that the legislature was aware that there are and may be the situations where altering or reviewing of criminal court judgement is contemplated in the Code itself or any other law for the time being in force. For example Under Section 145 Cr.P.C. the rigours of Section 362 Cr.P.C. were relaxed. Similarly, Section 125 Cr.P.C. alongwith its Sub-Sections 125 as well as Section 127 of the Cr.P.C. were considered by the Hon'ble Supreme Court and it also considered the trial court's jurisdiction to alter the maintenance on proof of change in circumstances of any person receiving such maintenance under Section 125 Cr.P.C., or where it appeared to the Magistrate that in consequence of any decision of the competent civil court any order made under Section 125 Cr.P.C. should be cancelled or varied, or where any order has been made under Section 125 Cr.P.C. in favour of a woman who has been divorced or has obtained a divorce from her husband, and that after divorce she has re-married or that she has received permanent alimony.

Several such instances were referred to by the Hon'ble Supreme Court where the order passed under Section 125 Cr.P.C. was capable of alteration in terms of the language of different Sections of the Cr.P.C. itself.

9. In paragraph 27 of the report, it referred to Section 362 of the Cr.P.C. and then observed that such embargo is expressly relaxed in a proceeding under Section 125 Cr.P.C., and therefore, the Family Court was entitled to cancel its earlier order and pass a different order in the facts and circumstances of the case before it.

10. This Court having considered the judgement rendered in ***Sanjeev Kapoor vs. Chandana Kapoor and Others*** and also the orders dated 26.10.2021 and 07.10.2021 finds that the learned trial court has rejected the modification application paper no. C-53 as also the application paper no. C-45 of the revisionist without looking into the law settled by the Hon'ble Supreme Court in the case of ***Sanjeev Kapoor(Supra***) although the same was cited before it.

11. Accordingly, this revision is **disposed of** and the orders dated 07.10.2021 and

26.10.2021 are set aside with a direction to the learned trial court to consider both the applications afresh in the light of the judgements rendered by the Hon'ble Supreme Court in the case of ***Sanjeev Kapoor(Supra)*** and pass appropriate orders thereafter within a period of six weeks. from the date of the copy of this order be produced before it.

(2021)12ILR A627
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.10.2021

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE KRISHAN PAHAL, J.

First Appeal No. 241 of 2006

Smt. Vijai Lakshmi ...Appellant
Versus
Lalji ...Respondent

Counsel for the Appellant:
Sri A.K. Gupta, Sri A.K.Mishra, Sri Ashish Agrawal, Sri Dinesh Gupta, Sri Dinesh Mishra

Counsel for the Respondents:
Sri Satish Kumar Mishra, Sri A.C. Tiwari, Sri Arvind Kumar Srivastava, Sri H.P. Dubey, Sri Rajesh Kishore Srivastava, Sri Satish Kumar Mishra

A. Hindu Marriage Act, 1955 – Section 13(1) – Family dispute – Divorce – Cruelty – Proof – Criminal complaint by the wife against husband – Relevancy – Held, mere fact that the wife had lodged the criminal complaint on the allegations of atrocities committed by the husband after a compromise had been arrived between the parties would not be a reason to hold that the complaint was false and the wife had committed cruelty by lodging the said report – The ground for seeking the decree of divorce, i.e cruelty, taken by the husband in the plaint could not be proved by bringing any cogent material on record – The bald assertion of the husband in his statement recorded before the Family Court is not sufficient to prove cruelty on the part of the wife – High Court found the findings returned by the trial court for granting the divorce on the ground of cruelty not sustainable. (Para 13 and 15)

B. Hindu Marriage Act, 1955 – Section 13(1) – Divorce – Irretrievable Breakdown of Marriage – Relevancy – Held, the `irretrievable breakdown of marriage' not being a ground of divorce under Section 13(1) of the Hindu Marriage Act, the decree of divorce cannot be granted on the said ground while deciding the appeal arising out of the proceeding under Section 13(1) of the Hindu Marriage Act. (Para 20)

C. Constitution of India – Article 15(3) and 39 – Right of maintenance – Social justice – While wife had no source of earning, the husband was a permanent driver – Liability of husband to honour matrimonial obligations – Held, maintenance laws have been enacted as a measure of social justice to provide recourse to dependent wife and children for their financial support; so as to prevent them from falling into destitution and vagrancy – Article 15(3) of the Constitution of India reinforced by Article 39 of the Constitution of India envisages a positive role of the St. in fostering change towards the empowerment of women. (Para 29 and 31)

D. Hindu Adoptions and Maintenance Act, 1956 – Section 18 – Right of Maintenance – The right to claim maintenance u/s 18 of the Act, 1956 is a substantive right – Section 18 recognises the right of a Hindu wife to seek maintenance from her husband during her life-time while living separately from her husband – Sub-Section (2) of Section 18 provides that a Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance; if he is guilty of desertion, i.e. abandoning her without reasonable cause and without her consent or against her wish, or of willfully neglecting her – While the wife is forced to live separately as the respondent-husband has deserted her without any reasonable excuse, she is entitled for monthly maintenance during her life-time which is being fixed to the tune of Rs. 30,000/- per month. (Para 35, 37 and 41)

E. Family Courts Act, 1984 – Section 19 – Appellate power of the High Court – Nature and Scope – Held, the appeal u/s 19 of the Family

Courts Act is extension of the proceedings of the Family Court. Meaning thereby, this Court can exercise the same jurisdiction as has been conferred upon the Family Court under the Family Courts Act, 1984. (Para 39)

F. Jurisprudence – Law of equity – A person seeking a relief in the Court of law cannot take benefit of his own wrong. (Para 31)

Appeal allowed. (E-1)

Cases relied on :-

1. Naveen Kohli Vs Neelu Kohli 2006 (4) SCC 558

2. Prakash Chandra Kapoor Vs Smt. Ritu Kapoor; 2005 (2) SCC 22

3. Shivsankaran Vs Santhimeenal; 2021 (5) ALD 286

4. Romesh Chander Kaushal Vs Veena Kaushal; 1978 (4) SCC 70

5. Rajnesh Vs Neha & anr.; 2021 (2) SCC 324

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Krishan Pahal, J.)

1. No one has put in appearance on behalf of the appellant-wife.

2. A perusal of the order dated 04.10.2021 passed by this Court indicates that the parties had appeared in the Court personally but they have not been able to reconcile. The appeal, thus, has been posted for final disposal.

3. Heard learned counsel for the respondent and perused the record.

4. This is wife's appeal against the judgment and order dated 17.05.2006 whereby divorce decree had been passed in favour of the husband.

5. A perusal of the impugned order of the Family Court indicates that the decree of divorce had been granted on the premise that the wife had lodged a false complaint namely Case Crime No.6 of 2003 against the husband which had resulted in incarceration of the husband for 4 days and as such the wife had caused mental cruelty upon the husband. On account of the trauma, the mother of the respondent-husband had died. It was further noted that initially on the similar complaint sought to be filed by the wife, a compromise had been arrived between the parties in the police station and both the parties had reconciled with the intervention of the Station House Officer which made it evident that there was no serious dispute. However, the wife had turned around and contacted the Senior Superintendent of Police again to lodge the report on the allegations of demand of dowry. The Family Court has, thus, opined that the wife had exaggerated the whole matter and lodged a false complaint against the husband for demand of dowry. In such a situation, the marital relationship between the parties had been completely broken and the decree of divorce was liable to be granted.

6. Learned counsel for the respondent-husband, has, defended the decree on the premise that there was no reasonable excuse with the wife to leave her matrimonial home after the compromise had been arrived between the parties with the intervention of wise persons and lastly the police. The wife was guilty of not honouring the terms of the compromise and leaving her matrimonial home without any reason.

7. It is further submitted that the appellant-wife was harassing the respondent and pressurising him to leave his mother alone and move to her paternal home. When the respondent-husband did not accede to the said request she had threatened him to lodge a false complaint and with dire consequences. On 21.11.2002, when the respondent-husband was at home, she had left the house with all jewellery, clothes and Rs.5,000/- without any

information. In the proceeding under Section 9 of the Hindu Marriage Act, however, a compromise had been arrived between them on 09.02.2003 and thereafter, the wife had returned to her matrimonial home. But, again on 17.03.2003, she had left with all the clothes and jewellery in the absence of her husband and despite best efforts of the husband, she did not return and lodged a criminal case on the allegations of demand of dowry. On account of the said cruelty inflicted by his wife, the widow mother of the appellant had died which had resulted in severe mental cruelty to the respondent-husband and as such he was constrained to file the divorce suit.

8. Testing these submissions of the learned counsel for the respondent, having gone through the findings returned by the Family Court as also the statements of the appellant-wife and the respondent-husband, we may note that there are allegations and counter allegations of the parties against each other. On the one hand, the respondent husband had pleaded that his wife had left her matrimonial home without any reasonable excuse and she had taken all clothes and jewellery alongwith cash of Rs.5,000/- on 21.11.2002 when he was present in his house but there is no statement of the husband that he had tried to stop his wife from leaving her matrimonial home. After compromise between the parties, on 09.02.2003 the wife had returned to her matrimonial home. As per the version of the husband, the wife had left her matrimonial home again on 17.03.2003 in his absence taking all clothes and jewellery.

9. This version of the respondent that the appellant-wife had again left her matrimonial home on 17.03.2003 with clothes and jewellery seems to be false at its face value. The reason being that as per own version of the husband, while leaving her matrimonial home on 21.11.2002 his wife had taken all her clothes and jewellery then where was the occasion for her to take the clothes and jewellery again on 17.03.2003, moreso, when the husband had not stated that his wife had brought back her jewellery on returning to her matrimonial home on 09.02.2003.

10. In the said circumstance, the allegations of husband that the wife had left her matrimonial home in his absence with all clothes and jewellery per se appears to be false. We may further note that no report had been lodged by the husband that the wife had taken jewellery on 17.03.2003 other than her stree-dhan in his absence. Further, apart from the bald assertions of the husband, there is no other evidence on record which would substantiate the allegations of the husband that his wife had refused to discharge her matrimonial obligations without any reasonable excuse.

11. On the other hand, the appellant wife in her statement recorded on 15.05.2006 had categorically stated that she was thrown out of her matrimonial home by the husband after she was assaulted physically. Her husband used to demand dowry and assault her on account of which a report was sought to be lodged by her when a compromise had been arrived on 23.01.2003 with the intervention of the police. The copy of the compromise is on record. However, her husband had again thrown her out and hence she had lodged the report. She has categorically stated that she did want divorce.

12. We may further note that in terms of the compromise dated 23.01.2003 the wife had returned to her matrimonial home on 09.02.2003, but, thereafter, in barely one month, she had to approach the Senior Superintendent of Police on 17.3.2003 to lodge the first information report regarding the demand of dowry after she was thrown out as per her version.

13. No one knows as to what had happened inside the four walls of the house. But the record

indicates that the marriage was solemnised on 06.03.2002 and the dispute arose within 4-5 months of the marriage. The allegations and counter allegations are made by the couple to assert that the fault lies on the other side. In this circumstance, it is not possible for the Court to find out as to who was at fault. But that by itself cannot be a reason to grant divorce. The respondent-husband, who is the plaintiff in the divorce suit, was required to substantiate his allegations of commission of cruelty by the wife by bringing cogent evidence. Mere fact that the wife had lodged the criminal complaint on the allegations of atrocities committed by the husband after a compromise had been arrived between the parties would not be a reason to hold that the complaint was false and the wife had committed cruelty by lodging the said report. The ground for seeking the decree of divorce, i.e cruelty, taken by the husband in the plaint could not be proved by bringing any cogent material on record. The bald assertion of the husband in his statement recorded before the Family Court is not sufficient to prove cruelty on the part of the wife.

14. Considering the discussion in the judgment and order dated 17.05.2006, we find that the Family Court had been swayed away by the fact of lodging of the first information report under Section 498-A I.P.C after the wife had left her matrimonial home on 09.02.2003. In any case, the earlier compromise between the parties with the intervention of the police or the act of the wife in lodging the first information report cannot be a reason to presume that only she was at fault and there was no fault on the part of the husband, moreso, when the wife had come forward with the categorical assertion that she was thrown out of her matrimonial home by the husband after beating her.

15. The findings returned by the trial court for granting the divorce on the ground of cruelty, therefore, are not sustainable.

16. Further contention of the learned counsel for the respondent-husband is that the couple are separated for the last 18 years and there are no chances of revival of matrimonial relationship and hence the husband is entitled for the decree of divorce on the ground of 'irretrievable breakdown of marriage', in view of the decision of the Apex Court in the cases of ***Naveen Kohli vs. Neelu Kohli 2006 (4) SCC 558*** and ***Prakash Chandra Kapoor vs. Smt. Ritu Kapoor 2005 (2) SCC 22.***

17. Considering this contention of the learned counsel for the appellant we may note that no such ground for divorce exists in the Hindu Marriage Act. In an appropriate cases, the Apex Court has granted decree of divorce exercising its unique jurisdiction under Article 142 of the Constitution of India, to do complete justice between the parties. Such a course had been adopted in various kinds of cases where there were inter se allegations between the parties and in order to put a quietus to the matter, where the parties withdrew those allegations and by mutual consent.

18. It has been noted by the Apex Court in ***Shivsankaran vs. Santhimeenal reported in 2021 (5) ALD 286*** that the Law Commission in its 71st report made recommendation while departing from the fault theory of divorce to recognise situations where a marriage has completely broken and there is no possibility of reconciliation. It had recommended for incorporation of the situation where neither party need individually be at fault for a breakdown of the marriage which may be the result of prolonged separation, clash of personalities, or incompatibility of the couple. As noted in the Law Commission report, such marriages are merely a shell out of which the substance is gone. For such situations, the Law Commission recommended that the law be amended to provide for 'irretrievable breakdown of marriage' as an additional ground of divorce.

This recommendation was reiterated in its 217th report in the year, 2010 by the Commission. But, these recommendations, have not been implemented. The bill introduced by the Government in the year 2010 namely the Marriage Laws (Amendment) Bill, 2010, reintroduced as the Marriage Laws (Amendment) Bill, 2013, was never passed.

19. It is observed therein that under the Hindu Law, the institution of marriage is sacramental in character and is supposed to be an eternal union of two people. The society at large does not accept divorce, given the heightened importance of marriage as a social institution in India. It is more difficult for women to retain social acceptance after a decree of divorce. This, coupled with the law's failure to guarantee economic and financial security to women in the event of a breakdown of marriage; is stated to be the reason for the legislature's reluctance to introduce irretrievable breakdown as a ground for divorce-even though, there may have been a change in social norms over a period of time. Not all persons come from the same social background, and having a uniform legislative enactment is thus, stated to be difficult. It is in these circumstances that the Apex Court has been exercising its jurisdiction, despite such reservations, under Article 142 of the Constitution of India.

20. As regards the proceedings before us, the present appeal under Section 19 of the Family Courts Act is nothing but an extension of the proceedings of the trial court. While exercising the power of appellate Court, we can grant the decree of divorce in a petition under Section 13(1) of the Hindu Marriage Act, only, in case, any of the grounds for seeking divorce as provided under the said Section is found to be in existence. The 'irretrievable breakdown of marriage' not being a ground of divorce under Section 13(1) of the Hindu Marriage Act, the decree of divorce cannot be granted on the said ground while deciding the appeal arising out of the proceeding under Section 13(1) of the Hindu Marriage Act.

21. The contention of the learned counsel for the respondent seeking dismissal of the appeal on the ground that there are no chances of revival of matrimonial relationship and the husband is entitled for the decree of divorce on account of "irretrievable breakdown of marriage", therefore, is found devoid of merits.

22. As noted above, the respondent-husband has not been to establish the plea of cruelty by the wife i.e. the ground taken by him to seek the decree of divorce in the petition under Section 13(1) of the Hindu Marriage Act filed in the year 2003. The wife has made a categorical claim that she had been thrown out of her matrimonial home as the husband was demanding dowry. The criminal case had been lodged by the wife upon intervention of the Superintendent of Police. Nevertheless, during pendency of the present appeal, on the application filed by the appellant-wife, vide order dated 01.04.2013, monthly maintenance of Rs.10,000/- w.e.f. 01.04.2013 onwards had been awarded. The order-sheet indicates that the order of interim maintenance was not complied with. As a result of which, on 26.05.2014, direction was issued to the respondent to clear all arrears of interim maintenance till June, 2014. The arrears of maintenance had been paid only upon the intervention of the Court. Again, the order dated 06.10.2016 in the order sheet indicates that the respondent-husband did not pay the interim maintenance. It was, therefore, observed in the order dated 17.10.2016 that the appellant-wife was at liberty to recover the amount of maintenance as arrears of land revenue as was due till that date and for future.

23. Again on 21.01.2016, this Court had to issue a non-bailable warrant to ensure presence of the respondent in custody to provide interim

maintenance to the appellant-wife. And only after the respondent-husband had appeared in custody before this Court on 05.12.2016, he had deposited the arrears of maintenance by way of cheque in the account of appellant-wife. Again, by the order dated 08.11.2017, with a view to end the ordeal of the wife, it was directed by this Court that the monthly maintenance of Rs.10,000/- shall be transferred directly in her bank account through RTGS by 7th of each succeeding month.

24. Further, an application No.83384 of 2017 supported by an affidavit was filed by the wife seeking for enhancement of compensation as determined vide order dated 01.04.2013 as well as to grant litigation expenses in lump sum.

25. While disposing of the said application, it has been noted in the order dated 12.12.2017 that there had been repeated defaults in payment of monthly maintenance as fixed by this Court though the respondent was earning a handsome amount on monthly basis being employed as permanent driver in Railways and after enforcement of 7th Pay Commission, there had been substantial increase in his salary. An additional income of Rs.20,000/- per month was stated to be earned by the husband in view of the lease rent of the property owned by him. The husband, however, did not respond to the application of wife and hence, having noted that the assertions of wife remained uncontroverted, monthly maintenance of Rs.30,000/- per month was fixed from December, 2017 payable by 7th of each succeeding month. In addition to the same, the appellant-wife has been held entitled to litigation expenses in lump sum for Rs.30,000/-, payable within a period of one month.

26. The recall application seeking recall of the order dated 12.12.2017 filed by the respondent-husband had been dismissed vide order dated 10.12.2018 with the observations as under:-

"2. This is an application seeking recall of this Court's order dated 12.12.2017 whereby amount of maintenance was enhanced to Rs. 30,000/- per month considering the fact that monthly salary of respondent-husband w.e.f. 01.01.2016 is more than Rs. 1 lac.

3. This factum of salary, we find is not in dispute and, therefore, looking to entire facts and circumstances, we do not find any reason to recall the order dated 12.12.2017. Application is accordingly rejected."

27. The order dated 28.09.2020 further indicates that the learned counsel for the respondent-husband was directed to prepare a draft of the entire defaulted amount outstanding against the appellant-wife and produce the same on the next date fixed. There is nothing on record to indicate whether the draft had been presented by the respondent-husband.

28. The above facts make it evident that the respondent-husband, in utter disregard of the directions of this Court, has refused to maintain his legally wedded wife since 2013. Prior to that, the wife was not getting maintenance as neither interim maintenance was awarded by the Family Court nor permanent alimony was granted while decreeing the divorce suit. Resultantly, the appellant-wife has been neglected by the respondent-husband since the year 2003 when, according to him, she had left her matrimonial home on her own. The vague assertions in the divorce petition of the wife of leaving her matrimonial home without any reasonable excuse could not be established by bringing any cogent material on record. It, thus, appears that the respondent-husband has utterly failed to discharge his matrimonial obligation. For the fact that the dependent wife has failed in matrimonial alliance, she cannot be left as a destitute. The moral and legal duty of the husband to maintain his wife is not discharged by the institution of the divorce suit.

29. It is settled that the maintenance laws have been enacted as a measure of social justice to provide recourse to dependent wife and children for their financial support; so as to prevent them from falling into destitution and vagrancy. Article 15(3) of the Constitution of India reinforced by Article 39 of the Constitution of India envisages a positive role of the State in fostering change towards the empowerment of women and has led to the enactment of various legislations from time to time. In ***Romesh Chander Kaushal vs. Veena Kaushal reported in 1978 (4) SCC 70***, Krishna Ayyar J., while considering the object of maintenance laws observed as under:-

"9. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfill. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause- the cause of the derelicts."

30. The Apex Court in the case of ***Rajnesh vs. Neha & another reported in 2021 (2) SCC 324*** considering the scope of the law of interim maintenance has held that the pre-requisite for grant of maintenance under Section 24 of the Hindu Marriage Act is that the applicant does not have independent income, which is sufficient for her or his support, during pendency of the lis. Section 24 of the Hindu Marriage Act provides for maintenance pendente lite, where the Court may direct to pay the expenses of the proceedings and pay such monthly amount, which is considered to be reasonable, having regard to the income of both the parties. While considering the criteria for determination of the quantum of maintenance, it is observed that there can not be any straitjacket formula and the quantum would depend upon the factual situations and the Court should mould the claim for maintenance based on various factors before it. The objective of granting interim/permanent alimony is to ensure that the dependent spouses is not reduced to destitution or vagrancy on account of the failure of the marriage.

31. In the instant case, it is admitted on record that the appellant-wife has no source of income whereas the respondent-husband is a permanent driver in Railways and is earning a handsome salary. For a long time, during the pendency of the present appeal, the respondent-husband has succeeded in flouting the orders of this Court granting interim maintenance to sustain the appellant-wife. Payments of some arrears had been made only upon intervention of the Court and at one point of time, the Court had to require the presence of the respondent-husband in custody. This situation, further leads to the belief that the fault lies on the part of the husband in not honouring his matrimonial obligations. It is settled law that a person seeking a relief in the Court of law cannot take benefit of his own wrong.

32. The appellant-wife has already suffered a lot on account of negligence of her husband. The respondent husband being a wrongdoer cannot be allowed to walk away out of the matrimonial alliances on the ground that the marriage has broken down. For this reason also, the plea for grant of decree of divorce on the ground of "irretrievable breakdown of marriage" is not acceptable.

33. Lastly, we may note that the respondent-husband has sought decree of divorce on irrelevant grounds based on reckless allegations and the wife is living separately since

2003 without any financial support. In order to prevent the appellant-wife from reaching the stage of destitution, in the peculiar facts and circumstances of the present case, we find it just and proper that monthly maintenance be awarded to the appellant-wife as has been fixed by this Court to the tune of Rs.30,000/-, which shall be payable to her regularly even after the decision of the present appeal.

34. We are conscious of the situation that we are denying the decree of divorce to the respondent-husband while allowing the present appeal and the result is that the matrimonial relationship between the parties subsist. Consequently, the husband and wife are obliged by law to live together and in such case the respondent-husband would obviously maintain his wife. However, in this case, the possibility of the parties living together seems remote. The respondent has been neglected his wife who is living separately for a long time for no reason.

35. Section 18 of the Hindu Adoptions and Maintenance Act, 1956 recognises the right of a Hindu wife to seek maintenance from her husband during her life-time while living separately from her husband. Sub-Section (2) of Section 18 provides that a Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance; if he is guilty of desertion, i.e. abandoning her without reasonable cause and without her consent or against her wish, or of willfully neglecting her.

36. In the instant case, it is evident from the record that the respondent-husband has abandoned his wife without any reasonable cause and filed the suit for divorce on irrelevant grounds to get rid of her. He has been willfully neglecting her during the continuation of the divorce proceedings and denied payment of interim maintenance (bare means of sustenance) fixed by this Court during the pendency of the present appeal.

37. The right to claim maintenance under Section 18 of the Act, 1956 is a substantive right. The Family Courts constituted under the Family Courts Act, 1984 have jurisdiction exercisable by a Civil Court in respect of the suits and proceedings, of the nature referred to in the explanation to Section 7(1) of the Family Courts Act, which includes a suit or proceeding for maintenance.

38. Under the scheme of the Act' 1984, the Family Courts have been given liberty to lay down their own procedure with a view to arrive at the truth of the facts alleged by one party denied by the other, i.e. for effective determination of the dispute before it under Section 10(3) of the Family Courts Act' 1984. Strict rule of evidence is not applicable in the proceedings before the Family Courts and the evidences are generally accepted on affidavits.

39. The present appeal under Section 19 of the Family Courts Act is extension of the proceedings of the Family Court. Meaning thereby, this Court can exercise the same jurisdiction as has been conferred upon the Family Court under the Family Courts Act, 1984.

40. For the claim of maintenance under Section 18 of the HAM Act, the appellant wife has to approach the Family Court. The appellant has suffered for long having been neglected by her husband who took vow to maintain her. We cannot be oblivious of the fact that in case the appellant-wife is directed to approach the Family Court, she may be dragged in a long drawn litigation to get the bare means of sustenance, i.e. maintenance from her husband. The respondent who did not obey this Court's order will not easily agree to pay the maintenance. In the said scenario, we see no reason to leave the wife abandoned and relegate her to seek maintenance by instituting fresh proceedings before the Family Court which may take years.

41. For the above reason, exercising the jurisdiction of the appellate court under Section 19 of the Family Court Act' 1984 invoking the provisions of Section 18 of the Hindu Adoption and Maintenance Act, 1956, we are of the considered opinion that while the wife is forced to live separately as the respondent-husband has deserted her without any reasonable excuse, she is entitled for monthly maintenance during her life-time which is being fixed to the tune of Rs.30,000/- per month as has been determined by this Court, after consideration of the affidavits of the parties.

42. However, the appellant-wife is at liberty to seek enhancement of the maintenance amount by moving a proper application (by bringing fresh action) before the competent court in accordance with law.

43. Further, in case the husband is ready to discharge his matrimonial obligations by keeping his wife alongwith him and the appellant-wife agrees to his request, i.e. if the parties agree to live together in future, the above direction to pay interim maintenance shall stand automatically modified in terms of the agreement and the liability of the respondent-husband to maintain his wife by paying the fixed monthly maintenance, would stand exhausted.

44. However, the appellant wife is held entitled to the arrears of monthly maintenance from the date it has been fixed by this Court vide order dated 01.04.2003, and enhanced by the order dated 12.12.2017, till the date of this order. In addition to the same, the cost of the proceedings to the tune of Rs.30,000/- in lump sum, as determined by the order dated 12.12.2017, is also liable to be paid, if remained unpaid.

45. We further provide that the arrears of monthly maintenance and the litigation expenses, if not paid in full, shall be paid within a period of two months from today.

46. In case of any default on the part of the respondent-husband to pay the monthly maintenance or the arrears thereof and the litigation expenses as directed above, it would be open for the appellant-wife to seek execution by approaching the competent Court and in that case the entire outstanding amount would be liable to be recovered as arrears of land revenue. In the alternative, the appellant wife would be at liberty to approach the employer of the respondent-husband to seek deduction directly from his salary and to transmit the monthly maintenance and the outstanding arrears in her saving bank account.

47. For the above discussion, the judgment and order dated 17.05.2006 passed by the Additional Family Judge, Allahabad in Marriage Petition No. 26 of 2003 granting the decree of divorce is found suffering from serious infirmity and is hereby set aside. The Matrimonial Petition no.26 of 2003 (Lalji vs Vijay Laxmi) stands dismissed.

48. With the observations and directions made above, the appeal is **allowed.**

(2021)12ILR A635
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.10.2021

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Second Appeal No. 445 of 2019

Naval Singh ...Appellant
Versus
Smt. Radha Dixit ...Respondent

Counsel for the Appellant:
Capt Seema Singh, Sri Vinay Kumar Singh

Counsel for the Respondents:

A. Civil Law - Code of Civil Procedure, 1908 – Section 100 – Second Appeal – Substantial question of law – Determination – Principle discussed – The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views – Sir Chunilal's case relied upon – High Court found that no substantial question of law is involved in the appeal. (Para 20 and 39)

B. Civil Law - Code of Civil Procedure, 1908 – Section 100 – Second Appeal – Concurrent finding of fact, when can be interfered with – The general rule is, that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof – Nazir Mohamed's case relied upon. (Para 24)

C. Evidence Law - Evidence Act, 1872 – Sections 101 & 102 – Burden of proof, on whom it lie – Held, it is the plaintiff-appellant, who had to prove the existence of a fact (fraud practised to it and the burden is upon it) – Until and unless the plaintiff-appellant discharges its burden of proof, the burden cannot be shifted upon the defendant-respondent – Anil Rishi's case and Rattan Singh's case relied upon. (Para 29)

D. Evidence Law - Evidence Act, 1872 – Section 68 - Proviso – Registration Act, 1908 – S. 17 – Proof of the registered documents – Calling of the attesting witnesses, whether required or not – Held, in view of the proviso attached to Section 68 of 1872, it was not necessary to call an attesting witness in proof of an execution of a document, which has been registered in accordance with the provisions of Indian Registration Act, 1908, unless its execution by a person by whom it purports to have been executed specifically denies. (Para 34)

E. Evidence Law - Evidence Act, 1872 – Registered documents – Proof – Presumption of its validity – Held, there is a presumption that a registered document is validly executed and a registered document, therefore, prima facie, would be valid in law. (Para 35)

Appeal dismissed (E-1)

Cases relied on :-

1. Sir Chunilal Vs Mehta & Sons Vs Century Spg. & Mfg. Co. Ltd, AIR 1962 SC 1314

2. Panchagopal Barua Vs Vinesh Chandra Goswami, AIR 1997 SC 1047

3. Santosh Hajari Vs Purushottam Tiwari, 4(2001) 3 SCC 179

4. Hero Vinoth Vs Seshammal, (2006) 5 SCC 545

5. Civil Appeal No. 2843-2844/2010; Nazir Mohamed Vs J. Kamala & ors. decided on 1.11.2021

6. Anil Rishi Vs Gurbuksh Singh; (2006) 5 SCC 558

7. Rattan Singh Vs Nirmal Gill; AIR 2021 SC 899

8. Prem Singh & ors. Vs Birbal & ors.; (2006) 5 SCC 353

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This is a second appeal purported to be under Section 100 of Code of Civil Procedure, 1908 challenging the validity and the legality of the judgment, order and decree dated 17.1.2019 passed by the Court of IVth Addl. District Judge, Agra in Civil Appeal No. 47 of 2018, Naval Singh vs. Smt. Radha Dixit, as well as the judgment, order and decree dated 25.2.2017 passed by the Court of Small Causes / Civil Judge, Agra in Original Suit no. 526 of 2010, Naval Singh vs. Smt. Radha Dixit.

2. Briefly stated, facts shorn of unnecessary details are that plaintiff-appellant as per the averments contained in the plaint in Original Suit No. 526 of 2010 instituted before the Court of Civil Judge (Senior Division), Agra being Naval Singh Vs. Smt. Radha Dixit had claimed himself to be the absolute owner and in actual physical possession of demised property being Khasra no. 688 and 672, Rakba 0.023 hect, situate at Sikri (2 hissa), Tehsil Kirawali, district Agra.

3. According to the plaintiff-appellant, the defendant respondent being Smt. Radha Dixit wife of Sri Shanti Swaroop is residing just in front of the plaintiff-appellant. As per the case set up in the plaint, the plaintiff-appellant has alleged that he was in dire need of financial assistance to the tune of Rs.20,000/- for house and family members, accordingly, the plaintiff-appellant approached the husband of defendant-respondent being Sri Shanti Swaroop and he showed his willingness to grant financial assistance to the plaintiff-appellant, provided that a security/ mortgage deed is executed by the plaintiff-appellant in favour of the defendant-respondent. It was, therefore, settled between the plaintiff-appellant on the one hand and defendant-respondent on the other hand that a mortgage/ security deed will be executed for grant of financial assistance to the tune of Rs.20,000/-, and thus, the plaintiff-appellant, defendant-respondent and her husband went to Tehsil-Kirawali on 16.8.2008 for the purposes of registration of security / mortgage instrument.

4. Plaintiff-appellant has further alleged that the defendant got prepared some document from the document-writer and the plaintiff-appellant, thereafter, on the belief that mortgage / security deed is being sought to be registered so he effected his thumb impression and accordingly, the instrument in question was registered by the Registrar, so presented therein on 16.8.2008. The plaintiff-appellant has further asserted in its plaint in Original Suit No. 526 of 2010, Sri Naval Singh Vs. Smt. Radha Dixit, which finds place as Annexure-1 at Page-64 of the stay application to the present appeal, that the registration, which was done at 16.6.2008, was a registered sale deed in place of mortgage/ security deed and then the defendant-respondent started threatening the plaintiff-appellant since 21.6.2008 for forcible and illegal dispossession, then the plaintiff was constrained to institute Original Suit no. 526 of 2010 before the Court of Civil Judge (S.D.), Agra, Naval Singh Vs. Radha Dixit, verified on 12.7.2010 seeking following reliefs: -

"A. That it be declared that sale deed dated 16.6.2008 purporting to be executed by plaintiff in favour of defendants is illegal invalid avoidable obtained by playing fraud and does not effect the right of plaintiff in disputed plot in any whatsoever and is liable to be set aside.

B. That a decree of permanent prohibitory injunction be passed in favour of plaintiffs and against defendants restraining the defendants her agent or associates from causing any sort of interference in peaceful possession over disputed plot either by forcible and illegal dispossession subsequent transfer to any other person or in any other manner whatsoever.

C. The cost of suit be awarded to the plaintiff against defendants.

D. That any other relief which the Hon'ble Court Court may deem fit and proper in the circumstances of the case be awarded to the plaintiff against the defendants."

5. On being noticed, the defendant-appellant filed its written statement verified on 2.12.2010 refuting the averments and the allegations contained in the plaint mentioning

therein that on 16.6.2008, registered sale deed was executed with respect to the demised property by the plaintiff-appellant in favour of the defendant-respondent and the plaintiff-appellant himself was present before the Registrar and he had endorsed his thumb impression and he very well knew about the nature of the transaction, so sought to be entered culminating into registration of sale deed on 16.6.2008 and further the plaintiff-appellant had also received and was paid Rs.1,20,000/- in lieu of the sale consideration and thus, the suit was itself not maintainable and it was liable to be dismissed.

6. It appears that the Original Suit No. 526 of 2010, Naval Singh Vs. Smt. Radha Dixit was transferred to the Small Causes Court/ Civil Judge, Agra (hereinafter referred to as the Trial Court), wherein the following issues were framed :

"1. Whether in view of the averments in the allegations conained in the Original Suit No.526 of 2010, the sale deed dated 16.6.2008 is liable to be declared null and void?

2. Whether the plaintiff-appellant is entitled to permanent declaration as sought for?

3. Whether the suit is properly valued?

4. Whether sufficient court fees has been paid?

5. Whether any cause of action has arisen in favour of the plaintiff- appellant?

6. Whether the trial court has the jurisdiction to adjudicate the suit?

7. Whether the suit barred under Section 60 of the Registration Act?

8. Whether the suit barred under the provisions under Order VII Rule 11 CPC?

9. Other relief?"

7. The Trial Court after analysing the pleadings set-forth by the parties as well as the documents available on record proceeded to hold Issue Nos. 1, 2, 5 and 9 against the plaintiff and issue nos. 3, 4, 6, 7 and 8 in favour of the plaintiff-appellant. In nutshell, the Trial Court dismissed the suit, so instituted by the plaintiff-appellant holding that the plaintiff-appellant had failed to prove any fraud committed by the defendant-respondent in the matter of the execution of the sale deed dated 16.6.2008, in view of the fact that the plaintiff-appellant was himself present before the Registrar and he had endorsed his thumb impression and an amount of Rs.1,20,000/- was paid to him in lieu of the transaction, so conducted vide registered sale deed dated 16.6.2008.

8. Challenging the judgment, order and decree dated 25.2.2007 passed in Original Suit no. 526 of 2010 by the Trial Court, the plaintiff-appellant preferred the appeal being Civil Appeal No.47 of 2018, Naval Singh Vs. Smt. Radha Dixit before the Court of District Judge, Agra, which was later on transferred to IVth Additional District Judge, Agra (hereinafter referred to as the Lower Appellate Court).

9. The Lower Appellate Court has framed the following issues: -

"(i) Whether the finding recorded by the Trial Court holding that the plaintiff-appellant was unsuccessful in proving the fact that the registered sale deed dated 16.6.2008 was equated with fraud?

(ii) What relief the plaintiff-appellant is entitled to be granted?"

10. The Lower Appellate Court vide its judgment, order and decree dated 17.1.2009 as dismissed the appeal preferred by the plaintiff-appellant while concurring with the findings recorded by the Trial Court.

11. Further, challenging both the orders as referred to above, the plaintiff-appellant has filed the present second appeal under Section 100 of the CPC, 1908. In the memo of appeal, the plaintiff-appellant has framed the following substantial questions of law: -

"1. Whether the plaintiff suit is barred by the provisions of sec. 34 of the Specific Relief Act when he is owner and in possession of the property in suit.

2. Whether the learned trial Court erred in deciding the issue that plaintiff appellant has no locus for relief of cancellation of sale deed on the ground of averments made in suit.

3. Whether the lower appellate court erred in not appreciating the evidence educated by plaintiff-appellant.

4. Whether the judgment and decree passed by trial Court as well as appellate court is vitiated in law as being based on conjectures and surmises."

12. Before adverting to the substantial question of law, so framed by the plaintiff-appellant, this Court has to bear in its mind while deciding the present controversy, the relevant facts that there are concurrent findings of fact recorded both by the Trial Court as well as by the Appellate Court.

13. In nutshell, the plaintiff-appellant has to place its case within the parameters was envisaged under Section 100 of the CPC, 1908.

14. Section 100 of the Civil Procedure Code (CPC), which provides for a Second Appeal, as amended by the Civil Procedure Code (Amendment) Act, 104 of 1976, with effect from 1.2.1977, provides as follows:-

"100. Second Appeal. - (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

15. In the light of the aforesaid statutory provision, as contained under Section 100 CPC, the present matter is to be adjudicated.

16. Today the matter has been listed before this Court under the heading "Order 42 Rule 11 of the CPC" as the present appeal is yet to be admitted.

17. Heard Sri Vinay Kumar Singh, learned counsel for the appellant on the issue of admission of the present appeal.

18. Learned counsel for the appellant has drawn the attention of this Court towards the judgment of the Trial Court as well as the Lower Appellate Court, so as to contend that both the courts below have committed patent error of law, apparent on the fact of the record in not decreeing the suit, so instituted by the plaintiff as fraud has been practised upon the plaintiff-appellant in view of the fact that the plaintiff-appellant had only taken financial assistance to the tune of Rs.20,000/- from the husband of the defendant-respondent being Sri Shanti Swaroop and it was mutually settled between them that a mortgage / security deed will be executed. However, while defrauding the plaintiff-appellant in place of a security / mortgage deed, a sale deed was registered on 16.6.2008, resulting to the fact that the value of the property being approximately Rs.6 lacs has been sold for Rs.20,000/- It has been further urged that the plaintiff-appellant is an illiterate person and he is entitled for a declaration that the sale deed dated 16.6.2008 is illegal and invalid and has been obtained by playing fraud and decree of permanent prohibitory injunction be passed in favour of the plaintiff and against the defendant restraining the defendant, her agent or associates from causing any sort of interference in peaceful possession over the disputed plots.

19. Learned counsel for the appellant has further invited the attention of this Court towards the substantial question of law, while referring to the first substantial question of law with respect to the fact whether the plaintiff's suit is barred by provisions of Section 34 of the Specific Relief Act, 1963, particularly when the plaintiff-appellant is the owner and is in possession of the of the suit property. A pointed query was made from the learned counsel for the appellant with regard to the fact as to how the said question of law as sought to be referred to and placed by way of an argument before this Court is attracted and relevant for the present controversy. However, the counsel for the plaintiff-appellant was not able to advance submission on the said point. Similarly, so far as the second substantial question of law, so framed by the plaintiff-appellant is concerned, the same is also totally irrelevant, as the learned Trial Court as well as the Lower Appellate Court have not non-suited the claim of the plaintiff-appellant on the ground that the plaintiff-appellant had no locus standi to institute suit for cancellation of the sale deed in question. So much so, the third and fourth framed substantial question of law are even in fact no substantial questions of law.

20. The principles determining the question of law being transformed as substantial question of law has been taken notice by a Constitution Bench of this Court in the case of ***Sir Chunilal Vs. Mehta & Sons v. Century Spg. & Mfg. Co. Ltd, AIR 1962 SC 1314*** wherein the Hon'ble Court has observed as under: -

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

21. The Hon'ble Apex Court in the case of ***Panchagopal Barua Vs. Vinesh Chandra***

Goswami, AIR 1997 SC 1047, has observed as under: -

"Where no such question of law, nor even a mixed question of law and fact was urged before the Trial Court or the First Appellate Court, as in this case, a second appeal cannot be entertained".

22. The Hon'ble Supreme Court in the case of Santosh Hajari Vs. Purushottam Tiwari, 4(2001) 3 SCC 179, has observed as under: -

"Whether a question of law is a substantial one and whether such question is involved in the case or not, would depend on the facts and circumstances of each case. The paramount overall consideration is the need for striking a judicious balance between the indispensable obligation to do justice at all stages and the impelling necessity of avoiding prolongation in the life of any lis."

23. Following the judgment in the case of Chunni Lal (supra), the Hon'ble Apex Court in the case of Hero Vinoth v. Seshammal, (2006) 5 SCC 545, in paragraph-21 has observed as under: -

*"21. The phrase "substantial question of law", as occurring in the amended Section 100 CPC is not defined in the Code. The word substantial, as qualifying "question of law", means of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with- technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal 2(2006) 5 SCC 545 shall be heard need not necessarily be a substantial question of law of general importance. I**n Guran Ditta v. Ram Ditta AIR 1928 PC 172** the phrase substantial question of law as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju [AIR 1951 Mad 969 : (1951) 2 MLJ 222 (FB)] : (Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR p. 557) "When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law."*

24. The Apex Court in Civil Appeal No. 2843-2844/2010 decided on 1.11.2021 in the ***Nazir Mohamed Vs. J. Kamala and others***, has observed as unde:

"25. A second appeal, or for that matter, any appeal is not a matter of right. The right of appeal is conferred by statute. A second appeal only lies on a substantial question of law. If statute confers a limited right of appeal, the Court cannot expand the scope of the appeal. It was not open to the Respondent-Plaintiff to re-agitate facts or to call upon the High Court to

reanalyze or re-appreciate evidence in a Second Appeal.

26. Section 100 of the CPC, as amended, restricts the right of second appeal, to only those cases, where a substantial question of law is involved. The existence of a "substantial question of law" is the sine qua non for the exercise of jurisdiction under Section 100 of the CPC."

27. ...

28. ...

29. ...

30. ...

31. ...

32. To be "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way.

33. To be a question of law "involved in the case", there must be first, a foundation for it laid in the pleadings, and the question should emerge from the sustainable findings of fact, arrived at by Courts of facts, and it must be necessary to decide that question of law for a just and proper decision of the case.

34. ...

35. ...

36. ...

37. The principles relating to Section 100 CPC relevant for this case may be summarised thus :

(i) An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

(iii) A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered 5 AIR 1963 SC 302 on a material question, violates the settled position of law.

(iv) The general rule is, that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence;

(ii) the courts have drawn wrong inferences from proved facts by applying the law

erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

25. Now, coming to the facts of the present case, it is not under dispute that a registered sale deed was executed on 16.6.2008 between the plaintiff-appellant on one hand and the defendant on the other hand, whereby the land in question was transferred in favour of the defendant by the plaintiff-appellant. It is also not disputed by the plaintiff-appellant that he himself was present before the Registrar for the registration of the said instrument dated 16.6.2008 and he had endorsed his thumb impression.

26. Now, a question arises as upon whom, the burden of proof lies that the sale deed so executed on 16.6.2008 is fraudulent and under which provision of law. Sections 101 and 102 of the Evidence Act, 1872 gives a complete answer to the same. The same for ready reference is being quoted hereinunder: -

"Section 101 of Evidence Act "Burden of proof"

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that he burden of proof lies on that person.

Section 102 of Evidence Act "On whom burden of proof lies"

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

27. The Hon'ble Apex Court in the case of ***Anil Rishi Vs. Gurbuksh Singh reported in (2006) 5 SCC 558*** in paragraph- 8 to 16 has clearly observed as under: -

"8. The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:-

"Sec. 101. Burden of proof. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be exception thereto. The learned trial Court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

10. Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who

asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.

11. The fact that the defendant was in a dominant position must, thus, be proved by the plaintiff at the first instance.

*12. Strong reliance has been placed by the High Court in the decision of this Court in Krishna Mohan Kul @ Nani Charan Kul & Anr. v. Pratima Maity & Ors., [AIR 2003 SC 4351]. In that case, the question of burden of proof was gone into after the parties had adduced evidence. It was brought on record that the witnesses whose names appeared in the impugned deed and which was said to have been created to grab the property of the plaintiffs were not in existence. The question as regards oblique motive in execution of the deed of settlement was gone into by the Court. The executant was more than 100 years of age at the time of alleged registration of the deed in question. He was paralytic and furthermore his mental and physical condition was not in order. He was also completely bed-ridden and though his left thumb impression was taken, there was no witness who could substantiate that he had put hi*s thumb impression. It was on the aforementioned facts, this Court opined:-

"12The onus to prove the validity of the deed of settlement was on the defendant No. 1. When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person, in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with jealously all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position"

13. This Court in arriving at the aforementioned findings referred to Section 111 of the Indian Evidence Act which is in the following terms:-

"111. Proof of good faith in transactions where one party is in relation of active confidence. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

14. But before such a finding is arrived at, the averments as regard alleged fiduciary relationship must be established before a presumption of undue influence against a person in position of active confidence is drawn. The factum of active confidence should also be established.

15. Section 111 of the Evidence Act will apply when the bona fides of a transaction

is in question but not when the real nature thereof is in question. The words `active confidence' indicate that the relationship between the parties must be such that one is bound to protect the interests of the other.

16. Thus, point for determination of binding interests or which are the cases which come within the rule of active confidence would vary from case to case. If the plaintiff fails to prove the existence of the fiduciary relationship or the position of active confidence held by the defendant- appellant, the burden would lie on him as he had alleged fraud. The trial Court and the High Court, therefore, in our opinion, cannot be said to be correct in holding that without anything further, the burden of proof would be on the defendant."

28. The judgment in the case of Anil Rishi (supra) was followed in a recent judgment in the case of ***Rattan Singh Vs. Nirmal Gill*** reported in ***AIR 2021 SC 899,*** wherein the Hon'ble Apex Court held as under: -

"40. The trial Court had justly placed the initial burden of proof upon the plaintiff as it was her case that the subject documents were forged or product of fraud and moreso because the documents bore her signature. The first appellate Court did not elaborate on that aspect. Even assuming that the burden had shifted upon the defendants, the witness identifying signatures of the dead attesting witness was examined by the defendants. Therefore, the documents stood proved and the burden was duly discharged by the defendants."

"The requirement regarding shifting of burden onto the defendants had been succinctly discussed in ***Anil Rishi v. Gurbaksh Singh (supra),*** *wherein this Court had held that for shifting the burden of proof, it would require more than merely pleading that the relationship is a fiduciary one and it must be proved by producing tangible evidence."*

29. The plaintiff-appellant has neither laid down factual foundation of fraud played upon it in the plaint nor had adduced any evidence in support thereof. Even, in fact, the plaintiff-appellant had not discharged its onus to prove that the fraud had been practised upon it and rather to the contrary the plaintiff-appellant had shifted the burden upon the defendant-respondent without any basis. As per the provisions contained under Section 101 read with Section 102 of the Evidence Act, 1872, it is the plaintiff-appellant, who had to prove the existence of a fact (fraud practised to it and the burden is upon it). Until and unless the plaintiff-appellant discharges its burden of proof, the burden cannot be shifted upon the defendant-respondent as held by the Hon'ble Apex Court in the case of ***Anil Rishi (supra) and Rattan Singh (supra)***. Paragraphs-18 and 19 of the judgment of Anil Rishi (supra) further read as under:-

"18. Difficulties which may be faced by a party to the lis can never be determinative of the question as to upon whom the burden of proof would lie. The learned Trial Judge, therefore, posed unto himself a wrong question and arrived at a wrong answer. The High Court also, in our considered view, committed a serious error of law in misreading and misinterpreting Section 101 of the Indian Evidence Act. With a view to prove forgery or fabrication in a document, possession of the original sale deed by the defendant, would not change the legal position. A party in possession of a document can always be directed to produce the same. The plaintiff could file an application calling for the said document from the defendant and the defendant could have been directed by the learned Trial Judge to produce the same.

19. There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same."

30. There is another point of angle, which needs to be addressed also, i.e, with regard to the provisions contained under Section 17 of the Registration Act, 1908.

31. Section 17 of the Registration Act, 1908, for the ready reference, is being quoted hereunder: -

"17. Documents of which registration is compulsory.--*(l) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:--*

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:

Provided that the [State Government] may, by order published in the [Official Gazette], exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

[(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such

commencement, then, they shall have no effect for the purposes of the said section 53A.]

(2) Nothing in clauses (b) and (c) of sub-section (l) applies to--

(i) any composition deed; or

(ii) any instrument relating to shares in a joint stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v) [any document other than the documents specified in sub-section (1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court 29 [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding]; or

(vii) any grant of immovable property by 30 [Government]; or

(viii) any instrument of partition made by a Revenue-Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(x) any order granting a loan under the Agriculturists, Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

[(xa) any order made under the Charitable Endowments Act, 1890, (6 of 1890) vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or]

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue-Officer.

[Explanation.--A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.]

(3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered.

***Uttar Pradesh**: In section 17,--*

(a) in sub-section (1)--

(i) in clauses (b) and (e) omit the words "of the value of one hundred rupees and upwards",

(ii) after clause (e), insert as under-- "(f) any other instrument required by any law for the time being in force, to be registered",

(iii) Omit proviso.

(b) in sub-section (2)--

(i) in clause (v), after the words "any document" occurring in the beginning, insert the words "other than contract for sale", and omit the words "of the value of the one hundred rupees and upwards",

(ii) omit Explanation.

(c) in sub-section (3), after the words "by a will", insert the words "and an instrument recording adoption of a child executed after the first day of January, 1977". [Vide Uttar Pradesh Act 57 of 1976, sec. 32 (w.e.f. 1-1-1977)]."

32. Further, Section 68 of the Evidence Act reads as under: -

***"68. Proof of execution of document required by law to be attested.**--If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."*

33. Section 68 of the Evidence Act, 1872 deals with the subject regarding the proof of execution of a document required by law to be attested.

34. It is the admitted case of the parties that the sale deed dated 16.6.2008 was a registered sale deed dated 16.6.2008 was a registered document and thus in view of the proviso attached to Section 68 of 1872, it was not necessary to call an attesting witness in proof of an execution of a document, which has been registered in accordance with the provisions of Indian Registration Act, 1908, unless its execution by a person by whom it purports to have been executed specifically denies. There is a fine distinction in the present case, inasmuch as, the plaintiff-appellant has not disputed the factum of execution of the deed dated 16.6.2008, as according to the plaintiff-appellant, the same was shown to be a mortgage/security deed, but in its place, registered sale deed was executed. Even otherwise, it is/was the onus of the plaintiff-appellant to have discharged its burden, while proving the fact that the registered sale deed dated 16.6.2008 was a fraudulent transaction. However, as noted earlier, the same has not been discharged.

35. The law in this regard is well settled that there is a presumption that a registered document is validly executed and a registered document, therefore, prima facie, would be valid in law. In the case of ***Prem Singh and others Vs. Birbal and others, reported in (2006)5 SCC 353,*** the Hon'ble Apex Court in paragraph-27 has held as under:-

"27. There is a presumption that a registered document is validly executed. A

registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption."

36. The judgment in the case of ***Prem Singh (supra)*** has been followed in the recent judgment in the case of ***Rattan Singh (supra),*** which reads as under:-

"32. To appreciate the findings arrived at by the Courts below, we must first see on whom the onus of proof lies. The record reveals that the disputed documents are registered. We are, therefore, guided by the settled legal principle that a document is presumed to be genuine if the same is registered, as held by this Court in Prem Singh and Ors. v. Birbal and Ors."

37. Though this Court is not required to go into the factual issues, but this Court while deciding the present appeal, has carefully gone through the pleadings as well as the judgment of the Trial Court as well as that of the Appellate Court. The plaintiff-appellant has alleged that he is an illiterate person and he is not in a position to make his signatures. The Trial Court as well as the lower appellate court have dealt with the said issue and in paragraph-12 of the judgment and decree of the lower Appellate Court, the following has been observed:

"वादी/अपीलार्थी द्वारा अपनी प्रतिपरीक्षा में यह स्वीकार किया है कि उसने तहसील में जाकर बैनामा की लिखा पढ़ी करवाई थी तथा कागजों पर अपना अँगूठा लगाया था। केदार सिंह एडवोकेट ने तहसील किरावली ने बैनामा लिखा था। वादी द्वारा यह भी स्वीकार किया गया है कि उसने रजिस्ट्रार के यहाँ भी अँगूठा लगाया था तथा अँगूठा लगाया था। वादी द्वारा यह भी स्वीकार किया गया है कि बैनामें वाले दिन वह अपनी मर्जी से तहसील अकेला गया था तथा कोई नशा नहीं करता है। तहसील में वह पूर्ण होश हवाश में था।"

38. So far as, the issue in relation to the payment of Rs.1,20,000/- is concerned, the lower Appellate Court in its judgment and decree dated 25.2.2017 has recorded a clear cut finding as under: -

"प्रतिवादिनी के पति ने वादी के साथ काई धोखाधड़ी नहीं की। वादी ने बैनामा से पहले घर पर कुल रकम बैनामा समक्ष गवाहान हासिया गवाह चन्द्रभान उर्फ सोलुआ के हाथ से 1,20,000/रूपये शान्ती स्वरूप पुत्र श्री बाबू लाल यादराम अध्यापक के सामने प्राप्त किये थे। वादी के कहने पर ही बैनामा के कागज तैयार किये गये और वादी ने समक्ष गवाहान बैनामा के कागजात पर अपने अँगूठा निशानी किये थे। सब रजिस्ट्रार किरावली द्वारा वादी के कागजात पर अपने अँगूठा निशानी किये थे। सब रजिस्ट्रार किरावली द्वारा वादी को बैनामा पढ़कर सुनाया था और प्रतिफल प्राप्त करने की बावत् पूछा था तब वादी ने विक्रीत रकम 1,20,000/– रूपये प्राप्त होने की स्वीकारोक्ति की, उसके बाद सब रजिस्ट्रार महोदय किरावली द्वारा बैनामा पंजीकृत किया गया।"

39. After going through the pleadings set forth in the present appeal, as well as the arguments so advanced by the learned counsel for the plaintiff-appellant, this Court finds that no substantial question of law is involved in the present appeal purported to be under Section 100 of CPC, 1908 and thus, the present appeal is liable to be dismissed at the stage of admission under Order 41 Rule 11 of CPC, 1908.

40. Accordingly, the present second appeal under Order 41 Rule 11 of CPC is dismissed at the admission stage.

41. Cost made easy.

(2021)12ILR A649
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Second Appeal No.862 of 2001

Kanpur Development Authority Kanpur
...Appellant
Versus
Gafar & Anr. ...Respondents

Counsel for the Appellant:
Man Mohan Das Agarwal, Deepak Jaiswal, Shashi Shekhar Mishra

Counsel for the Respondents:

Eeppak Jaiswal, Azad Khan, B.N. Rai, L.M. Singh, Manas Bhargava, Manoj, Manoj Srivastava, P.K. Jain, Pankaj Agarwal, Sufia Saba

A. Civil Law - Code of Civil Procedure, 1908 – Order 41 - Rule 31 – Point of determination – Necessity in passing the judgment – Held, the appellate Court has appreciated and discussed all the evidence on record and has considered the relevant points which arose for adjudication. Although, no specific point has been framed by the appellate Court but there is substantial compliance of the Provisions of Order 41 Rule 31 C.P.C. and there is no necessity or sufficient ground to remand the matter. (Para 3)

B. Code of Civil Procedure, 1908 – Section 100 – Second Appeal – Substantial question of law – Disputed plot was an agricultural land – Plaintiff's name was mutated in the revenue record on the basis of will deed – Appellate court reversed the finding of trial court on the issue of plaintiff's ownership – Held, the learned appellate court has rightly held that plaintiff is owner of the disputed property as he is recorded tenure holder and there is no illegality or perversity in the aforesaid finding – Respondent-plaintiff is recorded tenure holder in possession of the disputed property. The appellant/defendant has failed to prove that disputed land was acquired by him – Held further, the findings recorded by the learned appellate court are according to evidence and just and proper. (Para 7 and 11)

Appeal dismissed. (E-1)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. This second appeal is directed against the judgment and decree dated 9.1.2001 passed by 17th Additional District Judge, Kanpur in Civil Appeal No. 376 of 1998 Gaffar Vs. Kanpur Development Authority and another. By the impugned judgment the first appellate court has allowed the appeal and set-aside the judgment and decree of trial court in O.S. No. 1552 of 1989 Gaffar Vs. Kanpur Development Authority and has decreed the original suit and restrained the respondents (defendants) from interfering in the peaceful possession of the appellant-plaintiff on the disputed property.

2. The brief facts are that respondent filed Original Suit No. 1552 of 1989 Gaffar Vs. Chairman, Kanpur Develpment Authority and another for permanent injunction. In the plaint it was alleged that plaintiff is absolute owner and landlord of field no. 797 ad-measuring 6 bigha 13 biswa situated in village Chandari, Kanpur Nagar, in pursuance of a will deed duly registered and the name of the plaintiff has been duly mutated in the revenue records of Khatauni for 1391 Fasli to 1396 Fasli as per order of Tehsildar dated 14.9.1987. The plaintiff is in peaceful possession upon the said land and has got his Pakka house therein which is in-existence for last more than forty years besides well, tomb and garden. The defendant no. 2 being a Cooperative Housing Society is not at all the owner and landlord of the disputed land. The defendant no. 2 by executing a fictitious sale deed is now approaching the field owned and possessed by the plaintiff to deliver the possession of the land of the plaintiff forcibly and illegally and for that purpose defendant no. 2 is making survey of the land owned and possessed by the plaintiff. Defendant no. 1 through his employees is also making survey. The defendants have no right, title or interest upon the land owned and possessed by the plaintiff and plaintiff is in lawful possession since long back and prior to that the predecessors in interest of the plaintiff were in peaceful possession without interruption.

The defendant no. 1 filed written statements in which it denied the plaint allegations and further pleaded that Arazi No. 797 ad-measuring 17 bigha and 9 biswa situated in Chandari area was acquired vide award no. 38 of 25-3-1963 and possession of the acquired land was obtained on 20.8.1963. The defendant has a plan/scheme over the disputed land for

Basic Primary School. The plaintiff has trespassed over the disputed land and constructed a Pakka house and a kitchen with boundary wall without any authority/permission, right, title or interest. The said construction is without any approved map and no duly sanctioned plan has been obtained by the plaintiff for construction from the map section. The construction erected on the plot can be demolished as unauthorized construction and is liable to be demolished under the Provisions of Nagar Mahapalika Act, 1959. The acquired land has already been developed and an impediment is caused due to unauthorized construction. The trial court framed following 8 issues:

1. Whether suit is under valued and court fees paid is insufficient ?

2. Whether the plaintiff is owner in possession of Khasra No. 797 area 6 bigha 13 biswa village Chandari, Tehsil and District Kanpur and in possession and his forty years old construction are situated on it ?

3. Whether defendant no. 2 has any right to transfer the disputed property ?

4. Whether the disputed property has been validly acquired by the defendant no. 1 ? If yes, then how in which manner.

5. Whether any valid notice under section 4 of Land Acquisition Act has been issued under Land Acquisition Act ? If yes, then its effect.

6. Whether Nagar Mahapalika has given any notice in relation to construction ? If yes, then its effect.

7. Whether construction of plaintiff is illegal ?

8. Whether plaintiff is entitled to any relief ?

After taking evidence the learned trial court decided issue nos. 2, 3 and 4 against the plaintiff and on that basis dismissed the suit vide judgment and decree dated 6.11.1998. Aggrieved by it the plaintiff preferred Civil Appeal No. 376 of 1989. The first appellate court by the impugned judgement and decree dated 9.1.2001 allowed the appeal, set-aside the judgment and decree of trial court and decreed the original suit of appellant-plaintiff and passed an injunction decree in favour of plaintiff restraining the defendants not to interfere in the possession of the plaintiff upon disputed property.

3. Learned counsel for the appellant raised a preliminary argument that the judgment of appellate court is not consistent with the Provision of Order 41 Rule 31 C.P.C. No point for determination has been framed, hence, judgment is not valid judgment under the Provision of Order 41 Rule 31 C.P.C. Learned counsel on the aforesaid point cited Bhagirath Vs. Ram Chandra and others Second Appeal No. 43 of 1996 decided on 11.4.2019, and prayed that on the aforesaid ground the judgment and decree passed by the appellate court be set-aside and the matter be remanded back to the first appellate court for a fresh decision.

In para 3 of the aforesaid judgment this Court has observed that :

"How the regular first appeal is to be disposed of by the appellate Court/High Court has been considered by this Court in various decisions. Order 41 C.P.C. deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate Court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled."

In the aforesaid judgment itself in para no. 32 this Court has relied on the judgment of Supreme Court in the case of H. Siddiqui V. A. Ramalingam 2011 (4) SCC 240 and has quoted para 21 of the aforesaid judgment which is as follows:

"The said provisions provide guidelines for the appellate Court as to how the Court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate Court that the Court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate Court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate Court are well founded and quite convincing. It is mandatory for the appellate Court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points."

From the perusal of the judgment of the appellate Court it is clear that the appellate Court has appreciated and discussed all the evidence on record and has considered the relevant points which arose for adjudication. Although, no specific point has been framed by the appellate Court but there is substantial compliance of the Provisions of Order 41 Rule 31 C.P.C. and there is no necessity or sufficient ground to remand the matter.

4. Following are substantial questions of law for disposal of this second appeal:

(i) Whether the first appellate court misinterpreted and misconstrued the evidence led by the parties and has relied on any inadmissible evidence and has ignored any admissible evidence ?

(ii) Whether the findings recorded by the first appellate court are perverse and based on conjuncture and surmises ?

5. Learned counsel for the appellant firstly contended that respondent/plaintiff has filed the original suit on the basis of will deed but the said document in original was never produced and duly proved before the trial court. The trial court has given the finding in this respect against the plaintiff but the first appellate court without any good reason has set-aside the aforesaid finding. Learned counsel also contended that there is no documentary evidence on record about the title of the plaintiff. The title of plaintiff was not proved with any cogent evidence but the learned appellate court has given the finding that plaintiff is owner in possession of the disputed property. The finding of the appellate court is perverse and illegal.

6. Learned counsel for the respondents on the other hand contended that will in favour of plaintiff is a registered document which was filed in other case. Plaintiff has filed its certified copy. Learned counsel also contended that plaintiff is recorded tenure holder of disputed Khasra no. 797 area 6 bigha 13 biswa and has filed Khatauni which is the document of title, so the title of the plaintiff is duly proved.

7. From the material on record it appears that disputed plot was an agricultural plot and recorded in the name of legal representative of its previous owner Suleman. On the basis of registered will plaintiff got his name mutated in

the revenue records and plaintiff has filed the extract of the Khatauni in which the order of mutation is recorded in his favour. Plaintiff has also filed the copy of the order of Naib Tehsildar passed in mutation proceeding on the basis of which his name has been mutated in the revenue records. The validity of this document (Khatauni) has not been challenged at any stage by the defendants or any other person. So from the evidence on record it is clear that plaintiff is recorded tenure holder and his name is duly recorded in the revenue record (Khatauni) which is a document of title. It is also well settled that civil court can not decide the question of title regarding agricultural plot and that is sole jurisdiction of revenue courts. There was no necessity to file original will deed or got it proved before the trial court. The said proceeding has been duly conducted before the competent court of Naib Tehsildar and on its basis the name of plaintiff is entered in the revenue records. It appears that learned trial court has lost the aforesaid legal aspect and has observed that plaintiff has not filed the original will and has not got it proved before the trial court and on this basis has rejected his claim of ownership. The aforesaid finding of the trial court was illegal. The learned appellate court has rightly held that plaintiff is owner of the disputed property as he is recorded tenure holder and there is no illegality or perversity in the aforesaid finding. The learned trial court has also held that plaintiff is not in possession of disputed property observing that he has not disclosed the duration of his construction on the disputed property. The learned trial court has also disbelieved the other evidence produced by the plaintiff regarding possession. This finding of the learned trial court is also bad in law. The defendant no. 1 in his written statement has admitted the constructions of the plaintiff. So from the admission of the defendant no. 1 the possession of the plaintiff on the disputed property stands proved and no other evidence at all was required. The finding in this regard recorded by the appellate court thus is according to material on record and proper and legal.

8. Learned counsel for the appellant further contended that Kanpur Development Authority has acquired the disputed Khasra No. 797 in the year 1967. The defendant has filed the relevant document in this regard. The learned trial court on the basis of evidence produced by the defendants has given the finding that the disputed land was acquired by the Kanpur Development Authority in the year 1967, so plaintiff has no right, title or interest in the disputed property but the first appellate court has reversed the finding of the learned trial court without any sound reasoning. The finding recorded by the first appellate court in this regard is also perverse and illegal.

9. Learned counsel for the respondent submitted that from the document produced by the defendants it is proved that Kanpur Development Authority has acquired only 12 bigha 9 biswa area of Khasra no. 797 and remaining 6 bigha and 13 biswa area was not acquired. There is no evidence on record to show that appellant-defendant has acquired the entire area of Khasri No. 797. Learned counsel also contended that in possession certificate and other documents related to acquisition proceedings the area acquired of Khasra No. 797 is mentioned as 11 bigha and 9 biswa only. The plaintiff has also filed a certificate issued by the officer of appellant/defendant in which it is specifically mentioned that 6 bigha and 13 biswa area of Khasra No. 797 has not been acquired by Kanpur Development Authority. The finding recorded by the learned trial court in this regard was against the evidence on record and has rightly been reversed by the first appellate court.

10. The defendant no. 1 in his written statement has pleaded that Arazi no. 797 ad-measuring 17 bigha and 9 biswa situated in Chandari area was acquired vide award no. 38 of

25.3.1963. The possession of the acquired land was obtained on 20.8.1963. The aforesaid pleading of defendant no. 1 is not proved by the documents filed by the defendant no. 1 because in the possession certificate the acquired area of Khasra No. 797 Minjumla is recorded as 11 bigha and 9 biswa only. There is no evidence on record to prove that 17 bigha and 9 biswa area of Arazi No. 797 was acquired by the Kanpur Development Authority as pleaded in the written statement of defendant no. 1. Contrary to it there is letter no. D/12/AA IPL/87 dated 27.7.1987 issued under the signature of Executive Engineer (Planning) Kanpur Development Authority, Kanpur addressed to plaintiff Gaffar in which it is mentioned that, "you are hereby informed that Arazi No. 797 village Chandari area 6 bigha and 13 biswa has not been acquired by the Kanpur Development Authority." The learned trial court has misread the documentary evidence in this regard. The observation of the learned trial court that plaintiff himself has admitted the acquisition of land is also misconstrued because the plaintiff has stated that Kanpur Development Authority has acquired only 11 bigha and 9 biswa of Arazi No. 797. There is no admission of plaintiff that 17 bigha and 9 biswa area of Arazi No. 797 was acquired by Kanpur Development Authority or the disputed property was acquired by Kanpur Development Authority. The finding of learned trial court due to above reason was incorrect and illegal. The learned appellate court has rightly appreciated the evidence on this point also and finding recorded by the learned appellate court that Kanpur Development Authority has acquired only 11 bigha and 9 biswa of Arazi No. 797 is just and proper. There is no illegality or perversity in the aforesaid finding of the learned first appellate court.

11. From the evidence on record it is proved that respondent-plaintiff is recorded tenure holder in possession of the disputed property. The appellant/defendant has failed to prove that disputed land was acquired by him. The appellant-defendant has further admitted the possession of the respondent-plaintiff on the disputed property. The learned trial court has failed to properly appreciate the evidence on record and the judgment and decree passed by the learned trial court was erroneous. The findings recorded by the learned appellate court on the aforesaid issues are according to evidence and just and proper.

12. The learned appellate court has neither misinterpreted nor misconstrued the evidence led by the parties and has also not relied on any inadmissible evidence and has not ignored any admissible evidence. There is no perversity or illegality in the findings recorded by the learned appellate court. Hence, both the question of law framed are decided against the appellant. This second appeal has no merit and is liable to be dismissed.

Accordingly, the second appeal is **dismissed.**

Parties shall bear their own cost.

(2021)12ILR A654
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2021

BEFORE

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

Government Appeal No. 426 of 2021

State of U.P. ...Appellant
Versus
Dharmendra & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Sri Nigamendra Shukla, Sri Syed Shahnawaz Shah

A. Practice & Procedure - Scope of Appellate Court - It is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court when it is just and proper. (Para 12)

Appeal Rejected. (E-10)

List of Cases cited:

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr. (2006) 6 S.C.C. 39

2. Chandrappa Vs St. of Karn.(2007) 4 S.C.C. 415

3. St. of Goa Vs Sanjay Thakran & anr. (2007) 3 S.C.C. 75

4. St.of U.P. Vs Ram Veer Singh & Ors. 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (Dead) by L.Rs. Vs St. of M.P. 2007 A.I.R. S.C.W. 5589

6. Luna Ram Vs Bhupat Singh & ors. (2009) SCC 749

7. Mookkiah & Anr Vs State of Representatives by the Inspector of Police, Tamil Nadu AIR 2013 SC 321

8. State of Karnataka Vs Hemareddy AIR 1981 SC 1417

9. Shivasharanappa & ors. Vs St. of Karn. JT 2013 (7) SC 66

10. State of Punjab Vs Madan Mohan Lal Verma (2013) 14 SCC 153

11. Jayaswamy Vs St. of Karn. (2018) 7 SCC 219

12. Shaildenra Rajdev Pasvan Vs St. of Guj.(2020) 14 SC 750

13. Samsul Haque Vs St.of Assam (2019) 18 SCC 161

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

&

Hon'ble Ajai Tyagi, J.)

(Oral Judgment by Hon'ble Ajai Tyagi, J.)

1. This appeal under Section 378 (3) of Criminal Procedure Code (in short 'Cr.P.C.'), at the behest of the State, has been preferred against the judgment and order dated 17.3.2017, passed by learned Additional Sessions Judge/Fast Track Court, Hapur, in Session Trial No.245 of 2015 arising out of Case Crime No.154 of 2014 under Sections 376, 366, 506 and 120-B of Indian Penal Code (in short 'IPC'), Police Station-Garh Mukteshwar, District-Hapur, whereby the learned trial-court acquitted the accused-respondents.

2. The brief facts of this case are that on 3.3.2014 at about 7:00 pm, Dharmendra s/o Dharmpal, brother-in-law of elder sister-Archana of complainant, sister-in-law Anita, Nand Kumar *(nandoi)* and Surendri w/o Nand Kumar came to her house. At that time, the complainant was alone in her house. They all said that her elder sister, namely, Archana was seriously ill and admitted in the hospital so they had come to take her to the hospital. Subsequently, they forcibly put her in a car and took her to dance-club at Ganga Nagar. There, they prepared some documents misguiding her for marriage and since then Dharmendra continuously kept her in dance-club and committed rape. On 23.3.2014 at about 5:00 pm, they left her at Garh-crossing and threatened her not to lodge any report.

3. On the basis of this report, Case Crime bearing No.154 of 2014 was registered against all the accused-respondents under Sections 366, 376/120-B IPC against Anita, Nand Kumar, Smt.Surendri and Dharmendra.

4. Investigation started by SI-Brijendra Singh, who recorded statement of witnesses

under Section 161 Cr.P.C., visited the spot, prepared site-plan and after completing the investigation, another I.O., namely, B.P.Singh submitted charge-sheet against all the respondents. The case being exclusively triable by court of session was committed for trial to the court of session by competent Magistrate.

5. Learned trial-court framed charges under Sections 366, 376 and 506 IPC against the accused Dharmendra and under Sections 366, 376/120-B IPC against Anita, Nand Kumar and Smt.Surendri. Accused persons denied charges and claimed to be tried.

6. To bring home the charges, the prosecution produced following witnesses, namely:

1.	Prosecutrix	PW1
2.	Nanak Singh	PW2
3.	Smt.Shakuntala	PW3
4.	Dr.Mamta Sodhi	PW4
5.	HCP Jugal Kishore	PW5
6.	Jai Pal	PW6
7.	SI-Bijendra Singh	PW7
8.	Inspector B.P. Singh	PW8

7. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	Written Report	Ex.ka1
2.	Statement u/S 164 Cr.P.C.	Ex.ka2
3.	Medical Report	Ex.ka3
4.	FIR	Ex.ka4
5.	Copy of GD	Ex.ka5
6.	Site-plan	Ex.ka6
7.	*Supurdginama*	Ex.ka7
8.	Charge-sheet	Ex.ka8

8. We have heard Shri N.K.Srivastava, learned AGA for the State-appellant, Shri Nigamendra Shukla and Shri Syed Shahnawaz Shah, learned counsel for the accused-respondents and perused the record.

9. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

10. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***M.S. Narayana Menon @ Mani vs. State of Kerala and another***, (2006) 6 S.C.C. 39, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

11. Further, in the case of ***Chandrappa vs. State of Karnataka***, reported in (2007) 4 S.C.C. 415, the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

12. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

13. Even in the case of ***State of Goa vs. Sanjay Thakran and another, reported in (2007) 3 S.C.C. 75,*** the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

14. Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others,*** *2007 A.I.R. S.C.W. 5553* and in ***Girja Prasad (Dead) by L.R.s vs. State of MP***, *2007 A.I.R. S.C.W. 5589.* Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

15. In the case of ***Luna Ram vs. Bhupat Singh and others,*** reported in *(2009) SCC 749*, the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

16. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives by the Inspector of Police, Tamil Nadu,*** reported in *AIR 2013 SC 321,* the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

17. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Karnataka vs. Hemareddy***, *AIR 1981, SC 1417,* wherein it is held as under:

" ... This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial

Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

18. In a recent decision, the Hon'ble Apex Court in ***Shivasharanappa and others vs. State of Karnatak***a, *JT 2013 (7) SC 66* has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

19. Further, in the case of ***State of Punjab vs. Madan Mohan Lal Verma,*** *(2013) 14 SCC 153*, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

20. The Apex Court recently in ***Jayaswamy vs. State of Karnataka,*** *(2018) 7 SCC 219*, has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of

acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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 the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

21. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat,*** *(2020) 14 SC 750,* has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam,*** *(2019) 18 SCC 161* held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

22. The prosecutrix has levelled allegations against the respondents that they forcibly took her from her house to dance-club at Ganga Nagar where she was kept for a long time and respondent-Dharmendra committed rape with her several times. She is star witness of the prosecution. In her testimony before learned trial-court, she supported the prosecution version only in examination-in-chief, but in her cross-examination, she altogether resiled from her testimony. She has stated in cross-examination that her father wanted to marry her with Dharmendra without her will, but it was further stated by her that she has solemnized marriage with Dharmendra in Arya Samaj Mandir.

23. Prosecutrix (PW1) has deposed that she was kept forcibly by Dharmendra for 20 days, but she never raised alarm during this period. It is also stated that she went with Dharmendra to solemnize marriage and put her signature, which was crowded area, but even then she did not raise any alarm. She has further stated that she filed complaint against the respondents by misguiding her brother and father. When she was being taken away forcibly, she did not think proper to apprise her neighbors. In the latter part of the statement, the prosecutrix has clearly and specifically stated that she had filed this complaint at the behest of her relatives and Dharmendra did not commit rape with her. She has also stated that at the time of said occurrence, she was major and the accused-Nand Kumar, Anita and Surendri did not force her to marry and they did not co-operate Dharmendra. As far as statement under Section 164 Cr.P.C. is concerned, the prosecutrix has stated that this statement was made by her under duress of police and her family members. In this way, the star witness of prosecution did not support prosecution case in her cross-

examination in entirety. Her testimony does not inspire even a bit of confidence.

24. Nanak Chand (PW2) is father of the prosecutrix and Smt.Shakuntala (PW3) is mother of the prosecutrix. Testimony of these two witnesses is based on hearsay. They have deposed before the trial-court on the basis of information they gathered from others.

25. It is also very pertinent to mention that when the prosecutrix was taken to hospital for medical examination, she refused her internal medical examination. This fact also goes against the prosecution and shatters the prosecution case. In toto, it has come on record that the prosecutrix wanted to marry Dharmendra while her father wanted his elder widowed daughter-Archana to marry with Dharmendra and due to this reason only, this false complaint was lodged against the accused-respondents. Learned trial-court rightly appreciated the evidence on record. The evidence produced by prosecution does not inspire confidence at all as held by learned trial Judge.

26. In view of above, we are of the considered opinion that no two views are possible and we cannot take different view from that taken by the learned trial-court. We also do not find any infirmity in the impugned judgment and order, therefore, we have no other option, but to concur with the findings recorded by the learned trial Judge.

27. The appeal lacks merit and is **dismissed**, accordingly.

28. The record and proceedings be sent back to the court-below.

(2021)12ILR A661
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.11.2021

BEFORE

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

Government Appeal No. 1544 of 2006

State of U.P. ...Appellant
Versus
Kashmir Singh & Anr. ...Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:

A. Practice & Procedure - Scope of Appellate Court - It is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court when it is just and proper. (Para 10)

Appeal Rejected. (E-10)

List of Cases cited:

1. Guru Dutt Pathak Vs St. of U.P. Laws (SC) 2021 55

2. The St. of Guj. Vs B.L Dave (2021) 2 SCC 735

3. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr. (2006) 6 S.C.C. 39

4. Chandrappa Vs St. of Karn. (2007) 4 S.C.C. 415

5. St. of Goa Vs Sanjay Thakran & anr. (2007) 3 S.C.C. 75

6. St. of U.P. Vs Ram Veer Singh & ors. 2007 A.I.R. S.C.W. 5553

7. Girja Prasad (Dead) by L.R.s Vs St. of M.P. 2007 A.I.R. S.C.W. 5589

8. Luna Ram Vs Bhupat Singh & ors. (2009) SCC 749

9. Mookkiah & Anr. Vs St. Representatives by the Inspector of Police, Tamil Nadu AIR 2013 SC 321

10. St. of Karnataka Vs Hemareddy AIR 1981 SC 1417

11. Shivasharanappa & ors. Vs St. of Karn. JT 2013 (7) SC 66

12. St. of Punjab Vs Madan Mohan Lal Verma (2013) 14 SCC 153

13. Jayaswamy Vs St. of Karn. (2018) 7 SCC 219

14. Shaildenfra Rajdev Pasvan Vs St. of Gujarat (2020) 14 SC 750

15. Samsul Haque Vs St. of Assam (2019) 18 SCC 161

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

1. Heard learned Government Pleader for the appellant.

2. This appeal under Section 378(3) of CrPC challenges the acquittal of the accused, who was charged with commission of offence under Sections 363 and 366 of the Indian Penal Code (IPC).

3. The prosecution was moved into motion by a written report dated 18.6.1996 at P.S. Dannahar, District Mainpuri and it was alleged that the sister of the complainant, who was 14 years of age, when they went to ease in the field, accused Kashmir Singh, Pappu and Girish Chandra enticed away the prosecutrix, namely, the sister of the complainant. The complainant's mother started searching the prosecutrix, but the prosecutrix end the accused absconded and the complainant did not lodge the complaint because of the fear of being defamed. It was then disclosed that the accused had kidnapped the minor and therefore, the case being Crime no. 117 of 1996 under Sections 363, 366 of the Indian Penal Code (IPC) was lodged. The police investigated the matter and the victim/ prosecutrix was recovered on 27.9.1996 from a village known as Bhanupura. She got her statement recorded under Section 164 of Criminal Procedure Code before the Magistrate. On investigation being over, charge sheet was laid before the Magisterial Court. The Magistrate being satisfied that the case was triable by the Court of Sessions, as Section 376 IPC was subsequently added from the medical test of the prosecutrix, charge sheet was submitted. As the case being triable by the Court of Sessions, the accused were summoned and they denied the charges. On denying the charges, they were set up for trial.

4. The prosecution examined about 5 witnesses of fact and the prosecutrix herself, which are follows:-

1.	Dhani Ram	P.W.-1
2.	Smt. Baikunthi Devi	P.W.-2
3.	Dr. Sunita Bahodha	P.W.-3
4.	Keshav Dev	P.W.-4
5.	Shiv Autar Pandey	P.W.-5
6.	victim Km. Urmila	P.W.-6

5. Document was filed, which was sought to be proved by leading evidence.

6. The learned counsel for the State has relied on the judgment of ***Guru Dutt Pathak vs. State of Uttar Pradesh,*** Laws (SC) 2021 55 and the case of ***The State of Gujarat vs. B.L. Dave*** [(2021) 2 SCC 735] and has contended that this is a clear case, where despite the contour of acquittal, it is very clear that the prosecutrix, who was admittedly minor in age, her consent even if cannot be considered as consent and a heinous crime against the society has been committed by the accused. The child was

recovered after three months and she had a featus of 5/ 8 months old, which shows the heinousness committed by the respondents and the case is similar to that of case of Guru Dutt Pathak (supra). It is further submitted that acquittal is perverse. The victim namely the prosecutrix was offered made to undergo the agony. It is proved beyond reasonable doubt from the evidence recorded that the accused were the persons, who had enticed the girl, namely the prosecutrix from the custody of the parents. The evidence is not properly weighed by the learned Judge, while acquitting the accused.

7. Despite summons being served, none has appeared for the accused, hence we have heard this appeal and perused the record.

8. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***M.S. Narayana Menon @ Mani vs. State of Kerala and another,*** *(2006) 6 S.C.C. 39,* the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

9. Further, in the case of ***Chandrappa vs. State of Karnataka,*** reported in *(2007) 4 S.C.C. 415,* the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is

further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

10. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

11. Even in the case of ***State of Goa vs. Sanjay Thakran and anothe***r, reported in *(2007) 3 S.C.C. 75,* the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

12. Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others***, *2007 A.I.R. S.C.W. 5553* and in G***irja Prasad (Dead) by L.R.s vs. State of MP***, *2007 A.I.R. S.C.W. 5589.* Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

13. In the case of ***Luna Ram vs. Bhupat Singh and others***, reported in *(2009) SCC 749,* the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

14. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives by the Inspector of Police, Tamil Nadu,*** reported in *AIR 2013 SC 321,* the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence,

acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

15. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Karnataka vs. Hemareddy,*** *AIR 1981, SC 1417,* wherein it is held as under:

" ... This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

16. In a recent decision, the Hon'ble Apex Court in ***Shivasharanappa and others vs. State of Karnataka,*** *JT 2013 (7) SC 66* has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

17. Further, in the case of ***State of Punjab vs. Madan Mohan Lal Verma,*** *(2013) 14 SCC 153,* the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof

beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

18. The Apex Court recently in ***Jayaswamy vs. State of Karnataka,*** *(2018) 7 SCC 219,* has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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 the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

19. The Apex Court recently in **Shailendra Rajdev Pasvan v. State of Gujarat,** *(2020) 14 SC 750,* has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam***, *(2019) 18 SCC 161* held that judgment of acquittal, where two views are possible, should not be set aside, even if

view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

20. In the case in hand, evidence was recorded after six years of the incident. The accused before us were alleged to have accompanied Pappu, the main accused, who had unfortunately passed away during the trial. The allegations against the present accused are that they had positively made the prosecutrix sit on the motorcycle and taken her to the village. She stayed with Pappu for about five months. There is no role of the present accused for enticing away to the prosecutrix or took her on the motorcycle forcibly.

21. Unfortunately, the medical evidence does not categorically show the age of the prosecutrix. As far as the medical evidence of Dr. Sunita is concerned, she has examined her, but she has mentioned that she could not make out what was the age of the prosecutrix.

22. Learned trial Judge has rightly appreciated the evidence on record. We are convinced that learned court-below has given cogent reason in the judgment impugned and we have no reason to differ with the view taken by the learned trial Judge. All these facts are sufficient for us to concur with the learned trial-court.

23. The appeal sans merits and is **dismissed.** The record of proceedings be sent back to the court below.

24. We are thankful to Sri Goswami, learned A.G.A. for ably assisting the Court for the State.

(2021)12ILR A667
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.11.2021

BEFORE

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

Government Appeal No. 1576 of 1986

State of U.P. ...Appellant
Versus
Khushi Ram & Anr. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Sri R.K.S. Chaudhary, Sri R.K.S. Chauahan, Sri Suresh Dhar Dwivedi

A. Practice & Procedure - Scope of Appellate Court - It is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court when it is just and proper. (Para 10)

Appeal Rejected. (E-10)

List of Cases cited:

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr. (2006) 6 S.C.C. 39

2. Chandrappa Vs St. of Karn.(2007) 4 S.C.C. 415

3. St. of Goa Vs Sanjay Thakran & anr. (2007) 3 S.C.C. 75

4. St. of U.P. Vs Ram Veer Singh & ors. 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (Dead) by L.Rs. Vs St. of M.P. 2007 A.I.R. S.C.W. 5589

6. Luna Ram Vs Bhupat Singh & ors. (2009) SCC 749

7. Mookkiah & anr Vs St. of Representatives by the Inspector of Police, Tamil Nadu AIR 2013 SC 321

8. St. of Karn. Vs Hemareddy AIR 1981 SC 1417

9. Shivasharanappa & ors. Vs St. of Karn. JT 2013 (7) SC 66

10. St. of Pun.Vs Madan Mohan Lal Verma (2013) 14 SCC 153

11. Jayaswamy Vs St. of Karn. (2018) 7 SCC 219

12. Shaildenra Rajdev Pasvan Vs St. of Guj. (2020) 14 SC 750

13. Samsul Haque Vs St. of Assam (2019) 18 SCC 161

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal, under Section 378 (3) Cr.P.C. at the behest of the State, has been preferred against the judgment and order dated 18.2.1986, passed by the learned Additional Sessions Judge-V, Shahjahanpur, in Session Trial No.300 of 1985 *(State vs. Khushi Ram & another)* arising out of Case Crime No.172 of 1985 under Sections 376, 380 and 376/114 IPC, Police Station-Sehramau (South), District-Shahjahanpur, whereby learned trial Judge acquitted both the accused persons of all the charges.

2. Brief facts of this case are that an FIR was lodged by the complainant stating that on 20.3.1985 at about noon, accused persons Khushi Ram and Satish entered the house of prosecutrix, who is a married lady, where she was alone. Her father and sister were also away from the home. Accused persons shut the main door of the house and accused-Khushi Ram committed the rape upon the prosecutrix forcibly. Accused-Satish caught hold the prosecutrix during the course of commission of the crime. Satish also took jewelry and cash of the prosecutrix at the time of running from the home. Investigation was taken up by SI-Bhagat Singh, who visited the spot and prepared the site-plan. Investigating Officer recorded the statements of the witnesses under Section 161 Cr.P.C. During the course of investigation, medical examination of the prosecutrix was conducted and medical report as well as supplementary report were prepared. After completing the evidence, charge-sheet was submitted against both the accused persons. The case being exclusively triable by court of session was committed to the court of session for trial by competent Magistrate. Learned trial-court framed charges against the accused-Khushi Ram under Sections 376 and 380 IPC and against the accused-Satish under Section 376 read with Sections 114 and 380 IPC.

3. To bring home the charges, the prosecution produced the following witnesses, namely:-

1.	Prosecutrix	PW1
2.	Ram Swaroop	PW2
3.	S.I.Bhagat Singh	PW3

4. In support of the ocular version of the witnesses, following documentary evidence was produced and contents were proved by leading the evidence :-

1.	FIR	Ex.ka1
2.	Recovery Memo	Ex.ka7
3.	Medical Examination Report	Ex.ka3
4.	Supplementary Report	Ex.ka4
5.	Pathology Report	Ex.ka5
6.	Report of FSL	Ex.ka10
7.	Site-plan	Ex.ka6

Genuineness of the medical examination report, supplementary report and pathology report was admitted by the defence,

therefore, no oral testimony of the doctor was led by the prosecution.

5. After completion of prosecution evidence, statements of accused persons were recorded under Section 313 Cr.P.C., in which they denied the evidence and said that they were falsely implicated due to enmity. No witness was examined in defence.

6. We have heard Shri Vikas Goswami, learned AGA for the State of UP as well as Shri Suresh Dhar Dwivedi, learned counsel for the accused-respondents and perused the record.

7. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

8. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***M.S. Narayana Menon @ Mani vs. State of Kerala and another***, *(2006) 6 S.C.C. 39,* the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

9. Further, in the case of ***Chandrappa vs. State of Karnataka***, reported in *(2007) 4 S.C.C. 415,* the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is

further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

10. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

11. Even in the case o***f State of Goa vs. Sanjay Thakran and another,*** reported in *(2007) 3 S.C.C. 75,* the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

12. Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others,*** *2007 A.I.R. S.C.W. 5553* and in ***Girja Prasad (Dead) by L.R.s vs. State of MP****, 2007 A.I.R. S.C.W. 5589.* Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

13. In the case of ***Luna Ram vs. Bhupat Singh and others***, reported in *(2009) SCC 749,* the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

14. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives by the Inspector of Police, Tamil Nadu,*** reported in *AIR 2013 SC 321,* the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the

said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

15. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Karnataka vs. Hemareddy***, *AIR 1981, SC 1417,* wherein it is held as under:

" ... This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

16. In a recent decision, the Hon'ble Apex Court in ***Shivasharanappa and others vs. State of Karnataka***, *JT 2013 (7) SC 66* has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

17. Further, in the case of ***State of Punjab vs. Madan Mohan Lal Verma***, *(2013) 14 SCC 153*, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the

amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

18. The Apex Court recently in ***Jayaswamy vs. State of Karnataka***, *(2018) 7 SCC 219*, has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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 the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

19. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat,*** *(2020) 14 SC 750*, has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in Samsul Haque v. State of Assam, (2019) 18 SCC 161 held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

20. Learned AGA submitted that prosecutrix has supported the prosecution version in her statement as PW1. She has narrated the story, which took place with her by the accused persons in detail, but the learned trial court did not rightly appreciate her evidence. It is also submitted that Ram Swaroop (PW2) had seen the accused persons while running from the house of prosecutrix at the given date and time, but this evidence was also not considered by trial court in right perspective.

21. We had perused the evidence on record. Prosecutrix has stated that rape was committed upon her by the accused-Khushi Ram, but the medical evidence suggests that no rape was committed upon her. Medical Report (Ex.ka3) says that at the time of internal medical examination, hymen was found old torn and well-healed up. No fresh-injury detected. Therefore, as per medical-report, there was no external or internal injury on the person of the prosecutrix rather it was concluded by the doctor that she has used to sexual intercourse. In ossification-test, her age was found above 19 years and the doctor had opined that '*no opinion about rape can be given*'. In pathology-report, it is mentioned that *'no spermatozoa was seen*'. It is also pertinent to mention as far as the offence of theft under Section 380 IPC is concerned, no recovery is made from any of the accused persons.

22. We have considered the evidence on record meticulously and we are of the considered opinion that learned trial Judge had rightly appreciated the evidence on record and it was correctly opined by the learned trial Judge that offence of rape or theft was not proved by the prosecution case.

23. In view of above, we cannot take a different view from that of taken by the learned trial-court. We also do not find any infirmity in the impugned judgment and order dated 18.2.1986, therefore, we have no other option, but to concur with the findings recorded by the learned trial court and appeal is liable to be dismissed.

24. Hence, appeal sans merit and is **dismissed.**

25. We are thankful to Shri Vikas Goswami, learned AGA for the State of UP and Shri Suresh Dhar Dwivedi, learned counsel for the accused-respondents for ably assisting the Court.

(2021)12ILR A673
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.11.2021

BEFORE

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

Government Appeal No. 1850 of 2015

State of U.P. ...Appellant
Versus
Swaminath ...Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:

A. Practice & Procedure - Scope of Appellate Court - It is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court when it is just and proper. (Para 12)

Appeal Modified. (E-10)

List of Cases cited:

1. Shiv Shankar Vs St. of U.P. 2002 Crl. Law Journal 2673

2. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr. (2006) 6 S.C.C. 39

3. Chandrappa Vs. St. of Karn.(2007) 4 S.C.C. 415

4. State of Goa Vs Sanjay Thakran & anr. (2007) 3 S.C.C. 75

5. St. of U.P. Vs Ram Veer Singh & ors. 2007 A.I.R. S.C.W. 5553

6. Girja Prasad (Dead) by L.Rs. Vs St. of M.P. 2007 A.I.R. S.C.W. 5589

7. Luna Ram Vs Bhupat Singh & ors. (2009) SCC 749

8. Mookkiah & anr Vs State of Representatives by the Inspector of Police, Tamil Nadu AIR 2013 SC 321

9. State of Karnataka Vs Hemareddy AIR 1981 SC 1417

10. Shivasharanappa & ors. Vs St.of Karn. JT 2013 (7) SC 66

11. St. of Pun. Vs Madan Mohan Lal Verma (2013) 14 SCC 153

12. Jayaswamy Vs St. of Karn.(2018) 7 SCC 219

13. Shaildenra Rajdev Pasvan Vs St.of Gu. (2020) 14 SC 750

14. Samsul Haque Vs St.of Assam (2019) 18 SCC 161

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

1. Heard learned AGA for the State and perused the record.

2. This appeal, at the behest of the State, has been preferred against the judgment and order dated 18.10.2005, passed by the Additional Sessions Judge/F.T.C., Maharajganj, acquitting accused-respondent, who has been tried for commission of offence under Sections 376 and 511 of Indian Penal Code (hereinafter referred to as, "I.P.C').

3. The State of Uttar Pradesh has felt aggrieved while convicting the accused. The learned trial Judge has convicted under Section 354 of the Indian Penal Code as the learned Judge has considered the case under Section 354 as though the charge against the accused was for commission of offence under Section 376 of IPC and 511 IPC. The said offences were held to be not proved. The accused had entered the house of his uncle and aunt and tried to ravish her. The learned Judge has considered the judgment in ***Shiv Shankar v. State of Uttar Pradesh reported in 2002 Crl. Law Journal 2673*** and come to the conclusion that he held lost the right of being in the house of the uncle and, therefore, he has been considered to be an accused and is punished for committing offence under Section 457 IPC also read with 354 IPC.

4. Learned Judge while sentencing has considered the fact that this is first offence and he was under mental shock as he had lost his elder brother and wife of his younger brother. The accused tried to molest his aunt and, therefore, the court ordered his incarceration for 2 years under Section 354 of IPC and one year under Section 457 of the IPC but looking to his state of mind did not order recovery of fine or default sentence.

5. After recording the evidence of the witnesses and perusing the material on record, the trial Court passed the impugned order. Hence, the present appeal contending that offence committed was under Section 376 IPC.

6. We are not aware whether the accused has challenged the sentence or not, but the State

has challenged. The order sheet does not reveal that since 2006 whether the accused ever was issued with summons, though the record has been summoned and it is with this court since August, 2021.

7. The term shall also be liable to fine in section 457 and, therefore, we are of the opinion that while hearing the appeal, we find that error has occurred by not imposing fine for conviction under Section 457 IPC. The view taken by learned Judge is against the mandate of the Statute and no reasons are assigned by the learned Judge, as to why he has not inflicted punishment of fine though the sentencing as per Section 457 of Indian Penal Code uses the word 'and fine'.

8. As far as the facts are concerned, the accused was charged with commission of offence under Section 376 read with Section 511 of the IPC that he had committed rape of his aunt on 2.2.1995 by entering into his house, he had tried to commit rape and he was also liable for tress pass.

9. Learned AGA for the appellant-State, vehemently submitted that the trial Court committed a grave error in passing the impugned judgment and order, inasmuch as it failed to appreciate the material on record in its proper perspective. It is submitted that taking into consideration the oral evidence of the witnesses examined by the prosecution as well as the documentary evidences produced by it, the trial Court ought to have held the accused guilty of the charges leveled against them. It is, therefore, prayed that the appeal be allowed.

10. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of **"M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39,** the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

11. Further, in the case of **"CHANDRAPPA Vs. STATE OF KARNATAKA", reported in (2007) 4 S.C.C. 415,** the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to

curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

12. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

13. Even in the case of **"STATE OF GOA Vs. SANJAY THAKRAN & ANR.",** reported in **(2007) 3 S.C.C. 75**, the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

14. Similar principle has been laid down by the Apex Court in cases of **"STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553 and in "GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP", 2007 A.I.R. S.C.W. 5589.** Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

15. In the case of **"LUNA RAM VS. BHUPAT SINGH AND ORS."**, reported in **(2009) SCC 749,** the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody

would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

16. Even in a recent decision of the Apex Court in the case of "**MOOKKIAH AND ANR. VS. STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU",** reported in AIR 2013 SC 321, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

17. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of "**STATE OF KARNATAKA VS. HEMAREDDY", AIR 1981, SC 1417,** wherein it is held as under:

"...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

18. In a recent decision, the Hon'ble Apex Court in **"SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA", JT 2013 (7) SC 66** has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

19. Further, in the case of **"STATE OF PUNJAB VS. MADAN MOHAN LAL VERMA", (2013) 14 SCC 153**, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not

sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

20. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219***, has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10.It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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 the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may

arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

21. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750***, has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

22. The factual scenario of the case to show that on the fateful date, the accused who was the nephew of the prosecutrix tried to commit tress pass entered the house tried to molested her, but in the process when she tried to catch him, he ran away. The prosecutrix was moved into motion and the charge sheet was laid. The learned judge has given judgment which cannot be said to be in so perverse, that conviction under Section 354 IPC is bad, it cannot be said that the findings of facts are perverse but there is irregularity in not passing order of fine and default sentence.

23. In view of the above judgments and facts as discussed above, it would not permit us to take a different view then that taken by the learned Judge who has convicted the accused. The evidence on record also will not permit us to take a different view as far as punishment under Section 354 and not 376 IPC is considered. Thus, the above-mentioned decisions will not permit this Court to take a different view except infliction of fine. In this case it is not proved beyond doubt that the original accused respondent, herein, indulged into commission of rape of his own aunt.

24. While going through the record and the impugned judgment, the principle enunciated by the Apex Court for entertaining appeal against partial conviction which are reproduced herein above, will permit this Court to pass order which will meet ends of justice.

25. The Court on careful reading came to the conclusion that the provisions of Section offence under Sections, 375 and 376 IPC are not made out. The testimony of the witnesses do not permit us to take a different view that rape was not committed. The reason being there was no penetration in the vagina of the prosecutrix before he could do anything. She sounded the alarm by shouling and accused fled away. The provision of Section 511 IPC with which he was charged is also not be attracted. There was no charge under Section 457 of IPC, but the learned Judge has also convicted under Section 457 of IPC read with 354 IPC.

26. In the result, this appeal fails but to meet ends of justice as the judgment and order of the trial Court, Dated : 18.10.2005, stands modified. Bail bonds of the accused, if any, on bail, stands cancelled.

27. Lower Court Record be sent back to the concerned trial Court, forthwith.

28. As far as under Section 457 IPC is concerned, as there is mandate to impose fine as it is mandatory, we direct the learned trial Judge to summon the accused herein and pass order of fine and default sentence. The accused if he has

not undergone, the punishment will surrender to the Jail authorities concerned, if he has not preferred any appeal or no orders are passed.

(2021)12ILR A680
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.12.2021

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE JASPREET SINGH, J.

Misc. Single No. 156 of 2008 & other cases

Ram Vilas ...Petitioner
Versus
Commissioner Devi Patan Mandal Gonda & Ors. ...Respondents

Counsel for the Petitioner:
M/s Mohan Singh, Rajiv Kumar Tripathi, Rama Kant Dixit, Vinod Kumar Pandey, S. Chandra, Ganesh Nath Mishra, Satendra Nath Rai

Counsel for the Respondents:
Mr. Manjive Shukla, Additional Chief Standing Counsel, Mr. Brijesh Kumar Singh, Advocate

A. Interpretation of Statute - U.P. Panchayat Raj Act, 1947: Section 2(q)(ii), 27 - U.P. Panchayat Raj (Amendment) Rules, 1969 - By way of Amendment in Chapter XIII heading "SURCHARGE" was inserted in the U.P. Panchayat Raj Rules, 1947. The Court interpreted that the District Magistrate is the "Prescribed Authority" for imposing surcharge on Pradhan, Up-Pradhan and the Members under Section 27(2) and the District Panchayat Raj Officer is the Prescribed Authority for imposing surcharge upon the Officers or servants of the Gaon Sabha. (Para 20)

Reference is Answered. (E-10)

List of Cases cited:

1. Uday Pratap Singh @ Harikesh Vs St. of U.P. & ors. Writ C No. 24902 of 2019

(Delivered by Hon'ble Rajesh Bindal, C.J.)

1. The matter has been placed before this Court for consideration of the following questions of law, on account of doubt expressed by learned Single Judge on the view expressed earlier by a Single Judge of this Court in Writ-C No. 24902 of 2019 (Uday Pratap Singh @ Harikesh Vs. State of U.P. and others) decided on 30.09.2019:

"(1) Whether in view of the U.P. Panchayat Raj (Amendment) Rules, 1969 by which Chapter- XIII with the heading "SURCHARGE' was inserted in the U.P. Panchayat Raj Rules, 1947 in exercise of powers under Section 110 by the State Government, which have been notified in the Gazette on 31.05.1969, the District Magistrate is the "Prescribed Authority' for imposing surcharge on Pradhan, Up-Pradhan and Members under Section 27 (2) in terms of Section 2(q)(ii) of the U.P. Panchayat Raj Act, 1947 or not ?, and whether the District Pachayat Raj Officer is the Prescribed Authority for imposing surcharge upon the Officers or servants of the Gaon Sabha or not ?

(2) Whether the decision rendered by a Single Judge Bench in Writ- C No. 24902 of 2019; Uday Pratap Singh @ Harikesh Vs. State of U.P. and others and connected petitions on 30.09.2019 lays down the law correctly with regard to Question No. 1 framed above ?"

2. As only legal issues have been referred to be considered by Larger Bench, we do not go much in the facts of the case as for that purpose the matter will go back before the learned Single Judge.

3. The argument raised by learned counsel for the petitioners is that the Prescribed Authority having not been notified in terms of the provisions of the U.P. Panchayat Raj Act, 1947 (hereinafter referred to as "the Act"), the District Magistrate cannot exercise the power. A

plain reading of Section 27 of the Act shows that the Prescribed Authority is to fix the amount of surcharge and certify the same to the Collector for recovery of the same as arrears of land revenue. It would clearly mean that two persons have to be different authorities. The Prescribed Authority cannot be the Collector (District Magistrate).

4. On the other hand, learned counsel for the State submitted that Section 2(q) of the Act defines "Prescribed Authority". Clause (ii) thereof provides that the Prescribed Authority shall be the authority notified as such by the Government, whether generally or for any particular purpose. Chapter-XIII was added in the U.P. Panchayat Raj Rules, 1947 (hereinafter referred to as the "the Rules") vide Notification dated May 22, 1969 published in Gazette on May 31, 1969. It clearly provides the procedure and the authority competent to take action in terms of Section 27 of the Act. This is in compliance to the requirements of Section 27 read with Section 2(q) of the Act.

5. From a plain reading of the Rules contained in Chapter XIII of the Act, it is evident that hierarchy of officers has been provided even for hearing the appeals against the orders passed by the authorities concerned. No separate notification, as such, is required to be issued as the Rules framed in exercise of powers conferred under Section 110 of the Act provides for the same. It is not a matter of dispute that the Rules were notified in the Gazette. He further submitted that merely because in Section 27(2) it is mentioned that the Prescribed Authority shall fix the amount of surcharge and certify this amount to the Collector for recovery as arrears of land revenue, it will not mean that both the authorities have to be different. If seen in the light of the definition of "Collector", as provided in Section 2(e) of the Act, there are many officers who fall within the definition of Collector. Even otherwise, the same officer can exercise two powers. Recovery of an amount as arrears of land revenue is nothing but execution of the order passed by Prescribed Authority for recovering the amount as per procedure prescribed.

6. The matter came to be referred for decision by this Bench on account of opinion expressed by a Single Judge of this Court in **Uday Pratap Singh's case (supra)** holding as under:

"A. The expression "Prescribed Authority" referred to in Section 27(2) of the Act means an authority duly designated for that purpose in accordance with the provisions made in Section 2(q)(ii);

B. The State has failed to establish that the District Magistrate was duly notified as the Prescribed Authority in accordance with the mandate of Section 2(q)(ii). In the absence of a notification designating the District Magistrate as the competent authority for the purposes of Section 27(2), the orders of surcharge impugned cannot be sustained;

C. The prescription of a procedure for assessment and recovery of surcharge in Chapter XIII of the Rules and the assignment of a role to the District Magistrate or the District Panchayat Raj Officer thereunder cannot be held to be a compliance of the requirement of Section 27(2);

D. Rules 256-259 as contained in Chapter XIII of the Rules are only an extension of the requirement placed by Section 27(2) to lay in place a structure to "fix the amount of the surcharge according to the procedure that may be prescribed";

E. Section 27(2) neither sanctions nor envisages the designation of a Prescribed Authority by way of a rule or other subordinate legislation;".

7. Heard learned counsel for the parties.

8. The relevant provisions of the Act are extracted below:

"2. Definitions - In this Act, unless there is anything repugnant in the subject or context. -

x x x x

(e) "**Collector' or "District Magistrate' or "Sub-divisional Magistrate'** with reference to a Gram Sabha, means the Collector, District Magistrate or Sub-Divisional Magistrate of the District or the sub-division, as the case may be, in which such Gram Sabha is constituted; and shall respectively include Additional Collector, Additional District Magistrate and Additional Sub-Divisional Magistrate;

x x x x

(q) "Prescribed authority' means -

(i) for the purposes of the provisions of this Act mentioned in Schedule III of the Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961, the Zila Panchayat or the Kshettra Panchayat, as may be specified in column 3 of that Schedule; and

(ii) in respect of any other provisions of this Act, the authority notified as such by the State Government whether generally or for any particular purpose;

x x x x

27. Surcharge - (1) Every Pradhan of a Gram Panchayat, every member of a Gram Panchayat or of a Joint Committee or any other committee constituted under this Act shall be liable to surcharge for the loss, waste or misapplication of money or property belonging to the Gram Panchayat, if such loss, waste or misapplication is direct consequence of his neglect or misconduct while he was such Pradhan or Member;

Provided that such liability shall cease to exist after the expiration of ten years from the occurrence of such loss, waste or misapplication, or five years from the date on which the person liable ceases to hold his office, whichever is later.

(2) The prescribed authority shall fix the amount of the surcharge according to the procedure that may be prescribed and shall certify the amount to the Collector who shall, on being satisfied that the amount is due, realize it as if it were an arrear of land revenue.

(3) Any person aggrieved by the order of the prescribed authority fixing the amount of surcharge may, within thirty days of such order, appeal against the order to the State Government or such other appellate authority as may be prescribed.

(4) Where no proceeding for fixation and realization of surcharge as specified in sub-section (2) is taken the State Government may institute a suit for compensation for such loss, waste or misapplication, against the person liable for the same.

x x x x

110. Powers of State Government to make Rules - (1) The State Government may, by notification in the Gazette, make rules for carrying out the purposes of this Act."

9. The Rules 256 to 260 of the Rules, relevant for the purpose of this case, read as under:

"256 (1) In any case where the Chief Audit Officer, Co-operative Societies and Panchayats, considers that there has been a loss, waste or misuse of any money or other property belonging to a Gram Sabha as a direct consequence of the negligence or misconduct of a Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat, he may call upon the Pradhan, Up-Prahdan, Member, Officer or servant, as the case may be, to explain in writing why such Pradhan, Up-Pradhan, Member, Officer, or servant should not be required to pay the amount misused or the amount which represents the loss or waste caused to the Gram Sabha or to its property and such explanation shall be furnished within a period not exceeding two months from the date such requisition is communicated to the person concerned:

Provided that an explanation from the Pradhan, Up-Pradhan or member of the Gram Panchayat shall be called for through the District Magistrate and from the officer or servant through the District Panchayat Raj Officer:

Provided also that no explanation shall be called for from any member who is recorded in the minutes of the Gram Panchayats or any of its committee as having been absent from the meeting at which the expenditure objected to was sanctioned or who voted against such expenditure.

(2) Without prejudice to the generality of the provisions contained in sub-rule (1) the Chief Audit Officer, Cooperative Societies and Panchayts, may call for the explanation in the following cases:

(a) where expenditure has been incurred in contravention of the provisions of the Act or of the rules or regulations made thereunder;

(b) where loss has been caused to the Gram Sabha by acceptance of a higher tender without sufficient reasons in writing.

(c) where any sum due to the Gram Sabha has been remitted in contravention of the provisions of the Act or the rules or regulations made thereunder;

(d) where the loss has been caused to the Gram Sabha by neglect in realizing its dues; or

(e) where loss has been caused to the funds or other property of the Gram Sabha on account of want of reasonable care for the custody of such money or property.

(3) On the written request of the Pradhan, Up-Pradhan, Member, Officer or servant from whom an explanation has been called for, the Gram Panchayat shall give him necessary facilities for inspection of the records connected with the requisition for surcharge. The Chief Audit Officer may, on application from the person surcharged, allow a reasonable extension of time for submission of his explanation if he is satisfied that the person charged has been unable, for reasons beyond his control, to consult the record for the purpose of furnishing his explanation.

257. (1). After the expiry of the period prescribed in sub-rule (1) or (3) of Rule 256, as the case may be, and after examining the explanation, if any, received within time, the Chief Audit Officer shall submit the papers along with his recommendations to the District Magistrate of the district in which the Gram Sabha is situated in case of Pradhan, Up-Pradhan and Members and to the District Panchayat Raj Officer of the district in which the Gram Sabha is situated in case of Officers and servants.

(2) The District Magistrate or the District Panchayat Raj Officer, as the case may be, after examining and after considering the explanation, if any, shall require the Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat to pay the whole or part of the sum to which such Pradhan, Up-Pradhan, Member, Officer or servant is found liable:

Provided, firstly, that no Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat would be required to make good the loss, if from the explanation of the Pradhan, Up-Pradhan, Member, Officer or servant concerned or otherwise the District Magistrate or the District Panchayat Raj Officer, as the case may be, is satisfied that the loss was caused by an act of the Pradhan, Up-Pradhan, Member, Officer or servant in the bona fide discharge of his duties:

Provided secondly, that in the case of loss, waste or misuse occurring as a result of a resolution of the Gram Panchayat or any of its committees the amount of loss to be recovered shall be divided equally among all the members including Pradhan and Up-Pradhan, who are reported in the minutes of the Gram Panchayat or any of its committee as having voted for or who remained neutral in respect of such resolution:

Provided thirdly, that no Pradhan, Up-Pradhan, Member, Officer or servant shall be liable for any loss, waste or misuse after the expiry of four years from the occurrence of such loss, waste or misuse or after the expiry of three years from the date of his ceasing to be Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat, whichever is later.

258. (1) Any Pradhan, Up-Pradhan or Member of a Gram Panchayat aggrieved with an order of surcharge passed by the District Magistrate under Rule 256 may appeal to the Commissioner of the Division within thirty days from the date on which such order is communicated to him and the Commissioner of the Division may confirm, rescind or vary the order passed by the District Magistrate or may pass such orders as he thinks fit.

(2) Any Officer or servant of a Gram Panchayat aggrieved with an order of surcharge passed by the District Panchayat Raj Officer may appeal to the District Magistrate within thirty days from the date on which such order is communicated to him and the District Magistrate may confirm, rescind or vary the order passed by the District Panchayat Raj Officer or may pass such orders as he thinks fit.

259. (1) A Pradhan, Up-Pradhan, Member, Officer or servant of a Gram Panchayat who has been surcharged, shall pay the amount of surcharge within three months from the date of communication to him of the order of surcharge passed by the District Magistrate or the District Panchayat Raj Officer, as the case may be:

Provided that when an appeal has been preferred under Rule 258 against the order of surcharge passed by the District Magistrate or the District Panchayat Raj Officer, all proceedings for recovery of the surcharge from the persons who have preferred the appeal shall be stayed until the appeal has been finally decided.

(2) If the amount of surcharge is not paid within the period specified in sub-rule (1) it shall be recovered as arrears of land revenue.

260. Where a suit is instituted in a Court to question an order of surcharge and the District Magistrate, District Panchayat Raj Officer or the Commissioner of the Division is a defendant in such a suit, all costs incurred in defending such a suit shall be paid by the Gaon

Panchayat and it shall be the duty of the Gaon Panchayat to make such payment without undue delay."

10. Section 27 of the Act provides that every Pradhan of a Gram Panchayat and every member of a Gram Panchayat or of a Joint Committee or any other committee constituted under this Act shall be liable to surcharge for the loss, waste or misapplication of money or property belonging to the Gram Panchayat, if such loss, waste or misapplication is direct consequence of his neglect or misconduct in discharge of his duties. The Prescribed Authority has been given power to fix the amount of surcharge according to the procedure as may be prescribed. The amount has to be certified to the Collector for realization as arrears of land revenue. Sub-section (3) thereof provides that any person aggrieved by an order of Prescribed Authority fixing the amount of surcharge may file an appeal against such order to the State Government or such other appellate authority, as may be prescribed.

11. Section 2(q)(ii) defines "Prescribed Authority" as an authority notified as such by State Government, whether generally or for any particular purpose. It would mean that the Prescribed Authority is to be notified conferring power under this Act. Section 110 of the Act provides that the State Government may, by notification in the Gazette, make Rules for carrying out the purposes of this Act.

12. It cannot be disputed that the purpose of notifying Prescribed Authority is to carry out the purposes of this Act. It is not only the Prescribed Authority but in terms of Section 27(3) even an appellate authority is also to be prescribed.

13. Chapter-XIII was added in the Rules vide Notification dated May 22, 1969 published in Gazette on May 31, 1969. Rule 256 of the Rules provides different authorities for taking action in terms of Section 27 of the Act. A perusal of Rules 256 to 260 of Chapter XIII of the Rules show that complete procedure has been provided for fixation of the surcharge to be recovered from different officers in Gram Panchayat on account of loss, waste or misuse of any money/property belonging to the Gaon Sabha which is on account of a direct consequence of negligence or misconduct of the person concerned. Chief Audit Officer, Cooperative Society and Panchayats is to consider the same and after examination of the explanation, if any, received from persons concerned, submit the papers along with recommendation to the District Magistrate of the District in which the Gaon Sabha is situated, in case of Pradhan, Up-Pradhan and Member. The report along with recommendation has to be sent by Chief Audit Officer to the District Panchayat Raj Officer of the District in which Gaon Sabha is situated, in case of Officers and servants. The District Magistrate or the the District Panchayat Raj Officer, as the case may be, is to finally fix the amount, which is recoverable from the person concerned.

14. Rule 258 provides the appellate authority, in terms of Section 27 (3) of the Act. An order passed by the District Magistrate is appealable to the Commissioner of the Division, whereas an order passed by District Panchayat Raj Officer is appealable to the District Magistrate.

15. The argument raised by learned counsel for the petitioners that separate notification had to be issued for specifying Prescribed Authority for taking action for assessment of surcharge is misconceived and deserves to be rejected. A perusal of various provisions of the Act, as have been referred above, only shows that a notification has to be issued. That would not mean that a separate notification is to be issued only for notifying the

Prescribed Authority. Once the complete procedure for fixation of surcharge and authority concerned for the purpose has been prescribed in the Rules framed under the Act, which have been duly notified, in our opinion the mandate of the law stands satisfied.

16. The District Magistrate is the competent authority for fixation of amount of surcharge recoverable from Pradhan, Up-Pradhan and Member and the District Panchayat Raj Officer is competent authority for fixing the amount of surcharge in case of officers and servants.

17. The argument that the Prescribed Authority as well as Collector have to be separate persons is merely to be noticed and rejected as the same authority can be conferred with two different powers. In any case, recovery of an amount due from any person is merely a process of execution and power can be exercised even by the same authority, or any other authority prescribed under the Act.

18. It may also be seen in the light of the fact that in the definition of "Collector", it is not only "District Magistrate", rather Sub-divisional Magistrate, Additional Collector, Additional District Magistrate and Additional Sub Divisional Magistrate are also included therein.

19. The opinion expressed by learned Single Judge of this Court in **Uday Pratap Singh's case (supra)** is not in correct perspective of the provisions of the Act and the Rules, hence may not be treated as precedent to be followed, as it is does not lay down the law correctly.

20. For the reason mentioned above, the question no. 1, as referred to be considered by Division Bench, is answered in positive. In view of the U.P. Panchayat Raj (Amendment) Rules, 1969, by which Chapter- XIII with the heading "SURCHARGE' was inserted in the U.P. Panchayat Raj Rules, 1947 in exercise of powers under Section 110 by the State Government, as notified in the Official Gazette on May 31, 1969, the District Magistrate is the "Prescribed Authority' for imposing surcharge on Pradhan, Up-Pradhan and Members under Section 27(2) and the District Pachayat Raj Officer is the Prescribed Authority for imposing surcharge upon the Officers or servants of the Gaon Sabha.

21. As far as the question no. 2 is concerned, the answer thereof is in negative. The decision rendered by learned Single Judge of this Court in **Uday Pratap Singh's case (supra)** whereby a bunch of petitions were decided, does not lay down the law correctly.

22. The reference is, accordingly, answered.

23. The matters shall now be placed before learned Single Judge on January 17, 2021, for further consideration.

(2021)12ILR A686
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.11.2021

BEFORE

THE HON'BLE DEVENDRA KUMAR URADHYAYA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Misc. Bench No.21326 of 2020

Payal Agarwal & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Mr. Nadeem Murtaza,Mr. Anuj Dayal, Mr. Paavan Awasthi, Mr. Prashant Singh Atal and Mr. Prashast Puri

Counsel for the Respondents:

G.A.,Mr. Amarjeet Singh Rakhra, Mr. R.B.S. Rathaur, Mr. Shashank Dhaon, Mr. Shikhar Mishra and Mr. Tushar Hirwani.

A. Practice & Procedure - The Court held that an F.I.R. can be quashed on the basis of mutual compromise arrived at between the parties, even if an offence is not compoundable under Section 320 of Cr.P.C. (Para 13)

Writ Petition Allowed. (E-10)

List of Cases cited:

1. B.S. Joshi & ors. Vs St. of Har. & anr. (2003) 4 SCC 675

2. Gian Singh Vs St. of Pun. & anr. (2012) 10 SCC 303

3. Narinder Singh & anr. Vs St. of Pun. (2014) Criminal Law Journal 2436

4. Parabatbhai Aahir @ Parabatbhai Bhimsinghbhai Karmur & ors. Vs St. of Guj. & anr. (2017) 9 SCC 641

5. Social Action Forum for Manav Adhikar & anr. Vs UOI, Ministry of Law & Justice & ors. (2018) 10 SCC 443

6. St. of Har.Vs Bhajan Lal 1992 Supplementary (1) SCC 335

7. Nikhil Merchant Vs Central Bureau of Investigation & anr. (2008) 9 SCC 677

8. Manoj Sharma Vs St. of ors. (2008) 16 SCC 1

9. Anita Maria Dias Vs St. of Mah.a (2018) 3 SCC 290

10. Kapil Agarwal & ors Vs Sanjay Sharma & ors. (2021) 5 SCC 524

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. Heard Mr. Nadeem Murtaza and Mr. Prashant Puri, learned counsel for the petitioners, Mr. Amarjeet Singh Rakhra, learned counsel for the respondent No.4 and Mr. S.P. Singh, learned A.G.A. for the State.

2. This writ petition under Article 226 of the Constitution of India (in short Constitution) has been filed by the petitioners to quash the First Information Report (in short F.I.R.) registered at Case Crime No.0531 of 2020, under Sections 471, 468, 467, 420 and 406 of Indian Penal Code (in short I.P.C.) at Police Station Sarojani Nagar, District Lucknow and not to proceed, prosecute or arrest the petitioners on the basis of the aforesaid F.I.R.

3. Previously, after going through the record and having heard the learned counsel for the petitioners as well as learned A.G.A. and the counsel for the private respondent No.4, this Court gathered that prima-facie the case relates to business/corporate transactions and the F.I.R. has been lodged due to some personal feud between two real brothers. This Court deemed it proper to persuade the parties to settle the dispute amicably. 'Abraham Lincoln' has said *"discourage litigation persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses and waste of time.*" Hence the Court with the consent of petitioners and respondent No.4 gave them chance to settle their dispute amicably through the process of Mediation/Conciliation. Accordingly, the matter was so referred.

4. Today the counsel for the petitioners as well as private respondent No.4 appeared and submitted that they have settled their dispute amicably with the help of Mediator and blessings of the mother of petitioner No.1 and respondent No.4. So F.I.R. may be quashed, as there is no dispute or bickerings left between the petitioners and respondent No.4. The counsel for the petitioners as well as private respondent relied upon the following case laws:-

1. B.S. Joshi and others Vs. State of Haryana and another (2003) 4 SCC 675.

2. Gian Singh Vs. State of Punjab and another (2012) 10 SCC 303.

3. Narinder Singh and anothers Vs. State of Punjab (2014) Criminal Law Journal 2436.

4. Parbatbhai Aahir Alias Parbatbhai Bhimsinghbhai Karmur and others Vs. State of Gujarat and another (2017) 9 SCC 641.

5. Social Action Forum for Manav Adhikar and another Vs. Union of India, Ministry of Law and Justice and others (2018) 10 SCC 443.

5. This Court is empowered under Section 482 of the Code of Criminal Procedure (in short Cr.P.C.) and under Article 226 of the Constitution to quash the F.I.R. in certain circumstances and relating to certain offences. In the case of ***State of Haryana Vs. Bhajan Lal 1992 Supplementary (1) SCC 335***, Hon'ble the Apex Court has considered in detail the scope of the power of the High Court under Section 482 of the Cr.P.C. and/or under Article 226 of the Constitution to quash the F.I.R.

6. In ***B.S. Joshi and others Vs. State of Haryana and another*** (Supra) the Hon'ble Apex Court again explained the ambit of the inherent powers of the High Court under Section 482 of the Cr.P.C. read with Article 226 and 227 of the Constitution to quash the criminal proceedings.

7. In ***Nikhil Merchant Vs. Central Bureau of Investigation and Another (2008) 9 SCC 677,*** where the dispute was settled between the parties on the basis of compromise the Hon'ble Apex Court has observed as under:-

" 30. In the instant case, the disputes between the Company and the Bank have been set at rest on the basis of the compromise arrived at by them whereunder the dues of the Bank have been cleared and the Bank does not appear to have any further claim against the Company. What, however, remains is the fact that certain documents were alleged to have been created by the appellant herein in order to avail of credit facilities beyond the limit to which the Company was entitled. The dispute involved herein has overtones of a civil dispute with certain criminal facets. The question which is required to be answered in this case is whether the power which independently lies with this Court to quash the criminal proceedings pursuant to the compromise arrived at, should at all be exercised?

31. On an overall view of the facts as indicated hereinabove and keeping in mind the decision of this Court in B.S. Joshi's case and the compromise arrived at between the Company and the Bank as also clause 11 of the consent terms filed in the suit filed by the Bank, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, in our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise."

8. Again the Hon'ble Supreme Court in ***Manoj Sharma Vs. State of others (2008) 16 SCC*** 1 has held as under:-

" 27. There can be no doubt that a case under Section 302 IPC or other serious offences like those under Sections 395, 307 or 304B cannot be compounded and hence proceedings in those provisions cannot be quashed by the High Court in exercise of its power under Section 482 Cr.P.C. or in writ jurisdiction on the basis of compromise. However, in some other cases, (like those akin to a civil nature) the proceedings can be quashed by the High Court if the parties have come to an amicable settlement even though the provisions are not compoundable. Where a line is to be drawn will have to be decided in some later decisions of this Court, preferably by a larger bench (so as to make it more authoritative).

Some guidelines will have to be evolved in this connection and the matter cannot be left at the sole unguided discretion of Judges, otherwise there may be conflicting decisions and judicial anarchy. A judicial discretion has to be exercised on some objective guiding principles and criteria, and not on the whims and fancies of individual Judges. Discretion, after all, cannot be the Chancellor's foot."

9. In ***Parbatbhai Aahir Alias Parbatbhai Bhimsinghbhai Karmur and others Vs. State of Gujarat and another (2017) 9 SCC 641*** the three judges Bench of Hon'ble Apex Court has summarized the broad principles in this regard as under:-

"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1 Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.

16.2 The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3 In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

16.4 While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court.

16.5. The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated.

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

16.7 As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned.

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.

16.9. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions (16.8) and (16.9) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

10. In ***Anita Maria Dias Vs. State of Maharashtra (2018) 3 SCC 290*** the Hon'ble Apex Court re-hashed the principles and guidelines about the quashing of the F.I.R on the basis of mutual settlement, this was a case where an F.I.R. was lodged under Sections 406, 420, 467 and 471 read with section 34 of Indian Penal Code and under the provisions of Negotiable Instrument Act. The parties settled their dispute through mutual compromise. The Apex Court while passing the order to quash the F.I.R. observed as under:-

7. In a case like this, where the proceedings are still at initial and nascent stage, the High Court should have exercised its discretion in quashing the proceedings. Law in this behalf is well settled by catena of judgments of this Court including ***Parbatbhai Aahir & Ors. v. State of Gujarat and Gian Singh v. State of Punjab.***

11. From the perusal of the judgment in ***Social Action Forum For Manav Adhikar and another Vs. Union of India, Ministry of Law and Justice and others***(supra) it is apparent that similar line of ratio was propounded/summarised by the Hon'ble Apex Court.

12. In ***Kapil Agarwal and others Vs. Sanjay Sharma and others (2021) 5 SCC 524*** the Hon'ble Apex Court held as under:-

18.2 As held by this Court in the case of ***Parbatbhai Aahir v. State of Gujarat*** Section 482 Cr.P.C. is prefaced with an overriding provision. The statute saves the inherent power of the 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. Same are the powers with the High Court, when it exercises the powers under Article 226 of the Constitution.

13. The law laid down by the Apex Court in the above referred case laws makes it clear that an F.I.R. can be quashed on the basis of mutual compromise arrived at between the parties, even if an offence is not compoundable under Section 320 of Cr.P.C. relating to certain offences considering the facts and circumstances of the case. In the present matter the dispute between petitioners and private respondent (respondent No.4) relates to business/corporate transactions. The petitioner No.1 and respondent No.4 are real brothers and petitioner No.2 is wife of the petitioner No.1. They on the initiative of this Court, with blessings of their mother and sincere efforts of mediators and their counsel have settled their dispute amicably. The terms and conditions of settlement has been written down in the settlement deed dated 08.10.2021. Thus it appears just to quash the impugned F.I.R. registered at Case Crime No.0531 of 2020, under Sections 471, 468, 467, 420 and 406 of I.P.C. at Police Station Sarojani Nagar, District Lucknow.

14. Accordingly, this writ petition is ***allowed***. The impugned F.I.R. is quashed on the

basis of compromise between the petitioners and respondent No.4. The settlement deed dated 08.10.2021 shall remain integral part of this order.

15. The counsel for the petitioners is directed to upload the settlement deed dated 08.10.2021.

16. Office is directed to issue the certified copy of this order alongwith the copy of settlement deed dated 08.10.2021.

17. Mr. Nadeem Murtaza, learned counsel for the petitioners and Mr. Amarjeet Singh Rakhra, learned counsel for the respondent No.4 deserve appreciation of this Court for putting their efforts to get the dispute settled between the parties amicably. Their efforts are commendable.

(2021)12ILR A691
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.12.2021

BEFORE

THE HON'BLE J.J.MUNIR, J.

Misc. Single No. 22136 of 2021

Mohd. Saif Ali & Ors. ...Petitioners
Versus
Addl. Commissioner (Judicial) Ayodhya Division, Faizabad & Ors. ...Respondents

Counsel for the Petitioners:
Santosh Kumar Mehrotra, Ishwar Dutt Shukla

Counsel for the Respondents:
C.S.C., Ajeet Srivastava, Mohan Singh

A. Practice & Procedure - Civil Procedure Code, 1908: Order IX Rule 8, 9(1) - The order of dismissal in default can be set aside by the Court if the plaintiff satisfies the Court by showing sufficient cause for non-appearance. **The rule makes it pellucid that sufficiency of cause on the date of default is important and not the past conduct of the parties. (Para 15)**

It is a statutory principle of law that in judging the sufficiency of cause in matters of default, the Court should lean in favour of hearing rather than shutting out the doors of hearing. (Para 18)

Writ Petition Allowed. (E-10)

List of Cases cited:

1. Ram Raj & ors. Vs Deputy Director of Consolidation & ors. 1988 RD 139

2. Phool Chand Vs Vth A.D.J. & ors. 1983 ARC 637

3. Sangram Singh Vs Election Tribunal, Kotah & ors. AIR 1955 SC 425 *(followed)*

4. Ramji Das & anr Vs Mohan Singh 1978 RC 496 (SC) *(followed)*

5. The Collector, Land Acquisition, Anantnag & anr. Vs. Mst. Katiji & ors. (1987) 2 SCC 107 *(followed)*

(Delivered by Hon'ble J.J. Munir, J.)

1. Perused the Office report dated 06.12.2021, regarding service of notice upon respondent nos. 3, 6, 7 and 8 by registered post. The report reads to the following effect:-

"Notice were issued on 05.10.2021 and booked by the post office on 23.10.2021, 25.10.2021 through regd. post at correct address. Since then, neither any undelivered cover/AD received back nor any power has been filed on behalf of O.P. Nos. 3, 6, 7, 8.

Sd/- illegible
06.12.2021.
RO
M.S.-I"

2. A perusal of the aforesaid report, shows that service upon the said respondents, must be deemed sufficient. Accordingly, service upon respondent nos. 3, 6, 7 and 8, is held good.

3. Heard Mr. Mehandi Abbas Naqvi holding brief of Mr. I.D. Shukla, learned counsel for the petitioner, Mr. Mohan Singh appearing on behalf of the Gaon Sabha and Mr. Vinod Kumar Singh, learned Additional Chief Standing Counsel appearing on behalf of the State-respondents.

4. Mr. Ajit Srivastava appearing on behalf of the respondent nos. 1, 2 and 10 and Mr. Vivek Kumar Mishra appearing on behalf of the respondent nos. 11, 12 and 13, are not present when the case is called on.

5. None of the respondents have filed any counter affidavit.

6. Admit.

7. Heard forthwith.

8. The Additional Sub-Divisional Officer, Sadar, Sultanpur had before him Suit No. D201604680006159 under Section 229B of the U.P. Zamindari Abolition and Land ReformsAct, 1950, instituted by the petitioners and their predecessors. The suit appears to have been dismissed in default and restored to file on more than one occasion. The last successful restoration was on 12.07.2007. Thereafter, the suit was again dismissed in default on 29.01.2015. The application that was brought to set aside the order dated 29.01.2015 was to undo an episode of default.

9. The Additional Sub-Divisional Officer, Sadar, Sultanpur looked into the past conduct of the plaintiff-petitioners and came to the conclusion that they were not serious about prosecuting the suit. Accordingly, the Additional Sub-Divisional Officer, dismissed their restoration application vide order dated 11.08.2018. The plaintiff-petitioners assailed the order of the Additional Sub-Divisional Officer, Sadar, Sultanpur in revision before the Commissioner, Ayodhya Division, Ayodhya.

10 . The revision, being Case No. 02478 of 2018, came up for determination before the Additional Commissioner (Judicial), Ayodhya Division, Ayodhya on 22.07.2021. Unfortunately, for the plaintiff-petitioners, the Additional Commissioner (Judicial) also looked at the issue in the same perspective, as the Trial Court. He reached the same conclusion as the Trial Court and dismissed the petitioner's revision. This is what has led the petitioner to institute the present petition under Article 227 of the Constitution of India.

11. Learned counsel for the petitioner submits that the approach of both the courts below is not only flawed and manifestly illegal, but also works serious injustice and prejudice to the plaintiff-petitioners. He submits that the approach of the two courts below is manifestly illegal, because it is not permissible for a Court, seized of a restoration application, to look at the past conduct of parties. All that has to be seen is the emergent sufficiency of cause on the date of default.

12. Mr. Mohan Singh, on the other hand, submits that past conduction of the respondent is also relevant, particularly, before this Court, where he is invoking our extraordinary jurisdiction under Article 227 of the Constitution.

13. This Court has considered the rival submission and perused the record. It is no doubt true that in the past, the plaintiff has defaulted on a total of four occasions and applied for restoration of this suit, where he was successful in three instances. The last default has put him in trouble, with the Courts below holding that the plaintiff is not interested in pursuing this cause.

14. A perusal of the records shows that the suit was dismissed in default on 29.01.2015, in absence of the plaintiff, but in the defendant's presence. The dismissal of the suit in default is, therefore, one governed by Order IX Rule 8 CPC. The right to restoration of the suit would be governed by Rule 9 of Order IX CPC. Rule 9 of Order IX reads:

"(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

(Emphasis by Court)

15. Now, a perusal of sub-rule (1) of Rule 9 of Order IX shows that a dismissal in default under Rule 8 of Order IX may be set-aside by the Court if the plaintiff, on an application to set-aside that order, satisfies the Court that "there was sufficient cause for his non-appearance when the suit was called on for hearing", to borrow the phraseology of the Statute. What is, therefore, relevant is the sufficiency of cause for non-appearance on the date when the suit is dismissed in default. The rule makes it pellucid that what is relevant is the sufficiency of cause on the date of default and not the past conduct of parties, or for that matter, the plaintiff's.

16. In this regard, reference may be made to the decision of this Court in ***Ram Raj and Others vs. Deputy Director of Consolidation and Others, 1988 RD 139,*** wherein it has been held:

"..... These facts were not controverted by the opposite party No. 3. The Deputy Director of Consolidation appears to have rejected them to be habitual defaulters. There appears to be no justification for such observation. However, be as it may, I am of the opinion that if there is valid excuse for the petitioners' absence on the date when the restoration application was dismissed for default, the previous negligence or want of diligence on their part to prosecute their case could not be made a ground dis-entitling the petitioners for restoration of the case."

17. Again in ***Phool Chand vs. Vth Additional District Judge and Others, Aligarh; 1983 ARC 637,*** it has been held:

".....The Prescribed Authority when recording the finding that petitioner deliberately absented has drawn heavily on the cirucmstances that even earlier the suit had been decided ex parte. This was wholly immaterial to decide if petitioner was prevented from sufficient cause in not appearing on the date fixed. Nor was he justified in drawing adverse inference against petitioner for absence on assumption that he was deliberately delaying the proceedings because despite notice in 1972 he did not comply with it and six years were wasted in guardianship proceedings. The revising authority fell in same error. "

18. There is yet another aspect of the matter. It is a salutary principle of law that in judging the sufficiency of cause in matters of default, the Court should lean in favour of hearing rather than what has been described as shutting out the doors of hearing. In this connection, reference may be made to the decisions of the Supreme Court in ***Sangram***

Singh vs. Election Tribunal, Kotah and Others, AIR 1955 SC 425, Ramji Das and Another vs. Mohan Singh, 1978 ARC 496 (SC) and the Collector, Land Acquisition, Anantnag and Another vs. Mst. Katiji and Others, (1987) 2 SCC 107.

19. In this case also, what was before the Court is a declaratory suit, where title to property is at stake. There is ex-facie no reason why the plaintiff, who has moved the Court, asking for declaration of his right, would not be interested in the trial of his cause and judgment on merits. The fact that an accident has happened more than once, does not make it any less an accident. At the same time, the plaintiff ought to be careful in future and should compensate the defendants in costs, subject to which alone, he would be entitled to restoration.

20. In the circumstances, this petition succeeds and is ***allowed.*** The impugned orders dated 22.07.2021, passed by the Additional Commissioner (Judicial), Ayodhya Division, Ayodhya and the order dated 11.10.2018, passed by the Additional Sub-Divisional Officer, Sadar, Sultanpur, are hereby ***set-aside*** and ***reversed.*** The petitioner's restoration application dated 27.02.2015 stands allowed, subject to payment of Rs. 5,000/- in costs to the defendants. These costs shall be deposited within a month of date with the Trial Court, which shall be paid to the defendants. The suit shall stand restored to file of the Additional Sub-Divisional Officer, Sadar, Sultanpur, who shall proceed in accordance with law.

(2021)12ILR A694
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.12.2021

BEFORE

THE HON'BLE JASPREET SINGH, J.

Misc. Single No. 22635 of 2021

alongwith

Misc. Single No. 19490 of 2021

C/m Jai Maa Gange Manav Kalyan Sanstha & Ors. ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sharad Pathak, Piyush Pathak

Counsel for the Respondents:
C.S.C., Kuldeep Pati Tripathi, Savitra Vardhan Singh, Shivanshu Goswami

A. Interpretation of Statute - "Recognition" and "affiliation" - National Council for Teacher Education Act, 1993: Section 14 - U.P. St.Universities Act, 1973: Section 37(11) - The first step for an Institution is to procure recognition and after that it is required to obtain affiliation. The affiliating body has a limited field upon which it can act and after being satisfied it can grant or refuse the affiliation. The affiliating body does not have the powers to re-enter into the considerations regarding primary infrastructural facilities which have already been examined by the N.C.T.E., while granting the recognition. If the examining body or the St.Authorities find deficiency in the infrastructure then it can always recommend the cancellation of the recognition to the Regional Committee of the N.C.T.E. (Para 50)

The Court find that the grounds based on which affiliation for the year 2021-22 has been refused to the petitioner does not based on sound reasoning and being arbitrary is hit by the Article 14 of the Constitution of India. (Para 79)

Writ Petition Allowed. (E-10)

List of Cases cited:

1. Maa Vaishno Devi Mahila Mahavidyalaya Vs St.of U.P. & ors. (2013) 2 SCC 617

2. Managing Board of the Milli Talimi Mission, Bihar, Ranchi & ors. Vs St.of Bihar & ors. (1984) 4 SCC 500

3. Mata Gujri Memorial Medical College Vs St.of Bihar & ors. (2009) 16 SCC 309

4. Mahatma Gandhi University & Anr. Vs Manager. ST. Alberts College & ors. (2012) 13 SCC 442

5. Institute of Technical Education & Research Centre Vs St.of U.P. & ors. 2018 SCC OnLine All 841

6. Committee of Management Dr. M.C. Saxena College of Education & anr. Vs St.of U.P. & ors. Writ Petition No. 4125 (M/S) of 2013

7. Central Women College Vs St.of U.P. & ors. AIR OnLine 2019 Alld 2233

8. Committee of Management, Anuragi Devi Degree College & Anr. Vs St.of U.P. & anr. (2016) 12 SCC 517 *(distinguished)*

9. Chairman, Bhartia Education Society & anr. Vs St.of H.P. & ors. (2011) 4 SCC 527

10. Ramana Dayaram Shetty Vs International Airport Authority of India & ors. (1979) 3 SCC 489

11. Ajay Hasia & ors. Vs Khalid Mujib Sehravardi & ors. (1981) 1 SCC 722

12. St.of Jharkhand & ors. Vs Brahmaputra Metallics Ltd., Ranchi & anr. 2020 SCC OnLine SC 968

13. M/s Radha Krishan Industries Vs St.of H.P. & ors. 2021 OnLine SCC 334 *(followed)*

14. Assistant Commissioner of Sales Tax Vs Commercial Steel Limited 2021 SCC OnLine 884 *(followed)*

15. M/s Magadh Sugar & Energy Ltd. Vs St.of Bihar & ors. 2021 SCC OnLine 801 *(followed)*

(Delivered by Hon'ble Jaspreet Singh, J.)

1. The petitioner No.1 is the Committee of Management Jai Maa Gange Manav Kalyan Sansthan, Derwa Bazar, District Pratapgarh a society registered under the Societies Registration Act, 1860.

2. The Society as mentioned aforesaid runs a college in the name of Pt. Shiv Sharan College of Education, Derwa Bazar, District Pratapgarh (hereinafter referred to as "the college"), who is the petitioner No.3 and the petitioner No.2 is the Manager of the aforesaid college.

3. In the year 2017, the college was duly recognized by the National Council of Teacher Education (hereinafter referred to as "N.C.T.E." for short) for the course of Bachelor of Education (B.Ed.) and got approval of one unit (50) students annually.

4. After grant of recognition by the N.C.T.E., the college applied for the affiliation from the respondent No.3 University. The University after making due inspection and finding that the college complied with the requisite norms granted the affiliation on 20.05.2018 for the course of Bachelor of Education (B.Ed.) under the faculty of education for a period of two academic years (2018-2019 and 2019-2020).

5. Since, the petitioners were granted the affiliation for two academic sessions which was drawing to an end in the academic session 2019-20, hence, the petitioners again applied for the affiliation for the academic session 2020-21. The University did not conduct any physical inspection and extended the affiliation for another year vide order dated 18.02.2021 for the academic session 2020-2021.

6. Since, COVID-19 Pandemic was raging in the country, accordingly, the petitioners on 15.03.2021 sent a detailed representation to the respondent No.3 University received by them on 26.03.2021 and requested for further extension of the affiliation for the academic session 2021-2022.

7. It is the case of the petitioners that the respondent No.3-University did not respond to the representation of the petitioners dated 26.03.2021, despite passage of four months. It is only on 24.07.2021, the University uploaded a letter on the login-I.D. of the petitioner-College

stating that an inspection team has been constituted by the University, of which the petitioner is aware, and the petitioner has to get an inspection conducted in order to get the affiliation extended.

8. It is further stated that the petitioners contacted the University but as per the petitioner, no inspection team had been constituted and for the aforesaid reason it could not even deposit the fee for the inspection. Not receiving any categoric reply from the University, the petitioner once again on 28.07.2021 submitted a representation along with an affidavit indicating that the inspection of the college was already made in the year 2019 and every requisite norm was fulfilled. However, certain minor shortcomings such as lack of doors, windows and skylights were noticed, which could not be completed on account of suspension of classes on account of COVID-19 Pandemic. However, the petitioner was ready to get the same affixed within shortest possible time and in contemplation thereof it requested that the affiliation be extended for the academic session 2021-2022.

9. Despite the aforesaid representation dated 28.07.2021, no response was forthcoming from the University. In the meantime, on 28.08.2021, a letter was issued by the respondent No.3 University requiring the college to submit their profile in the prescribed format for the purposes of preparing the counseling schedule which was scheduled to be held by the Lucknow University.

10. In furtherance of the letter dated 28.08.2021, the petitioner submitted all the relevant documents seeking participation in the counseling for the Session 2021-2022 and the hard copies of the said documents were also submitted with the respondent No.3-University on 29.08.2021.

11. It is a specific case of the petitioner that between 24.07.2021 to 29.08.2021, 26 notices/letters raising various concerns were uploaded on the College I.D. by the University. However, the impugned letter/order dated 31.07.2021 is alleged to be uploaded antedated inasmuch as the same was uploaded on the College I.D. after 28.08.2021, wherein it expressed its inability to grant the affiliation, since, the inspection had not been conducted in furtherance of the letter dated 24.07.2021.

12. Petitioners were not aware of the said letter dated 31.07.2021 prior to 29.08.2021. The petitioner being aggrieved and also noticing that the career of the students was at stake, preferred a Writ Petition No.19490 of 2021 (M/S), wherein the petitioner claimed the following main reliefs, which are reproduced hereinafter:-

"*(a) To issue a writ, order or direction in the nature of certiorari quashing impugned order dated 31.07.2021 issued by Opp-Party no.2, so served upon the petitioner on 29.08.2021, so far as it relates to the petitioner, the true copy of which is contained as Annexure-1 to the writ petition.*

(b) To issue a writ, order or direction in the nature of mandamus commanding Opp.-party no.2 to grant affiliation for the course of B.Ed. in the light of permanent recognition granted by the N.C.T.E. to the College.

*(c) To issue a writ, order or direction in the nature of mandamus commanding the Opp-Parties namely Opp-Party No.5 to allow the petitioners to participate in the counseling for new admissions for the session 2021-2022 which is going to commence from 06.09.2021, notwithstanding w*ith the impugned order dated 31.07.2021 so served upon the petitioner on 29.08.2021."

13. A Coordinate Bench of this Court by means of the order dated 03.09.2021 passed in Writ Petition No.19490 of 2021 (M/S) noticing the respective submissions passed an order and the relevant portion thereof is being reproduced hereinafter for ready reference:-

"13. This Court is prima facie satisfied about the bonafide of the Institution in telling the University fairly that it could not remove the shortcomings through its letter dated 28.07.2021. As an interim measure, it is therefore directed that the petitioner shall deposit the fee for inspection within three days from today in the University and also ensure completion of all work/ removal of shortcomings as pointed out in the report dated 18.05.2018. The inspection team shall be sent by the University to the College concerned on 07.09.2021 and if a positive report is submitted in favour of the Institution, the respondent nos.2 and 3 shall pass appropriate orders regarding grant of affiliation."

14. In furtherance of the order dated 03.09.2021, the petitioner deposited the requisite fee and on 07.09.2021, the inspection of the Collage was done by an Inspecting Team comprising of two members (who have been impleaded as respondent No.5 herein). Despite the inspection having been done on 07.09.2021, the report was not known nor the outcome was informed to the petitioner while the counseling was to commence on 17.09.2021. The dilemma of the petitioner was made known to the Court seized with Writ Petition No.19490 of 2021 (M/S) and a Coordinate Bench of this Court by means of the order dated 15.09.2021 directed the respondent-University to file its counter affidavit within two days bringing on record the decision taken in respect of the affiliation of the petitioner-College.

15. Again on 21.09.2021, the matter was directed to be placed on 23.09.2021 permitting the University to bring on record the decision taken on the affiliation. It is thereafter that the decision taken by the respondent-University refusing the affiliation to the petitioner-College dated 22.09.2021 was brought on record.

16 . In view of the decision, not recommending the grant of affiliation to the petitioner taken by the University dated 22.09.2021 gave a fresh cause of action to the petitioners, hence, the petitioners challenged the same in the instant writ petition No.22635 of 2021 (M/S) and it is in the aforesaid backdrop that the two writ petitions have been heard together and are being decided by this common judgment.

SUBMISSIONS OF THE PETITIONERS:

17. Learned counsel for the petitioner has primarily raised threefold submissions: First, it is a case of the petitioner that it is the duty of the N.C.T.E. to make an inspection and after noticing the fact that the college concerned fulfills the requisite norms and infrastructural facilities only then it grants the recognition. Once, the recognition is granted by the N.C.T.E., the University is required to grant the affiliation and while doing so, it may ensure that the college complies with the necessary norms but it does not have the powers to look into those matters which have been considered and noticed by the N.C.T.E.

18. It is also urged that once the college was granted the recognition as well as the affiliation for the academic session 2018-2019, 2019-2020 and also extended for the academic session 2020-2021, there was no reason for the respondent-University to have denied the affiliation to the petitioner for the academic session 2021-2022.

19. The second limb of submission is that the grounds upon which the affiliation has been denied is actually not within the domain of the

University to examine. It is also vehemently stated that the report furnished by the Inspecting Committee is arbitrary inasmuch as it has shown deficiencies. If the said deficiencies would have been existing in fact then the N.C.T.E., would not have granted recognition to the college, in the first place.

20. It is also urged that the manner in which the report has been prepared shows a complete non-application of mind with a deliberate intent to refuse the recognition to harm the petitioner and the career of various students studying in the petitioner-College.

21. It is also urged that the arbitrariness is writ large on the report since double standards have been adopted by the Inspecting Committee as well as the University inasmuch as for the same deficiencies which were minor in nature and it did not in any manner affect or hamper the educational or infrastructural requirements and for the same deficiencies large number of colleges have been granted the affiliation, but step-motherly treatment has been meted out with the petitioners and affiliation has been denied to them.

22. The third limb of the submission is that the petitioner had applied for the affiliation in the current academic session 2021-2022 within the prescribed time-lines. The respondent-University did not inform the petitioner regarding any discrepancies nor gave any information for getting the college inspected. The petitioner had already submitted its subsequent representation in July, 2021 and also submitted its hard copies with the University and after almost a month, the impugned letter dated 31.07.2021 was uploaded antedated. The manner in which the respondent has proceeded with the application moved by the petitioner smacks of malafides, as result, the petitioners have been deprived of their rights in participating in the counseling. Number of students, who are already undertaking their education, their future and careers have been put at stake solely on the ground of high handedness, callousness and arbitrariness of the respondents.

23. It is urged, that from the perusal of the report submitted by the Inspection Committee, it would indicate that all the requisites were fulfilled by the petitioners in the year 2019 when the college was inspected. The only deficiency was non-availability of certain doors, windows and skylights, which as already urged were on account of COVID-19 Pandemic. This aspect of the matter was also noticed by a Coordinate Bench of this Court in its order dated 03.09.2021, however, ignoring the aforesaid, the report dated 07.09.2021 has been submitted which states that deficiency relating to doors, skylights and windows had been cured but it has now taken other grounds which were neither assessed properly, nor it was in their domain and artificial grounds have been raised, thus, rendering the report per se illegal, arbitrary and contrary to the records.

24. It is, thus, submitted that for all the reasons, the impugned order dated 31.07.2021 and order dated 22.09.2021 refusing affiliation are liable to be quashed and a direction be issued to the respondents to consider and grant the affiliation to the petitioner institution for the academic year 2021-2022.

25. Learned counsel for the petitioners in support of his submissions has relied upon the following judgments:-

(a) Maa Vaishno Devi Mahila Mahavidyalaya v. State of U.P. & Ors., (2013) 2 SCC 617;

(b) Managing Board of the Milli Talimi Mission, Bihar, Ranchi & Ors. v. State of Bihar & Ors., (1984) 4 SCC 500;

(c) Mata Gujri Memorial Medical College v. State of Bihar & Ors., (2009) 16 SCC 309;

(d) Mahatma Gandi University & Anr. v. Manager, ST. Alberts College & Ors., (2012) 13 SCC 442;

(e) Institute of Technical Education & Research Centre v. State of U.P. & 2 Ors., 2018 SCC OnLine All 841;

(f) Committee of Managment Dr. M.C. Saxena College of Education & Anr. v. State of U.P. & Ors., Writ Petition No.4125 (M/S) of 2013, decided on 02.07.2013;

(g) Central Women College v. State of U.P. & Ors., AIR OnLine 2019 Alld 2233.

SUBMISSIONS OF COUNSEL FOR THE RESPONDENT NO.3-UNIVERSITY

26. Per contra, learned counsel for the respondent No.3 University opposing the submission of the learned counsel for the petitioners, has submitted that the grant of affiliation by the University is a process which has been bound in a time-line as directed by the Apex Court in the case of ***Maa Vaishno Devi Mahila Mahavidyalaya v. State of U.P. & Ors., (2013) 2 SCC 617.***

27. It is urged that in furtherance of the direction given by the Apex Court in the aforesaid decision, the State of Uttar Pradesh has issued a Government Order dated 10.06.2015 and the affiliations and time-lines are subject to the same. It is submitted that the petitioner has been at fault inasmuch as it did not comply with all the requisite norms. The report of the Inspection Committee is a factual report which has noticed as many as sixteen discrepancies. The University has taken a decision solely on the basis of the said report. Once, the Inspecting Team, who visited the college found such large number of discrepancies persisting, a conscious decision was taken that it was not conducive to grant the affiliation as it would jeopardize the careers of various students, who may obtain admission in the petitioners' college.

28. It is further urged that the University has no animosity with the petitioners and in case if they comply with all the requisite norms and fulfill the same, they always have an opportunity of applying for the affiliation for the next academic session and as such it cannot be said that either the report is arbitrary or that there is any malafides harboured by the respondents against the petitioner.

29. It is further urged that it is for the petitioners to establish that they had made a requisite application within the time for seeking the affiliation for the academic session 2021-22. Since, the time-lines, which have been framed by the Apex Court and has been recognized in terms of the Government Order, it is not open for the University to grant the affiliation after the expiry of the time-line inasmuch as the Apex Court in the case of ***Maa Vaishno Devi Mahila Mahavidyalaya*** (supra) has made several observations including that any breach of the time-lines would amount to contempt and for the said reason, the respondents cannot be urged to do an act which would be in the teeth of the order passed by the Apex Court subjecting the respondents being charged with the contempt of Court.

30. The other submission of the learned counsel for the respondent No.3 is that the instant writ petition is not maintainable inasmuch as the petitioner has an adequate remedy of preferring an appeal under the State Universities Act, 1973 before the State Government.

31. It is urged that sub-section (11) of Section 37 of the U.P. State Universities Act,

1973 (hereinafter referred to as "the Act of 1973") categorically provides that any institution whose application is rejected by the University may prefer an appeal to the State Government within 30 days from the receipt of the order of the rejection which may either allow the appeal or reject. The State Government shall also have powers to review the matter on an application of a college in cases where the complaint received by it with respect to the irregularities committed by the college.

32. It is, thus, urged that the issue at hand is primarily whether the petitioners' college complies with the necessary norms and regarding the existence of the deficiencies as noticed by the Inspecting Team, these are pure questions of fact which may not be entertained or taken note of by this Court in exercise of powers under Article 226 of the Constitution of India. Thus, the appropriate remedy for the petitioners would be to invoke the appellate powers of the State Government, hence, for the aforesaid reasons, the writ petition being devoid of merits is liable to be dismissed.

33. In support of his submission, learned counsel for respondent No.3 has relied upon the decision of ***Committee of Management, Anuragi Devi Degree College & Anr. v. State of U.P. & Anr., (2016) 12 SCC 517.***

DISCUSSIONS AND ANALYSIS

34. Heard Shri Sharad Pathak, learned counsel for the petitioners and Shri Kuldeep Pati Tripathi alongwith Shri Shivanshu Goswami, leaned counsel for the respondent No.3 University and Shri Savitra Vardhan Singh, learned counsel for the respondent No.4.

35. This Court vide its order dated 25.10.2021 had also required the University to produce the record which was made available and was retained by the Court for perusal as well as to facilitate the dictation of the judgment.

36. Having heard learned counsel for the respective parties, the Court has given anxious consideration to the rival submissions and also perused the record.

37. The two issues involved in the instant petition can be succinctly noted as under:-

(i) Whether in the given facts and circumstances, the respondent No.3 University was justified in refusing the affiliation to the petitioners;

(ii) Whether the petitioners should be relegated to the forum of appeal in terms of Section 37(11) of the Act of 1973.

38. In order to answer the first question, it will be relevant to notice the powers exercised by the N.C.T.E., and the State University respectively relating to the grant of recognition and affiliation to a college.

39. At the very outset, it will be relevant to notice that the Central Government promulgated the National Council for Teacher Education Act, 1993. The preamble indicates that the said Act was to provide for establishment of a National Council for the Teacher Education with a view to achieve planned and co-ordinated development of teacher education system throughout the country. The regulation and proper maintenance of norms and standards in the teacher education system including qualification of school teachers and for matters connected therewith were within the framework of the Act of 1993. The Act envisages the establishment of a council tasked with a duty to take all measures for ensuring planned and coordinated development of teacher education and for determination and maintenance of

standards for teacher education and purpose for performing its function under the Act.

40. Section 12 of the Act of 1993 lays down the various functions which are required to be done by the council. Chapter-IV and more particularly Section 14 of the Act of 1993 relates to recognition of institutions offering course or training in teacher education.

41. Section 14 of the Act of 1993 is being reproduced for ease of reference:-

"14. Recognition of institutions offering course or training in teacher education.--*(1) Every institution offering or intending to offer a course or training in teacher education on or after the appointed day, may, for grant of recognition under this Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by regulations:*

Provided that an institution offering a course or training in teacher education immediately before the appointed day, shall be entitled to continue such course or training for a period of six months, if it has made an application for recognition within the said period and until the disposal of the application by the Regional Committee.

[Provided further that such institutions, as may be specified by the Central Government by notification in the Official Gazette, which--

(i) are funded by the Central Government or the State Government or the Union territory Administration;

(ii) have offered a course or training in teacher education on or after the appointed day till the academic year 2017-2018; and

(iii) fulfil the conditions specified under clause (a) of sub-section (3),

shall be deemed to have been recognised by the Regional Committee.]

(2) The fee to be paid along with the application under sub-section (1) shall be such as may be prescribed.

(3) On receipt of an application by the Regional Committee from any institution under sub-section (1), and after obtaining from the institution concerned such other particulars as it may consider necessary, it shall,--

(a) if it is satisfied that such institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper functioning of the institution for a course or training in teacher education, as may be determined by regulations, pass an order granting recognition to such institution, subject to such conditions as may be determined by regulations; or

(b) if it is of the opinion that such institution does not fulfil the requirements laid down in sub-clause (a), pass an order refusing recognition to such institution for reasons to be recorded in writing:

Provided that before passing an order under sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the concerned institution for making a written representation.

(4) Every order granting or refusing recognition to an institution for a course or training in teacher education under sub-section (3) shall be published in the Official Gazette and communicated in writing for appropriate action to such institution and to the concerned

examining body, the local authority or the State Government and the Central Government.

(5) Every institution, in respect of which recognition has been refused shall discontinue the course or training in teacher education from the end of the academic session next following the date of receipt of the order refusing recognition passed under clause (b) of sub-section (3).

(6) Every examining body shall, on receipt of the order under sub-section (4),--

(a) grant affiliation to the institution, where recognition has been granted; or

(b) cancel the affiliation of the institution, where recognition has been refused."

42. Section 15 of the Act of 1993 relates to the permission for a new course or training by recognized institutions. Sub-section (3) of Section 15 provides that on receipt of an application from an institution under sub-section (1), and after obtaining from the recognized institution such other particulars as may be considered necessary, the Regional Committee shall record its satisfaction that such a recognized institution has adequate financial resources, accommodation, library, qualified staff, laboratory, and that if fulfills such other conditions required for proper conduct of the new course or training in teacher education, as may be determined by regulations, pass an order granting permission, subject to such conditions as may be determined by regulations. In case, if the Regional Committee is of the opinion that such institution does not fulfill the requirements laid down in sub-clause (a), pass an order refusing permission to such institution for reasons to be recorded subject to condition that before passing an order refusing permission, the Regional Committee shall provide a reasonable opportunity to the institution concerned for making a written representation.

43. Section 16 of the Act of 1993 further mandates that no examining body shall, on or after the appointed day, grant affiliation, whether provisional or otherwise, to any institution; or hold examination, whether provisional or otherwise, for a course or training conducted by a recognized institution, unless the institution concerned has obtained recognition from the Regional Committee concerned, under Section 14 or permission for a course or training under Section 15. Thus, it would been seen that for any institution to commence a course, it is sine qua non for the institution to first acquire the recognition from the N.C.T.E. It is thereafter that the institution is required to seek affiliation from the examining body under the State Universities Act.

44. The issue regarding the purpose of 'recognition' and 'affiliation' and the powers of the authorities under the N.C.E.T. and State Act came for consideration before the Apex Court in the case of ***Chairman, Bhartia Education Society & Anr. v. State of Himachal Pradesh & Ors., (2011) 4 SCC 527***. The case arose under the N.C.E.T. Act and after noticing the Scheme, the Apex Court in Paragraph-19 to 24 of the said report has held as under:-

"19. The purpose of "recognition" and "affiliation" is different. In the context of the N.C.T.E. Act, "affiliation" enables and permits an institution to send its students to participate in the public examinations conducted by the examining body and secure the qualification in the nature of degrees, diplomas, certificates. On the other hand, "recognition" is the licence to the institution to offer a course or training in teacher education. Prior to the N.C.T.E. Act, in the absence of an apex body to plan and

coordinate development of teacher education system, respective regulation and proper maintenance of the norms and standards in the teacher education system, including grant of "recognition" were largely exercised by the State Government and universities/boards. After the enactment of the N.C.T.E. Act, the functions of N.C.T.E. as "recognising authority" and the examining bodies as "affiliating authorities" became crystallised, though their functions overlap on several issues. The N.C.T.E. Act recognises the role of examining bodies in their sphere of activity.

20. Section 14 of the NCTE Act requires recognition of the institution by NCTE, before the institute could offer any course or training in teacher education. Sub-section (4) of Section 14 provides that:

"14. (4) Every order granting or refusing recognition to an institution for a course or training in teacher education under sub-section (3) shall be published in the Official Gazette and communicated in writing for appropriate action to such institution and to the examining body concerned, the local authority or the State Government and the Central Government."

Sub-section (6) of Section 14 requires every examining body on receipt of the order under sub-section (4):

"14. (6)(a) grant affiliation to the institution, where recognition has been granted; or

cancel the affiliation of the institution, where recognition has been refused."

21. Section 16 of the NCTE Act provides that notwithstanding anything contained in any other law for the time being in force, no examining body shall grant affiliation whether provisional or otherwise, to any institution, or hold examination for a course or training conducted by a recognised institution, unless the institution concerned has obtained recognition from the Regional Committee of NCTE under Section 14 or permission for a course or training under Section 15 of the Act.

22. Sub-section (6) of Section 14 no doubt mandates every examining body to grant affiliation to the institution on receipt of the order of NCTE granting recognition to such institution. This only means that recognition is a condition precedent for affiliation and that the examining body does not have any discretion to refuse affiliation with reference to any of the factors which have been considered by NCTE while granting recognition. For example, NCTE is required to satisfy itself about the adequate financial resources, accommodation, library, qualified staff, and laboratory required for proper functioning of an institution for a course or training in teacher education. Therefore, when recognition is granted by NCTE, it is implied that NCTE has satisfied itself on those aspects. Consequently, the examining body may not refuse affiliation on the ground that the institution does not have adequate financial resources, accommodation, library, qualified staff, or laboratory required for proper functioning of the institution. But this does not mean that the examining body cannot require compliance with its own requirements in regard to eligibility of candidates for admissions to courses or manner of admission of students or other areas falling within the sphere of the State Government and/or the examining body. Even the order of recognition dated 17-7-2000 issued by NCTE specifically contemplates the need for the institution to comply with and fulfil the requirement of the affiliating body and the State Government, in addition to the conditions of NCTE.

23. We extract below Conditions 4, 5 and 6 of the order of recognition issued by NCTE in this behalf:

"4. The admission to the approved course shall be given only to those candidates who are eligible as per the regulations governing the course and in the manner laid down by the affiliating university/State Government.

5. Tuition fee and other fees will be charged from the students as per the norms of the affiliating university/State Government till such time NCTE regulations in respect of fee structure come into force.

6. Curriculum transaction, including practical work/activities, should be organised as per the NCTE norms and standards for the course and the requirements of the affiliating university/examining body."

24. The examining body can therefore impose its own requirements in regard to eligibility of students for admission to a course in addition to those prescribed by NCTE. The State Government and the examining body may also regulate the manner of admissions. As a consequence, if there is any irregularity in admissions or violation of the eligibility criteria prescribed by the examining body or any irregularity with reference to any of the matters regulated and governed by the examining body, the examining body may cancel the affiliation irrespective of the fact that the institution continues to enjoy the recognition of NCTE. Sub-section (6) of Section 14 cannot be interpreted in a manner so as to make the process of affiliation, an automatic rubber-stamping consequent upon recognition, without any kind of discretion in the examining body to examine whether the institution deserves affiliation or not, independent of the recognition. An institution requires the recognition of NCTE as well as affiliation with the examining body, before it can offer a course or training in teacher education or admit students to such course or training. Be that as it may."

45. The issue once again engaged the attention of the Apex Court in the case of ***Maa Vaishno Devi Mahila Mahavidyalaya*** (supra), wherein the Apex Court in Paragraphs 66 to 68 noticed the issue and conflict arising from the Central Act i.e. N.C.T.E. Act and the State Universities Act, which is the law enacted by the State. For ready reference, paragraphs 67 and 68 of the said report are being reproduced hereinafter:-

"67. In the present case, we are concerned with the provisions of the N.C.T.E. Act which is a Central legislation referable to Schedule VII List I Entry 66. Thus, no law enacted by the State, which is in conflict with the Central law, can be permitted to be operative.

68. Now, let us examine the conflict that arises in the present cases. In terms of the provisions of the Act, the Regional Committee is required to entertain the application, consider State opinion, cause inspection to be conducted by an expert team and then to grant or refuse recognition in terms of the provisions of the Act. Once a recognition is granted and before an institution can be permitted to commence the course, it is required to take affiliation from the affiliating body, which is the university."

Thereafter, the Apex Court noticing various decisions of the Apex Court in Paragraph 69 to 71 of the said report has held as under:-

"69. Thus, grant of recognition or affiliation to an institute is a condition precedent to running of the courses by the institute. If either of them is not granted to the institute, it would not be in a position to commence the relevant academic courses. There is a possibility of some conflict between a University Act or Ordinance relating to affiliation with the provisions of the Central Act. In such cases, the matter is squarely answered in Sant

Dnyaneshwar Shikshan Shastra Mahavidyalaya [(2006) 9 SCC 1] where the Court stated that after coming into operation of the Central Act, the operation of the University Act would be deemed to have become unenforceable in case of technical colleges. It also observed that provision of the Universities Act regarding affiliation of technical colleges and conditions for grant of continuation of such affiliation by the university would remain operative but the conditions that are prescribed by the university for grant and continuation of affiliation must be in conformity with the norms and guidelines prescribed by N.C.T.E..

70. Under Section 14 and particularly in terms of Section 14(3)(a) of the Act, N.C.T.E. is required to grant or refuse recognition to an institute. It has been empowered to impose such conditions as it may consider fit and proper keeping in view the legislative intent and object in mind. In terms of Section 14(6) of the Act, the examining body shall grant affiliation to the institute where recognition has been granted. In other words, granting recognition is the basic requirement for grant of affiliation. It cannot be said that affiliation is insignificant or a mere formality on the part of the examining body. It is the requirement of law that affiliation should be granted by the affiliating body in accordance with the prescribed procedure and upon proper application of mind. Recognition and affiliation are expressions of distinct meaning and consequences. In Bhartia Education Society v. State of H.P. [(2011) 4 SCC 527] this Court held that: (SCC p. 534, para 19)

"19. The purpose of "recognition' and "affiliation' is different. In the context of the N.C.T.E. Act, "affiliation' enables and permits an institution to send its students to participate in public examinations conducted by the examining body and secure the qualification in the nature of degrees, diplomas and certificates. On the other hand, "recognition' is the licence to the institution to offer a course or training in teaching education."

The Court also emphasised that the affiliating body/examining body does not have any discretion to refuse affiliation with reference to any of the factors which have been considered by N.C.T.E. while granting recognition.

71. The examining body can impose conditions in relation to its own requirements. These aspects are:

(a) eligibility of students for admission;

(b) conduct of examinations;

(c) the manner in which the prescribed courses should be completed; and

(d) to see that the conditions imposed by N.C.T.E. are complied with.

Despite the fact that recognition itself covers the larger precepts of affiliation, still the affiliating body is not to grant affiliation automatically but must exercise its discretion fairly and transparently while ensuring that conditions of the law of the university and the functions of the affiliating body should be complementary to the recognition of N.C.T.E. and ought not to be in derogation thereto."

46. Dealing with the Chapter-VII of the Universities Act particularly Section 37, the Apex Court held that the fields which are sought to be covered under Section 37 of the Universities Act and the statutes of various universities in regard to affiliation insofar as they are covered by the Act of 1993 must give way to the operation of the provisions of the

Central Act. In paragraph 77 in unambiguous terms, the Apex Court in ***Maa Vaishno Devi Mahila Mahavidyalaya*** (supra) has held as under:-

"77. The fields which are sought to be covered under the provisions of Section 37 of the Universities Act and the statutes of various universities are clearly common to the aspects which are squarely covered by the specific language under the Act. That being so, all State laws in regard to affiliation insofar as they are covered by the Act must give way to the operation of the provisions of the Act. To put it simply, the requirements which have been examined and the conditions which have been imposed by N.C.T.E. shall prevail and cannot be altered, re-examined or infringed under the garb of the State law. The affiliating/examining body and the State Government must abide by the proficiency and command of N.C.T.E.'s directions. To give an example, existence of building, library, qualified staff, financial stability of the institution, accommodation, etc. are the subjects which are specifically covered under Section 14(3)(b) of the Act. Thus, they would not be open to re-examination by the State and the university. If the recognition itself was conditional and those conditions have not been satisfied, in such circumstances, within the ambit and scope of Sections 46 and 16 of the Act, the affiliating body may not give affiliation and inform N.C.T.E. forthwith of the shortcomings and non-compliance with the conditions. In such situation, both the Central and the State body should act in tandem and, with due coordination, come to a final conclusion as to the steps which are required to be taken in regard to both recognition and affiliation. But certainly, the State Government and the university cannot act in derogation to N.C.T.E.."

47. Thus, it will be seen that it is the provisions of the Central Act, which have to be adhered to and the affiliating/examining body is required to abide by the N.T.C.E. directions as illustratively stated in the said report that existence of building, library, qualified staff, financial stability of the institution, accommodation, etc. are subjects specifically covered under Section 14(3)(b) of the Act of 1993. Hence, they would not be open to re-examination by the State University. The Apex Court also noted that both the N.C.T.E. and the State body should Act in synchronization and coordination but not required to act in derogation to the N.C.T.E.

48. Insofar as the examining body is concerned, it can impose its requirements in respect to eligibility of students to a course in addition to those prescribed by the N.C.T.E. The State and the examining body may also regulate the manner of admission. In case, if it finds that there is irregularity in admission or conditions of affiliation as prescribed by the examining body or any irregularity with reference to any of the matters recorded and governed by the examining body, the examining body may cancel the affiliation irrespective of the fact that the institution continues to enjoys the recognition of the N.C.T.E.

49. A Coordinate Bench of this Court in the case of ***Central Women's College of Educatio***n (supra) has also considered the issue in detail and held that the refusal to grant affiliation in respect of concerns which are the subject matter of satisfaction of the N.C.T.E. cannot be accepted. The relevant paragraphs 47 to 51 of the aforesaid report is reproduced hereinafter:-

"(47) In the case, in hand, the N.C.T.E. and RCI have granted recognition/ approval to the institution of the petitioners after satisfying the requirement of adequate financial resources accommodation, library, qualified staff, or laboratory. Thereafter, the examining body i.e.

the University was entrusted no power to examine the correctness in regard to above-referred ingredients required for grant of recognition. The examining body, after inspection of the institution of the petitioners, has proceeded to refuse to grant affiliation on the short-comings of infrastructure i.e. sufficient adequate financial resources accommodation, library, qualified staff, or laboratory.

(48) In the opinion of this Court, the examining body, if comes to the conclusion that there is short-coming in the institution in regard to infrastructure required while taking into consideration the grant of recognition, then it should have been informed to the N.C.T.E. and RCI for taking necessary action against the Institution. The University was empowered to examine that whether the students who have applied for grant of admission in B.Ed. and B.Ed. Special (H.I.) course are eligible and are having requisite qualification for grant of admission and if not would have refused the affiliation to the institution.

(49) Here, in the present case, the refusal of affiliation is not on the ground that the students who have applied for grant of admission, are having no requisite qualification for grant of admission. The refusal to grant affiliation is that the institution of the petitioner does not have sufficient adequate financial resources accommodation, library, qualified staff, or laboratory and is running different other courses on the same land. In case the University found certain inefficiency in regard to non-fulfillment of required land or staffs, then it should have been informed to the N.C.T.E. and RCI for taking necessary action for withdrawal of the recognition granted by the University.

(50) The N.C.T.E. is the apex body and Parliament has enacted an act in regard to grant of recognition to the training institute of teachers for appointment in the institution. The power given by the Parliament to the regional committee of N.C.T.E. cannot be usurped by the examining body while granting affiliation to the institution.

(51) The institution in question has been accorded recognition by the N.C.T.E. and RCI, after examining the infrastructure required for grant of affiliation. Therefore, the respondent-University, taking shelter of non-fulfillment of requirement of requisite requirement for grant of recognition, cannot refuse to grant affiliation to the institution of the petitioners. The affiliating University can examine only to the extent that whether the students who have opted for grant of admission in the recognized course, are eligible for grant of admission or not. Whether there are some malpractices on the part of the institute in grant of admission or not. It is not amenable to the examining body to reopen the recourse which was fulfilled by the institute at the time of recognition by the N.C.T.E. and RCI."

50. In the backdrop of the aforesaid decisions, it is now not open to two views, that insofar as recognition is concerned, it is the first step required by the Institution to procure the recognition and once having received it then it is required to obtain the affiliation as a second step. The affiliating body has a limited field upon which it can act and after being satisfied it can grant or refuse the affiliation. As noticed above, the affiliating body does not have the powers to re-enter into the considerations regarding primary infrastructural facilities which have already been examined by the N.C.T.E., while granting the recognition. In terms of the Scheme, in case, if the examining body or the State Authorities come to the conclusion that the college/the Institution concerned is severely deficient of requisite norms including infrastructural facilities it always has the powers to recommend the cancellation of the

recognition to the Regional Committee of the N.C.T.E.

51. Once having noticed the manner in which the recognition and the affiliation is to be treated by the respective authorities, if this Court considers the impugned order dated 22.09.2021 refusing the affiliation, it would indicate that upon the recommendation of the Inspecting Team which noticed 16 deficiencies during inspection, it did not find favour in granting affiliation to the petitioners.

52. Briefly, the crux of the deficiencies so noticed is being mentioned hereinafter:-

"(i) The name of the Manager in the Khatauni relating to the land of the college is shown as Rajeev Lochan Shukla whereas the documents indicate that the documents have been attested and certified by Shri Shravan Rajan. It is not clear as to who is the Manager of the Institution;

(ii) There does not appear to be any validly elected committee of Management inasmuch as by letter dated 20.01.2020, an observer was nominated, however, despite passage of more than 1.5 years, there is nothing on record to indicate that the elections have taken place and a validly elected committee has taken charge. In absence thereof, there is no responsible body to take charge of the Institution as well as to take care of the rights of the students;

(iii) The college is running from 2018 onwards, however, the receipts of the books and necessary equipments procured relates to the year 2020-2021;

(iv) There appears to be deficiencies in the signatures of Shri Shravan Rajan on the contract signed with the teachers. Insofar as the land of the Institution is concerned, the name of Shri Rajeev Lochan Shukla has been mentioned as a Manager;

(v) There is no certificate to indicate regarding the security deposit of Rs.2.50 lacs in favour of the University;

(vi) The certificate of national building code appears to be suspicious;

(vii) The entrance of the college indicates that it does not have a paved way;

(viii) The building of the college is still under construction;

(ix) The seating benches and the blackboards are ill-maintained;

(x) The chairs in the seminar hall and multi-hall appears to be procured recently as they are covered with polythene and tags are still intact;

(xi) There was lack of hygienic condition near the place provided for drinking water and there was nothing to indicate that there was separate toilet for boys and girls;

(xii) The appointment letters of the teachers were not made available;

(xiii) as per the bank statement and the balance-sheet, the salary paid to the teachers were inadequate;

(xiv) The bank statement indicating the payment to the teachers was only of six months whereas it ought to be for one year duly certified by the bank manager;

(xv) There was inadequate information regarding certification of the teachers' residence

and at one given address number of teachers were shown to be residing which appears to be suspicious; and

(xvi) The compact disc which was provided regarding video-graphy of the entire inspection was not found operational".

53. Thus, on the basis of the aforesaid deficiencies, which were placed before the University by the two members Inspection Committee, the affiliation was refused to the petitioner-Institution.

54. If the contentions of the learned counsel for the parties are noticed in light of the deficiencies noticed by the Inspecting Team and pleadings of the parties more specifically as mentioned in paragraph 41 of the writ petition, coupled with the response given by the University, both in its short counter affidavit dated 07.10.2021 and the detailed counter affidavit dated 16.10.2021, it would indicate that the said 16 deficiencies can be categorized under the following types:-

(i) deficiencies, which relate to existence of infrastructural facilities;

(ii) deficiencies, which may relate to the management of the institution;

(iii) deficiencies, which can be said to be recurring in nature on account of usage and passage of time.

55. The Court has also examined the record submitted by the University for perusal. The record made available to the Court would indicate that the petitioner-institution while applying for the affiliation for the current academic year 2021-2022 had furnished a letter dated 15.03.2021 which has been received by the University on 26.03.2021 as there is a receiving endorsement thereon to indicate the date and the serial no. 141.

56. The said letter is accompanied by an affidavit of Sri Shrawan Rajan, the Manager and along with the said affidavit there are a number of enclosures. (The said letter, affidavit and the enclosures are marked as Pages 1 to 67 in the record submitted by the University to the Court.)

57. Amongst the enclosures so furnished are the recognition order, the statement of account of the teachers, the erstwhile application seeking affiliation, the copy of the erstwhile inspection report dated 18.05.2018, the certificate regarding the declaration of results for the Academic Year 2019-20 for B.Ed First Semester and II Semester. The certificate issued by the University that the college in question was not found involved in any copying during examination. It also contains requisites regarding the fixed deposits receipts, the societies registration certificate, copy of the title deed and the corresponding revenue entries in the Khatauni, auditors reports amongst others.

58. The record indicates that in so far as the petitioner is concerned, it had within the requisite time applied for extension of the affiliation for the Academic Year 2020-21. This extension of affiliation was communicated to the petitioner on 18.02.2021, a copy of which has been brought on record as Annexure No. 11 to the writ petition.

59. The petitioner applied for the affiliation for the current Academic Year 2021-2022 vide letter dated 15.03.2021, a copy of which has been brought on record as Annexure No. 12 and is also corroborated by the record submitted by the University concerned.

60. It is only as late as on 24.07.2021 that the University informed the petitioner that a Committee has been constituted for inspection and that the College may get the inspection done by 28.07.2021. This letter was replied to by the College on 28.07.2021 indicating the extension

may be granted to the petitioner for affiliation as certain discrepancies were found at the time when the inspection was made in the year 2019 but on account of Covid-19 pandemic, the same could not be removed, hence, an extension may be provided for a year i.e. for the academic year 2021-22 within which the deficiencies shall be removed.

61. In the aforesaid facts and circumstances, though, the report of the Inspection Committee is factual in nature but the manner in which the report has been presented and the objections have been made, raises certain issues which cannot be said to be free from arbitrariness.

62. In inspection report it has been found that there is no clear averment regarding the land of the institution and the name of the Manager. It has been explained by the petitioners that prior to the year 2016, Sri Rajeev Lochan Shukla was the Manager of the Committee of Management of the Institution. After the year 2017, it is the petitioner no. 2 who is the manager. At the time, when the instrument regarding transfer of title of the land to the institution was executed, the then prevailing Manager signed the documents. It is also urged that the same documents existed at the time when the inspection was made by the N.C.T.E. and so also in the year 2019 when the Affiliating Body had inspected the institution.

63. It has also been urged that from the perusal of the sale deed, it would indicate that the name of Shri Rajeev Lochan Shukla has been shown as the Manager of the Institution and even in the revenue records, the property stands recorded in the name of the institution represented through its Manager Shri Rajeev Lochan Shukla. Apparently, once the aforesaid documents are already available and from the perusal thereof it could clearly be seen that the property even in the revenue records as well as in the title deed stands recorded in the name of the petitioner-institution and the Institution is represented by its alter ego which may change from time to time. Thus, this could not be a ground to refuse or find any deficiency where the land in the name of the college stood verified and was also considered by the N.C.T.E., while granting the recognition.

64 . Moreover, in light of the law as traced above, the Affiliating Body could not have re-examined this issue as it related to a matter covered for the satisfaction of the Regional Committee while granting recognition order and even if at all on account of certain changed circumstances, if the Affiliating Body found some major discrepancies which could not be reconciled or on account of glaring fraud recognition has been obtained and it comes to the knowledge of the affiliating body then as an exception it could take action and further it can recommend to the N.C.T.E. for cancellation of the recognition. In absence of such circumstances and without cogent reasons on its own it could not have refused the affiliation.

65. Even otherwise, in the instant case, once the aforesaid documents were available with the Affiliating Body and if at any point of time, the Affiliating Body had any doubt it could have called upon the petitioner-institution to explain, before taking a decision to refuse extension of affiliation, if it proposed refusal on such grounds which otherwise were verified and within the domain of the N.C.T.E.

66. As far as the second shortcoming/ deficiency is concerned, the record would indicate that the petitioner no. 2 had required an Observer to be appointed for the elections which was so done vide letter dated 20.01.2020, a copy of which has been brought on record as Annexure No. 39 to the writ petition. The said Observer had agreed to get the elections held on 26.09.2021 as indicated from the letter dated 24.08. 2021, a copy of which has been brought

on record as Annexure No. 40. Thereafter the elections have been held and the newly constituted Committee and the relevant documents thereof have also been brought on record as Annexure No. 41.

67. Though, it is true that the said elections took place after the inspection but the fact remains that the entire Country was reeling under the effect of Covid-19 Pandemic. In March, 2021, the second wave of the pandemic had hit the country severely. Almost all the spheres of life were severely affected. In the aforesaid circumstances where the University had granted time to various other institutions to get their Committee of Managements updated and regularized by holding the elections. Similarly, time also could have been granted to the petitioner. Moreover, since the Observer was appointed by the University at least before taking a decision, it could have also sought an explanation from the observer as to why the elections were not held and that since the Observer had already given its consent to hold the elections then it could not be said that the petitioner was squarely at fault. These issues relating to the management can re-occur and it will be necessary for any body before taking any decision to at least update itself by clarifying from the institution concerned and with the prevailing cause and effect of any change in the management.

68. In the instant case at hand, a striking feature is that there has been no complaint or any claim raised by rival party management. Apparently, there has been no dispute from any rival Committee of Management nor any such dispute was made known or in the knowledge of the University, thus, in absence of these accentuating circumstances, merely to come to a conclusion that in absence of any elections, there was no responsible body to take charge of the institution and the interest of the students was not quite justifiable.

69. Similarly, in so far as the issue regarding library and books are concerned, once the library was found existing when the inspection was made by the N.C.T.E. as well as the Affiliating Body, it could not be said that the library does not exist. Merely because some books and other equipments may have been purchased in the year 2020-21 would not mean that there is no infrastructural facilities available or that it is being created for the first time in 2020-21. The manner in which the report has been drawn indicates that the inspecting team has not applied its mind. It is not their contention to state that all the books in the library were of the year 2020-21.

70. In case if the present report is found to to be correct then it would have to be assumed that perhaps the earlier inspection made by the Inspection Committee was not correct. Since at the time when the earlier inspection was made, it was found that the institution was duly equipped with the full functional library.

71. At this stage, it will be relevant to notice that in the earlier inspection report made in the year 2019, the College was found fully compliant except for certain deficiencies which were noted relating to absence of certain doors, windows and sky lights. In the present inspection report dated 07.09.2021, other discrepancies have been noticed and it finds that those windows and skylights have been fixed.

72. It is also common knowledge that the Covid-19 had affected all walks of life including the education system. The issue regarding the non-availability of adequate teachers as already noticed above is the subject matter to be considered by the N.C.T.E. Even if at all the Affiliating Body found some discrepancies, it could have recommended the N.C.T.E. to cancel the recognition. At the cost of repetition, it may be stated that the reasons as indicated in the inspection report finding that there were no

adequate number of teachers, this requires a little bit of more explanation and documents to enable the petitioner to have clarified the doubt but without calling upon or waiting for the reply, the Inspecting Team has concluded and given its recommendations.

73. Similar discrepancies of minor nature such as the National Building Code Certificate being suspicious which was already available on record, though, there is nothing to indicate how the said certificate is found suspicious when earlier the certificate was found acceptable. The documents regarding requisite securities in favour of the University were already available and submitted earlier and there is nothing on record why the same could not be found verified. Moreover, such are issues which could easily be verified, however, the documents which have been brought on record by the petitioner established that apparently the petitioner complied with the aforesaid formalities and requisites.

74. As far as the ill-maintenance of the black boards, benches, un-hygenic conditions near the area earmarked for drinking water etc. are concerned. It is also to be noted that the College is in a rural area and the inspection was done during the Monsoons. The colleges had been closed and not functional on account of Covid-19 pandemic since over a year and half and on-line classes are being held. In such circumstances, if there are certain issues regarding ill-maintenance and hygiene it does not give an impression that the facilities do not exist rather that they are merely to be spruced up. For the aforesaid, unless the instiutiton is a chronic defaulter, some time could have been given to the petitioner to rectify and upgrade rather than to make it a ground to refuse the affiliation which is a harsh remedy and handicaps the institution for conducting the examination programme and also jeopardizes the future and career of many students. Apart from the fact that it deprives the institution from taking fresh admissions for new academic year.

75. Education is an important facet and vital for development of the society and it has been exhaulted to a fundamental right incorporated in Part III of the Constitution of India under Article 21-A. Higher education has its own paramount presence and in order to evenly regulate and provide such higher education, various legislations, rules, regulations have been formulated. It involves various stake holders, including State and non-State colleges, Universities, regulatory bodies, councils, students, teachers amongst others. The statutory bodies, colleges and stake holders are expected to work complimenting each other and not in derogation, hence, the action of one must not be arbitrary.

76. Arbitrariness is an anathema to a society governed by the rule of law. The Apex Court in the case of ***Ramana Dayaram Shetty v. International Airport Authority of India & Ors., (1979) 3 SCC 489.***

"27. Now this rule, flowing as it does from Article 14, applies to every State action and since "State" is defined in Article 12 to include not only the Government of India and the Government of each of the States, but also "all local or other authorities within the territory of India or under the control of the Government of India", it must apply to action of "other authorities" and they must be held subject to the same constitutional limitation as the Government. But the question arises, what are the "other authorities" contemplated by Article 12 which fall within the definition of "State"? On this question considerable light is thrown by the decision of this Court in Rajasthan Electricity Board v. Mohan Lal [AIR 1967 SC 1857 : (1967) 3 SCR 377 : (1968) 1 LLJ 257] . That was a case in which this Court was called upon to consider whether the Rajasthan Electricity Board was an "authority" within the meaning of

expression "other authorities" in Article 12. Bhargava, J., delivering the judgment of the majority pointed out that the expression "other authorities" in Article 12 would include all constitutional and statutory authorities on whom powers are conferred by law. The learned Judge also said that if any body of persons has authority to issue directions the disobedience of which would be punishable as a criminal offence, that would be an indication that that authority is "State". Shah, J., who delivered a separate judgment, agreeing with the conclusion reached by the majority, preferred to give a slightly different meaning to the expression "other authorities". He said that authorities, constitutional or statutory, would fall within the expression "other authorities" only if they are invested with the sovereign power of the State, namely, the power to make rules and regulations which have the force of law. The ratio of this decision may thus be stated to be that a constitutional or statutory authority would be within the meaning of the expression "other authorities", if it has been invested with statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequence or it has the sovereign power to make rules and regulations having the force of law. This test was followed by Ray, C.J., in Sukhdev v. Bhagatram. Mathew, J., however, in the same case, propounded a broader test, namely, whether the statutory corporation or other body or authority, claimed to fall within the definition of "State", is an instrumentality or agency of Government: if it is, it would fall within the meaning of the expression "other authorities' and would be "State". Whilst accepting the test laid down inRajasthan Electricity Board v. Mohan Lal, and followed by Ray, C.J., in Sukhdev v.Bhagatram, we would, for reasons already discussed, prefer to adopt the test of Governmental instrumentality or agency as one more test and perhaps a more satisfactory one for determining whether a statutory corporation, body or other authority falls within the definition of "State". If a statutory corporation, body or other authority is an instrumentality or agency of the Government, it would be an "authority" and therefore "State" within the meaning of that expression in Article 12."

77. Similarly, the Apex Court in ***Ajay Hasia & Ors. v. Khalid Mujib Sehravardi & Ors., (1981) 1 SCC 722*** has held as under:-

"16. If the Society is an "authority" and therefore "State" within the meaning of Article 12, it must follow that it is subject to the constitutional obligation under Article 14. The true scope and ambit of Article 14 has been the subject-matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that that article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in E.P. Royappa v. State of Tamil Nadu [(1974) 4 SCC 3, 38 : 1974 SCC (L&S) 165, 200 : (1974) 2 SCR 348] that this Court laid bare a new dimension of Article 14 and pointed out that that article has highly activist magnitude and it embodies a guarantee against arbitrariness. This Court speaking through one of us (Bhagwati, J.) said: SCC p. 38: SCC (L&S) p. 200, para 85]

"The basic principle which, therefore, informs both Articles 14 and 16 is equality and

inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life', and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

This vital and dynamic aspect which was till then lying latent and submerged in the few simple but pregnant words of Article 14 was explored and brought to light in Royappa case [(1974) 4 SCC 3, 38 : 1974 SCC (L&S) 165, 200 : (1974) 2 SCR 348] and it was reaffirmed and elaborated by this Court in Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : (1978) 2 SCR 621] where this Court again speaking through one of us (Bhagwati, J.) observed: (SCC pp. 283-84, para 7)

"Now the question immediately arises as to what is the requirement of Article 14: What is the content and reach of the great equalising principle enunciated in this Article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."

This was again reiterated by this Court in International Airport Authority case[(1979) 3 SCC 489] at p. 1042 (SCC p. 511) of the Report. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because any [Under Article 32 of the Constitution] action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

78. Again in ***State of Jharkhand & Ors. v. Brahmputra Metallics Ltd., Ranchi & Anr., 2020 SCC OnLine SC 968*** in para 48 and 49, it has held as under:

"48. As regards the relationship between Article 14 and the doctrine of legitimate expectation, a three judge Bench in ***Food Corporation of India v. Kamdhenu Cattle Feed Industries (1993) 1 SCC 71, s****peaking through Justice J.S. Verma, held thus:*

"7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law : A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is "fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent." (emphasis supplied)

49. More recently, in *NOIDA Entrepreneurs Assn. v. NOIDA, (2011) 6 SCC 508, a two-judge bench of this Court, speaking through Justice B.S. Chauhan, elaborated on this relationship in the following terms:*

"39. State actions are required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even

apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.

...

41. Power vested by the State in a public authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. "Public authorities cannot play fast and loose with the powers vested in them." A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other...]"

(emphasis supplied)"

79. In light of the aforesaid discussions and decisions of the Apex Court, if the grounds upon which the affiliation has been rejected, is tested, this Court has no hesitation to hold that the affiliation has been refused on the grounds which are not based on sound reasoning applicable on the factual matrix and the respondent no. 3, the University has not given due thought to the issue at hand and its decision making process is vitiated while recommending the refusal of affiliation for the year 2021-22 to the petitioner and being arbitrary is hit by the Article 14 of the Constitution of India.

80. The learned counsel for the respondent No.3 University has though relied upon the decision of the ***Committee of Management, Anuragi Devi Degree College & Anr.*** (supra) to urge that this Court may not issue a mandamus to grant the affiliation after the time-lines as specified by the Apex Court in the case of ***Maa Vaishno Devi Mahila Mahavidyalaya*** (supra) have lapsed. However, from the perusal of the aforesaid decision specifically Para-16 of ***Anuragi Devi*** (supra), it cannot be said that such direction cannot be issued for the reason that in the instant case, the petitioner had applied for the affiliation within the time-lines as provided by the Apex Court. Any decision taken by the University during pendency of the writ petition and found to be erroneous if set aside, cannot prevent the Court from doing substantial justice between the parties and for the said reason, the aforesaid decision cannot be pressed into service, as the Apex Court on different set of facts had made the said observations in Para-20 in the case of ***Anuragi Devi*** (supra) which is not applicable to the present case.

81. The learned counsel for the respondent no. 3 even while filing the counter affidavit could not dispute the fact that the petitioner had applied for the affiliation for the current year 2021-22 on 15.03.2021, though, the said letter was received by the University on 26.03.2021. Once the said application was received by the respondent-University within the timeline, it was necessary for the University to have responded. The University in its counter affidavit could not give a convincing answer regarding the fact that the letter dated 24.07.2021 was uploaded on the Log-in ID of the petitioner-college with delay so also the order dated 30.07.2021. Since the petitioner had applied for the affiliation in the time so specified and the Coordinate Bench of this Court by means of order dated 03.09.2021 passed in the connected petition bearing No.19490 (MS) of 2021 had directed the inspection to be conducted and in case if everything was found in order then appropriate order regarding the grant of affiliation were to be passed. Hence, this Court is not in agreement with the learned counsel for the respondent No.3

University that in all cases after the lapse of time-lines, the Court cannot direct the University to grant an affiliation even if facts and circumstances demand.

82. In so far as the submission of the learned counsel for the respondent no. 3 regarding availability of alternate remedy is concerned, it is to be noted that the alternate remedy is not an absolute bar. In the instant case, a coordinate Bench of this Court had already taken note of the grievance of the petitioner while entertaining Writ Petition No.19490 (M/S) of 2021. Any order or action having passed during the pendency of the writ petition, in such circumstances, it may not be appropriate where time is also an essence, to relegate the petitioner to the alternate forum of appeal before the State.

83. Thus, for the aforesaid reasons, so also that the inspection report is vitiated hence in the facts and circumstances of this case, this Court does not find much substance to the submission of availability of alternate remedy raised by the learned counsel for the respondent no. 3.

84. This Court is fortified in its view in light of the decision of the Apex Court in the case of ***M/s Radha Krishan Industries v. State of Himachal Pradesh and Others, 2021 SCC OnLine SCC 33***4 as well as in the case of ***Assistant Commissioner of Sales Tax v. Commercial Steel Limited, 2021 SCC OnLine 884, M/s Magadh Sugar & Energy Ltd. v. State of Bihar & Ors., 2021 SCC OnLine 801.***

85. After the aforesaid detailed discussions, this Court arrives at a conclusion that the inspection report and the reasons recorded therein are not appropriate and deserves to be ignored. Hence, in the aforesaid circumstances, this Court provides that the respondent no.3 shall constitute a fresh team (of new members not part of earlier inspection) to inspect the college after putting the college to notice within a period of 10 days from the date of this order. Thereafter, in light of a fresh report (and also providing an opportunity to the petitioner to clarify any point in case if the Inspecting Team so constituted has any doubt) and keeping in mind the decision of the Apex Court as discussed above in this judgment, shall pass a fresh order regarding grant of affiliation within ten days thereafter so that the entire exercise is completed within 20 days from the date of this order.

86. In view of the aforesaid detailed discussion, the present Writ Petition No.22635 (M/S) of 2021 is allowed. A writ in the nature of certiorari is issued and the impugned order dated 22.09.2021 contained in Annexure No.1 to the present writ petition No. 22635 (M/S) of 2021 shall stand quashed. The University concerned shall after getting the fresh inspection done within the time period as mentioned in paragraph 85 of this judgment shall pass a fresh order regarding grant of affiliation taking note of the fresh inspection report and in light of the observations made in this judgment. The original record as submitted by the learned counsel for the respondent No.3 has been handed over to Sri Shivanshu Goswami, learned counsel for the respondent No.3. In light of this judgment, the Writ Petition No.19490 (M/S) of 2021 shall accordingly stand disposed of.

87. In the facts and circumstances, there shall be no order as to costs.

(2021)12ILR A717
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.12.2021

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Misc. Single No. 23074 of 2021

Smt. Vandana Singh & Ors. ...Petitioners
Versus
A.D.J., Court No.1, Faizabad & Ors. ...Respondents

Counsel for the Petitioners:
Mohd. Ali , Kunwar Bahadur Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law - Res sub-judice - Civil Procedure Code, 1908: Section 10, 11: The Court observed that the requirement of necessary condition for application of Section 10 of C.P.C. is not present as the Misc. Case No. 422 of 2016 filed by the petitioner was not pending as the same was dismissed for want of prosecution and was not restored at the time of passing the final order dated 09.10.2018 in M.N.R. No. 82 of 2014, filed by the mother of the deceased. (Para 31)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Pawan kumar Gupta Vs Ruchi Ramnag Dey 1999 (4) SCC 243

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Mohd. Ali, learned counsel for the petitioners, learned Standing Counsel appearing on behalf of respondent No.3 and Sri Saurabh Tripathi, learned counsel appearing on behalf of respondent No.4.

2. By means of present petition, a challenge has been made to the judgment and order dated 24.08.2021 passed by the Additional District Judge, Court No. 1, Faizabad in Misc. Civil Appeal No. 56 of 2018 (Smt. Vandana Singh & Others Vs. Smt. Kokila Singh & Others) which was filed against the judgment and order dated 09.10.2018 passed by the Additional Civil Judge, (Senior Division)/F.T.C., Faizabad in M.N.R. No.82 of 2014 (Smt. Kokila vs. State of U.P.). A challenge has also been made to the order dated 09.10.2018 which was assailed in the Appeal No. 56 of 2018.

3. The prayer No. (ii) is consequential to main prayer sought in the petition, which on reproduction, reads as under:-

"to issue an order or direction for setting aside the judgment and order dated 24.08.2021, passed by the Additional District Judge, Court No.1, Faizabad, in Misc. Civil Appeal No. 56 of 2018; Smt. Vandna Singh and others Vs. Smt. Kokila Singh, together with the order dated 09.10.2018, passed by the Additional Civil Judge, (Senior Division)/F.T.C., Faizabad, in M.N.R. No. 82 of 2014; Smt. Kokila Vs. State and others, to the extent so far as it relates to grant of 1/5th share and issuance of Succession Certificate to that effect in favour of Smt.Kokila Singh, the opposite party No. 4, pertaining to Bank deposit amount of the deceased Ashwani Kumar Singh, as contained in Annexure Nos.1 and 2 to this petition."

4. Assailing the orders, above mentioned, learned counsel for the petitioners submitted that Ashwani Kumar Singh, husband of petitioner No. 1 and father of petitioner Nos. 2 to 4 was maintaining his two accounts i.e. (i) Bank Account No. 200156 (Old) [New Account No. 56640100000520] of Faizabad Kshetriya Gramin Bank, Branch Zila Panchayat, Faizabad and (ii) Bank Account No. 01090051775 (Old) [New Account No. 10961469703] of State Bank of India, Faizabad. On 25.10.2006, the Ashwani Kumar Singh was murdered. Thereafter, a Misc. Case No. 422 of 2006 (Vandna Singh Vs. State), under Section 372 of Indian Succession Act, 1925 (in short "Act of 1925") was instituted by the petitioner(s). In this case, opposite No. 4 appeared and filed an objection. Subsequently, opposite party No.4-Smt. Kokila, mother of the deceased-Ashwani Kumar Singh, filed another case under Section 372 of Act of 1925 registered as M.N.R. No. 82 of 2014 (Smt. Kokila Vs. State and others) with regard to same Bank Accounts.

5. It is submitted that the case of the petitioners was dismissed for want of prosecution vide order dated 16.07.2015 and on coming to know about the said order, an

application for restoration was preferred by the petitioners on 29.07.2015. On query being put, learned counsel for the petitioners submitted that the case has not yet been restored to its original number and the next date fixed is 21.01.2022.

6. He submitted that during pendency of the application for restoration, Trial Court proceeded with the case i.e. M.N.R. Case No. 82 of 2014 and taking note of the fact that application for restoration of Misc. Case No. 422 of 2006 is pending, petitioners preferred an application under Section 10 of C.P.C. for staying the proceedings of the suit. However, the Trial Court without taking note of the facts pleaded in the application preferred by the petitioners under Section 10 C.P.C. as also the law on the issue proceeded with the matter and passed final order dated 09.10.2018.

7. He submitted that the Trial Court was under obligation to stay the proceedings of the case as the findings recorded by it would apply as *res judicata* in subsequent suits including the case filed by the petitioners, under Section 372 of the Act of 1925, in which restoration application is pending and the next date fixed therein is 21.01.2022.

8. In addition, it is stated that the findings recorded by the Trial Court vide order dated 09.10.2018 would also affect the decision of the suit filed by the father of the deceased in Regular Suit No. 193 of 2007 (Narendra Bahadur Singh & Others Vs. Executive Engineer, Provincial, Division-2, P.W.D. Faizabad and Others).

9. He submitted that after the order dated 09.10.2018, petitioner(s) preferred an appeal i.e. Misc. Civil Appeal No. 56 of 2018. However, the Appellate Court, without taking note of spirit of Section 10 of C.P.C., dismissed the appeal vide judgment and order dated 24.08.2021, whereby confirmed the order dated 09.10.2018 of Trial Court.

10. As such, the judgment and order dated 09.10.2018 of the Trial Court as also the judgment and order of Appellate Court dated 24.08.2021 are liable to be interfered with.

11. He, in support of his case placed reliance upon the judgment of Hon'ble Apex Court passed in the case of ***Pawan Kumar Gupta vs. Ruchi Ramnag Dey, reported in 1999 (4) SCC 243,*** relevant paragraph on reproduction reads as under:-

"16. The rule of res judicata incorporated in Section 11 of the Code of Civil Procedure (CPC) prohibits the court from trying an issue which "has been directly and substantially in issue in a former suit between the same parties", and has been heard and finally decided by that court. It is the decision on an issue, and not a mere finding on any incidental question to reach such decision, which operates as res judicata. It is not correct to say that the party has no right of appeal against such a decision on an issue though the suit was ultimately recorded as dismissed. The decree was not in fact against the plaintiff in that first suit, but was in his favour as shown above. There was no hurdle in law for the defendant to file an appeal against the judgment and decree in that first suit as he still disputed those decisions on such contested issues."

12. Considered the submissions advanced by the learned counsel for the petitioner as also learned Additional C.S.C., appearing for opposite party No. 3 and Sri Saurabh Tripathi, learned counsel for the opposite party No.4.

13. From the aforesaid, it is apparent that present petition relates to the succession of properties of the deceased particularly movable properties.

14. Admittedly, the deceased was Male and was Hindu, as such, undisputedly, Hindu Succession Act, 1956 (in short "Act of 1956") would apply. It has not been stated in this petition that the deceased prior to his death had executed the will deed. Meaning thereby the case of the petitioners is not based on will. Thus, admittedly, deceased expired intestate. As such, property of the deceased in this case would be devolved in the manner prescribed under Section 8 of the Act of 1956, which provides General Rules of Succession in the case of males, read with the Scheduled appended to the Act of 1956. Relevant provisions are quoted below for ready reference:-

*"**8. General rules of succession in the case of males.**--The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter--*

(a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;

(b) secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

THE SCHEDULE
[Section 8]
HEIRS IN CLASS I AND CLASS II
CLASS I

Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a predeceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a predeceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son.

CLASS II

I. Father.

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

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

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

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

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

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

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

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

Explanation : In this Schedule, references to a brother or sister do not include references to a brother or sister by uterine blood."

15. In the instant case, admittedly, the deceased-Ashwani Kumar Singh expired intestate on 25.10.2006 leaving behind his Wife-Vandana Singh, minor daughters-Km. Anchal Singh and Km. Khushi, minor son-Abhay Singh, mother-Smt. Kokila and father-Sri Narendra Bahadur Singh.

16. As per the provisions of Act of 1956, indicated herein above, the wife, daught16. er(s), son, and mother, named above, of the

deceased-Ashwani Kumar Singh being legal heirs specified under Class-I of Schedule, are entitled to share in the property of the deceased.

17. In the instant case, for the reasons aforesaid, each legal heir, specified under Class-I of Schedule read with Section 8 of the Act of 1956, is entitled to 1/5th share in the property of the deceased-Ashwani Kumar Singh. Needless to say that father of the deceased being legal heir specified under Class-II, as per Act of 1956, would not inherit the property of the deceased.

18. The trial Court in the judgment and order dated 09.10.2018 has recorded a finding that the mother of the deceased is entitled only upto 1/5th share and thereafter passed the order accordingly for grant of Succession Certificate. Moreover, as per this order, each petitioner is also entitled to 1/5 share in property of the deceased.

19. On the issue of share, when a query has been put to the learned counsel for the petitioners, he could not place any law before this Court in which petitioners would be entitled for more than the share what has been expressed by the Trial Court in the judgment and order dated 09.10.2018.

20. Thus, in view of aforesaid, this Court feels that no prejudice would be caused to the petitioner on the basis of findings given by the Trial Court and affirmed by the Appellate Court.

21. Needless to say that the preliminary source of legal provisions of Section(s) 10 and 11 of C.P.C. is based on the concepts of Res-Subjudice and Res-Judicata.

22. 'Res' means every object of right that proves the subject matter in a particular case. In Latin, the expression 'Sub-Judice' means "Under a judge" or in other words, a matter "under consideration". It means a cause that is under trial or pending before a Court or Judge.

23. The doctrine of Res-Judicata prohibits the second trial of the same dispute between the same parties. This doctrine prevents the trial of a suit or issue if by a decision in earlier suit between the same parties or their successors, the issue(s) are settled.

24. This case relates to Section 10 of C.P.C. as such principles of Res Sub-judice would apply. The expression 'Res Sub-Judice' is Latin maxim which means "under judgment". The rule of the Sub-Judice is based on the public policy which prohibits the plaintiff to file two parallel cases on the same subject matter and restricts the chances of having two contradictory judgments by the two courts. The purpose of the doctrine of Res Sub-Judice is to prevent a multiplicity of the proceedings and to refrain two conflicting decisions. The doctrine bars the parallel trial of the suit where the matter is pending to adjudicate in the former suit but it does not restrict in filing the subsequent suit. The primary aim of this doctrine is to prohibit the courts of concurrent jurisdiction from simultaneously entertaining two parallel litigations. In case of two or more cases, pending between the same parties in the same subject matter, the competent court has power to stay the proceedings.

25. Considering the issue involved in this petition, it would be appropriate to refer Section 10 of C.P.C., the same reads as under:-

"10. Stay of suit.--No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India have jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and

having like jurisdiction, or before the Supreme Court.

Explanation.--The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."

26. Section 10 of C.P.C. states that no court will initiate the trial of any suit if the issues are directly or substantially related to the previously instituted suit between the same parties or parties litigating on behalf of them under the same title and the matter is pending before the court having the competent jurisdiction in the territory of India or any court beyond the limits of India established by central governments having the same jurisdiction or before supreme court. If parallel suits come before the competent court, section 10 gives the power to put a stay on the proceedings in another court. Section 10 prohibits the trial of parallel litigation where the same cause of action arises between the same parties on the same subject matter. Section 10 bars the two parallel litigation between the same parties on the same cause of action. The basic reasoning behind this provision is to prevent wastage of courts resource, protect the right of the litigant, reduce the burden on courts and avoid two contradictory decision. This provision was inserted in C.P.C. to meet the end of the justice and prevent abuse of the court.

27. It appears from the aforesaid that for application of Section 10 of C.P.C. the following are necessary condition:-

(a) There should be two suits.

(b) The suits must be between the same parties or their successors.

(c) The matter in the issue in the later suit must be directly and substantially the same as in the previous suits.

(d) Both the suits should be pending before the court of law.

(e) The parties must be litigating under the same title in both the suits.

28. From the aforesaid, the objective behind Section 10 in C.P.C. can be deduced as under:-

(i) To prevent parallel litigation between the same parties on the same issue/subject matter.

(ii) To reduce the burden on the courts as also to prevent wastage of time of the Courts.

(iii) To avoid contradictory decisions on the same issue/subject matter.

(iv) To protect the rights of other party.

29. In earlier part of this judgment, this Court has already held that the findings, regarding share in the property of the deceased, recorded by the Trial Court are just and proper and being so no prejudice would be caused to the petitioners. As such, to the view of this Court, the decision in the case filed by the petitioners under Section 372 of the Act of 1925, which was not pending on 09.10.2018 (the date on which the case filed by mother of the deceased under Section 372 of the Act of 1925 was allowed) as the same was dismissed for want of prosecution on 16.07.2015 and has yet not been restored to its original number, would not be contradictory.

30. After considering the principle of Res Sub-judice and Section 10 of C.P.C., this Court, in earlier part of this judgment, has observed regarding requirement of necessary condition for application of Section 10 of C.P.C. as also its objective.

31. In this case, admittedly, the Misc. Case No. 422 of 2016 filed by the petitioners was not pending as the same was dismissed for want of prosecution on 16.07.2015 and was not restored at the time of passing the final order dated 09.10.2018 in M.N.R. No. 82 of 2014, filed by the mother of the deceased.

32. From the aforesaid, it is crystal clear that one essential/ necessary requirement for applying Section 10 of C.P.C. was not present at the time of passing the impugned order dated 09.10.2018 which is to the effect that "Both the suits should be pending before the Court of Law". As such, this Court is of the view that the Trial Court rightly decided the subsequent case.

33. Upon due consideration of aforesaid particularly the findings recorded by this Court on the issue of contradictory decision and missing of one essential condition for applying the provisions of Section 10 of C.P.C., this Court is of the view that no interference in impugned orders is required in exercise of powers under Article 227 of the Constitution of India.

34. Accordingly, the writ petition is ***dismissed***. No order as to costs.

(2021)12ILR A723
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.11.2021

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Misc. Single No. 27631 of 2021

M/s Pan Realtors Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Abhishek Khare, Apoorva Tewari

Counsel for the Respondents:
C.S.C., Waseeq Uddin Ahmed

A. Maintainability - U.P. Urban Planning & Development Act, 1973: Section 41(3) - U.P. Industrial Development Area Act, 1976: Section 12 - Indian Constitution, 1950: Article 226, 227 - The Court examined whether an "Authority" i.e., " State Government" under Section 41(3) of the Act of 1973 is a "Tribunal" or not. On perusal it is ascertained that the power of adjudication is conferred upon to the 'State Government' is by the statute, the 'State Government' is under obligation to act judicially and is also required to follow principle of natural justice, the 'State Government' in this aforesaid sub-section decides the *lis* between the parties and decision of the 'State Government' under this sub-section is binding and final. Thus, having satisfied all the parameters/tests, the Court concluded that the 'State Government' under 41(3) of the Act of 1973 is a 'Tribunal'. (Para 20)

Under Article 227, the High Court exercise the power to correct the errors of jurisdiction and not to upset pure prior findings of facts. (Para 23)

Petition Disposed of. (E-10)

List of Cases cited:

1. Associated Cement Companies Ltd. Vs P.N. Sharma & anr. AIR 1965 SC 1595

2. Haji Manzoor Ahmed & anr. Vs State AIR 1970 Allahabad page 467

3. All Party Hill Leaders Conference Vs Captian W.A. Sangma (1977) 4 SCC 161

4. St. of Guj.Vs Gujarat Revenue Tribunal Bar Assn. (2012) 10 SCC 353: (2012) 4 SCC (Civ) 1229: (2013) 1 SCC (Cri) 35: (2013) 1 SCC (L&S) 56: 2012 SCC OnLine SC 874 page 365

5. Aidal Singh Vs Karan Singh AIR 1957 All 414 (FB)

6. Kihoto Hollohan Vs Zachillhu 1992 Supp (2) SCC 651 page 705

7. Umaji Keshao Meshram Vs Radhikabai 1986 (Supp) SCC 401

8. T.C. Basappa Vs T. Nagappa & anr. AIR 1954 SC 440

9. Manmohan Singh Jaitla Vs Commr., Union Territory of Chandigarh 1984 Supp SCC 540: 1985 SCC (L&S) 269 page 545

10. Waryam Singh Vs Amarnath AIR 1954 SC 215

11. Hari Vishnu Kamath Vs Ahmad Ishaque AIR 1955 SC 233

12. M.L. Sethi Vs R.P. Kapur (1972) 2 SCC 427

13. Chandrasekhar Singh Vs Siya Ram Singh (1979) 3 SCC 118

14. Mohd. Yunus Vs Mohd. Mustaquim (1983) 4 SCC 566

15. Rena Drego Vs Lalchand Soni (1998) 3 SCC 341

16. Baby Vs Travancore Devaswom Board (1998) 8 SCC 310

17. Ajaib Singh Vs Sirhind Co-operative Marketing cum Processing Service Society Ltd. (1999) 6 SCC 82

18. Shalini Shyam Shetty Vs Rajendra Shankar Patil (2010) 8 SCC 329

19. Madras Bar Association Vs U.O.I.(2014) 10 SCC 1

20. Radhey Shyam Vs Chhabi Nath (2015) 5 SCC 423

21. Surya Dev Rai Vs Ram Chander Rai (2003) 6 SCC 675

22. Ram Kishan Fauji Vs St.of Har. (2017) 5 SCC 533

23. Bikram Chatterji & ors. Vs U.O.I. & ors. Writ Petition No. 940 of 2017

24. Kartar Singh Vs St.of Punj.(1994) 3 SCC 675

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Apoorva Tewari, learned Counsel for the petitioner, Sri Devendra Mohan Shukla, learned Standing Counsel for opposite party no. 1 and Sri Waseeq Uddin Ahmed, learned Counsel for opposite party no. 2.

2. The petitioner by means of present petition filed under Article 227 of Constitution of India has sought the following main reliefs:-

"a) To issue an appropriate order or direction commanding the respondent no. 1 to decide the revision of the petitioner preferred under Section 41(3) of the U.P. Urban Planning and Development Act, 1973 read with Section 12 of the U.P. Industrial Area Development Act, 1976 expeditiously within a fixed reasonable period of time:

b) To issue an appropriate order or direction commanding the respondent no. 2 not to take any coercive measures against the petitioner pursuant to recovery certificate dated 12.09.2019 during the pendency of revision before the respondent no. 1:"

3. At the very outset, on pointing out regarding the defect as pointed out by the Registry of this Court, which is to the effect that the present petition for relief(s) sought is cognizable by the Division Bench of this Court under Article 226 of Constitution of India, the learned Counsel for the petitioner Sri Apoorva Tewari, submitted that present petition for the main relief(s) quoted above, is maintainable before this Court under Article 227 of Constitution of India. Elaborating his argument he submitted that being aggrieved by the order of New Okhla Industrial Development Authority dated 06.03.2018 and recovery certificate dated 12.09.2019, the revision petition was filed under ***Section 41(3) of U.P. Urban Planning and Development Act, 1973*** {in short "Act of 1973"} read with ***Section 12 of U.P. Industrial Development Area Act, 1976 {in short "Act of 1976"}.***

4. He further submitted that it appears from the language of Section 41(3) of the Act of 1973 that the State functions as Quasi Judiciary Authority and being so is covered under expression "Tribunal". In support of his submission he has placed reliance upon the judgment of Hon'ble Supreme Court in the case of ***Associated Cement Companies Ltd. Versus P.N.Sharma and Another reported in AIR 1965 SC 1595***. Paragraphs on which reliance has been placed are quoted hereinunder:-

"9. Tribunals which fall within the purview of Article 136(1) occupy a special position of their own under the scheme of our Constitution. Special matters and questions are entrusted to them for their decision and in that sense, they share with the courts one common characteristic; both the courts and the tribunals are "constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions", (vide Durga Shankar Mehta v. Thakur Raghuraj Singh [(1955) 1 SCR 267 at p. 272]). They are both adjudicating bodies and they deal with and finally determine disputes between parties which are entrusted to their jurisdiction. The procedure followed by the courts is regularly prescribed and in discharging their functions and exercising their powers, the courts have to conform to that procedure. The procedure which the tribunals have to follow may not always be so strictly prescribed, but the approach adopted by both the courts and the tribunals is substantially the same, and there is no essential difference between the functions that they discharge. As in the case of courts, so in the case of tribunals, it is the State's inherent judicial power which has been transferred and by virtue of the said power, it is the State's inherent judicial function which they discharge. Judicial functions and judicial powers are one of the essential attributes of a sovereign State, and on considerations of policy, the State transfers its judicial functions and powers mainly to the courts established by the Constitution; but that does not affect the competence of the State, by appropriate measures, to transfer a part of its judicial powers and functions to tribunals by entrusting to them the task of adjudicating upon special matters and disputes between parties. It is really not possible or even expedient to attempt to describe exhaustively the features which are common to the tribunals and the courts, and features which are distinct and separate. The basic and the fundamental feature which is common to both the courts and the tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State.

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25. It would thus be seen that in dealing with the question as to whether Respondent 2, while it exercises its appellate power under Rule 6(6), is a tribunal under Article 136(1), we must enquire whether Respondent 2 has been clothed with the State's inherent judicial power to deal with disputes between parties and determine them on the merits fairly and objectively. That is the test which has been consistently applied by this Court in considering the question about the status of any body or authority as a tribunal under Article 136(1). Before we proceed to apply this test to Respondent 2's status under Rule 6(6), we think it is necessary to advert to one aspect of the matter which sometimes creates some confusion.

26. We have referred to the three essential attributes of a sovereign State and indicated that one of these attributes is the legislative power and legislative function of the State, and we have also seen that in determining the status of an authority dealing with disputes, we have to enquire whether the power conferred on the said authority or body can be said to be judicial power conferred on it by the State by means of a statute or statutory rule. The use of the expression "judicial power" in this context proceeds on the well-recognised concept of political science that along with legislative and executive powers, judicial power vests in a sovereign State. In countries where rigid separation of powers has been effected by written Constitutions, the position is very different. Take, for instance, the Australian Constitution. Section 71 of the Commonwealth of Australia Constitution Act (63 & 64 Vict. Chapter 12) provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as Parliament prescribes. It is clear that the scheme of Sections 71 to 80 which form part of Chapter III of the said Constitution, is that the judicial power of the State can be conferred only on courts recognised by the provisions of the said Chapter. In other words, it is not competent to the legislature in Australia to confer judicial power properly so-called on any body or authority other than or apart from the courts recognised by Chapter III and so, the use of the expression "judicial power" or its conferment in regard to tribunals which are not courts properly so-called, would under the Australian Constitution be wholly inappropriate. If any tribunals other than courts are established and power is given to them to deal with and decide special disputes between the parties, the power which such tribunals would exercise cannot be described as judicial power, but would have to be called quasi-judicial power.

27. This technical aspect of the matter which is present under the Constitutions based on rigid separation of powers, should not be ignored when we are dealing with the question posed under Article 136(1) of our Constitution under our Constitution, there is no rigid separation of powers as under the Australian Constitution; and so, it would not be constitutionally inappropriate or improper to say that judicial power of the State can be conferred on the hierarchy of courts established under the Constitution as well as on tribunals which are not courts strictly so-called. Indeed, the fact that Article 136(1) refers to courts and tribunals and makes the determination, sentence or order passed by them subject to appeal to this Court by special leave, shows that our Constitution assumes that judicial power of the State can be vested in and exercised by both

courts and tribunals alike. We have already seen that the function discharged by courts and tribunals mentioned in Article 136(1) is essentially the same, though the nature of the questions entrusted to their jurisdiction, the procedure required to be followed by them, and the extent and character of their powers may be different.

28. As a result of the rigid separation of powers on which the Australian Constitution is based, questions which arise for decision of courts in Australia take a very different form. Let us refer to the decision of the Privy Council in Shell Company of Australia, Ltd. v. Federal Commissioner of Taxation [1931 AC 275] by way of illustration. In that case, the Privy Council had to consider whether the Board of Review created by Section 41 of the Federal Income Tax Assessment Act, 1922-1925, to review the decisions of the Commissioner of Taxation, and whose members are to hold office for seven years, is a court exercising the judicial power of the Commonwealth within the meaning of Section 71 of the Constitution of Australia. If the answer had been in the affirmative, the amending section by which the Board of Review was constituted, would have been invalid because of the provisions of Section 71 of the Australian Constitution. The Privy Council however, examined the functions of the Board and its powers and considered the scheme of the relevant provisions of the Taxation Act and came to the conclusion that the Board of Review was not a court and stood in the same position as the Commissioner. It was observed that the orders of the Board of Review were not made conclusive for any purpose whatsoever, and that the decisions of the Board were made the equivalent of the decision of the Commissioner. In dealing with the status of the Board in the context of the requirements of Section 71 of the Australian Constitution, Lord Sankey L.C. observed that "the authorities are clear to show that there are tribunals with many of the trappings of a court which, nevertheless, are not courts in the strict sense of exercising judicial power" (p. 296). It is in this connection that Lord Sankey referred to certain attributes of courts which he characterised as trappings. The negative propositions which he enunciated by reference to these trappings, indicate that the presence of the trappings would not make the Board a court and would not lead to the inference that the judicatory power exercised by tribunals was judicial power which courts alone can exercise. It would thus be noticed that the reference to the trappings was intended to show that the presence of the trappings does not alter the character of the tribunal, the decisive test being that judicial power under the Australian Constitution can be conferred only on courts and not on tribunals. When we refer to tribunals in dealing with the problem posed by Article 136(1), it is necessary to bear in mind the context in which Lord Sankey referred to these trappings.

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30. We have referred to these two decisions only for the purpose of emphasising the fact that the technical considerations which flow from the strict and rigid separation of powers, would not be applicable in dealing with the question about the status of Respondent 2 by reference to Article 136(1) of our Constitution. The use of the expression "judicial power" in the context, cannot be characterised as constitutionally impermissible or inappropriate, because our Constitution does not provide, as does Chapter III of the Australian Constitution, that judicial power can be conferred only on courts properly so-called. If such a consideration was relevant and material, then it would no doubt, be inappropriate to say that certain authorities or bodies which are given the power to deal with disputes between parties and finally determine them, are tribunals because the judicial power of the State has been statutorily

transferred to them. In that case, the more appropriate expression to use would be that the powers which they exercise are quasi-judicial in character, and tribunals appointed under such a scheme of rigid separation of powers cannot be held to discharge the same judicial function as the courts. However, these considerations are, strictly speaking, in-applicable to the Indian Constitution, because though it is based on a broad separation of powers, there is no rigidity or exclusiveness involved in it as under Section 71 as well as other provisions of Chapter III of the Australian Constitution; and so, it would not be inappropriate to say that the main test in determining the status of any authority in the context of Article 136(1) is whether or not inherent judicial power of the State has been transferred to it.

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34. In this connection, we may usefully recall the observation made by Lord Haldane in Local Government Board v. Arlidge [(1915) AC 120, 120] . Said Lord Haldane: "My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same". Having regard to the nature of the power conferred on the State Government, it seems to us clear that for reaching a fair and objective decision in the dispute brought before it in its appellate jurisdiction, the State Government has the power to devise its own procedure and to exercise such other incidental and subsidiary powers as may be necessary to deal effectively with the dispute. We are, therefore, satisfied that the State Government which exercises its appellate jurisdiction under Rule 6(5) and Rule 6(6) of the Rules is a tribunal within the meaning of Article 136(1); and so, the present appeal brought before this Court against the impugned appellate order passed by Respondent 2, is competent. In the result, the preliminary objection raised by Mr Goyal fails and must be rejected.

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44. An authority other than a court may be vested by statute with judicial power in widely different circumstances, which it would be impossible and indeed inadvisable to attempt to define exhaustively. The proper thing is to examine each case as it arises, and to ascertain whether the powers vested in the authority can be truly described as judicial functions or judicial powers of the State. For the purpose of this case, it is sufficient to say that any outside authority empowered by the State to determine conclusively the rights of two or more contending parties with regard to any matter in controversy between them satisfies the test of an

authority vested with the judicial powers of the State and may be regarded as a tribunal within the meaning of Article 136. Such a power of adjudication implies that the authority must act judicially and must determine the dispute by ascertainment of the relevant facts on the materials before it and by application of the relevant law to those facts. This test of a tribunal is not meant to be exhaustive, and it may be that other bodies not satisfying this test are also tribunals. In order to be a tribunal, it is essential that the power of adjudication must be derived from a statute or a statutory rule. An authority or body deriving its power of adjudication from an agreement of the parties, such as a private arbitrator or a tribunal acting under Section 10-A of the Industrial Disputes Act, 1947, does not satisfy the test of a tribunal within Article 136. It matters little that such a body or authority is vested with the trappings of a court. The Arbitration Act, 1940 vests an arbitrator with some of the trappings of a court, so also the Industrial Disputes Act, 1947 vests an authority acting under Section 10-A of the Act with many of such trappings, and yet, such bodies and authorities are not tribunals.

45. The word "tribunal" finds place in Article 227 of the Constitution also, and I think that there also the word has the same meaning as in Article 136.

46. Now, the question is whether the State Government deciding an appeal under Rule 6(6) of the Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952 (hereafter referred to as the Service Rules) is a tribunal within the meaning of Article 136 of the Constitution. The State Government made the Service Rules in exercise of its rule-making power under Section 112 read with Section 49(2) of the Factories Act, 1947. The Service Rules relate to the qualifications and conditions of service of a Welfare Officer in a factory and are well within the rule-making power. Rule 6 of the Service Rules prescribes the conditions of service of a Welfare Officer. Sub-rule (1) and (2) of Rule 6 provide that the Welfare Officer must have the appropriate status corresponding to the status of other executive heads of the factory, and his conditions of service shall be the same as of other members of the staff of corresponding status in the factory. Sub-rule (3) empowers the management to impose on the Welfare Officer one or more of the following punishments viz. (i) Censure; (ii) Withholding of increments including stoppage at an efficiency bar; (iii) reduction to a lower stage in a time scale; (iv) suspension; and (v) dismissal or termination of service in any other manner. The first proviso to sub-rule (3) provides that no order of punishment shall be passed against the Welfare Officer unless he has been informed of the grounds on which it is proposed to take action and given a reasonable opportunity of defending himself against the action proposed to be taken in regard to him. The second proviso to sub-rule (3) imposes the further safeguard that the management cannot impose any punishment on him other than censure except with the previous concurrence of the Labour Commissioner, Punjab. Sub-rule (4-) provides that before passing orders on a reference under the last proviso, the Labour Commissioner shall give the Welfare Officer an opportunity of showing cause against the proposed action, and, if necessary, may hear the parties in person. Sub-rule (5) provides that if the Labour Commissioner refuses to give his concurrence, the management may appeal to the State Government within thirty days from the date of the receipt of such refusal. Sub-rule (6) provides that the Welfare Officer upon whom the punishment of dismissal or termination of service is imposed may appeal to the State Government against the order of punishment within thirty days from the date of the receipt of the order by him. The decision of the State Government under both sub-rules (5) and (6) is made final and binding. Sub-rule (7) empowers

the State Government to pass such interim orders as may be necessary pending the decision of the appeal filed under sub-rule (5) or sub-rule (6). If the management imposes a punishment without making a reference to the Labour Commissioner and without obtaining his concurrence, the order of the management is a nullity and is liable to be set aside on this ground alone on an appeal by the Welfare Officer under sub-rule (6). On the other hand, if the action of the management does not amount to a punishment, an appeal under sub-rule (6) is incompetent and is liable to be dismissed on that ground.

47. On an appeal under sub-rule (6), the dispute is whether the action of the management amounts to a punishment and if so, whether the punishment should be imposed. The dispute concerns the civil rights of the management and the Welfare Officer. The State Government is empowered to decide this dispute between the two contending parties. Since the State Government is empowered to give a decision, it may either confirm the punishment or set it aside and pass consequential orders such as an order of reinstatement. As a matter of fact, in the instant case the State Government passed an order of reinstatement. By the express words of sub-rule (6) of Rule 6, the decision of the State Government is made final and binding. The appellate decision conclusively determines the rights of the contending parties with regard to the matter in controversy between them. The appellate function and the power of conclusive determination of the civil rights of the parties with regard to matters in controversy between them indicate that the State Government is under a duty to act judicially and to decide the dispute solely by ascertaining the facts on the materials before it and by the application of the relevant law on the point. As the rule does not prescribe any procedure for the hearing of the appeal, the State Government may devise its own procedure consistently with its judicial duty. Normally, the State Government has the advantage of enquiries with regard to the subject-matter of the dispute at two previous stages viz. once by the management under sub-rule (3) and again by the Labour Commissioner under sub-rule (4). The State Government may also call upon the parties to make their representations in writing, at the appellate stage. *As a matter of fact, in this case the parties were asked to make representations, and they did so. On ascertaining the relevant facts, the State Government may decide whether having regard to the relevant law viz. the ordinary law of master and servant as modified by the industrial law, the action of the management amounts to a punishment, and if so, whether such punishment should be imposed. A consideration of all these matters shows that the State Government deciding an appeal under Rule 6(6) of the Service Rules is vested with the judicial powers of the State, and satisfies the test of a tribunal as contemplated by Article 136 of the Constitution. It follows that the preliminary objection that the appeal under Article 136 does not lie, must be rejected."*

5. He has also placed reliance upon paragraph(s) 67 to 73 of the judgment passed by the Full Bench of this Court in the case of ***Haji Manzoor Ahmed and another Versus State*** reported in ***AIR 1970 Allahabad page 467***, the same are as under:-

"67. The respondents say that the aforesaid pronouncements of the Supreme Court must be confined to authorities which are tribunals within the meaning of Art. 136 of the Constitution, inasmuch as the requirement that the reasons should be stated proceeds upon the consideration that the impugned order is open to appeal to the Supreme Court and that the omission to state the reasons precludes the Supreme Court from effectively exercising its jurisdiction. The contention, in my opinion, is not well founded. From M.P. Industries Ltd. [A.I.R. 1966 S.C. 671.]

onward, the Supreme Court, it seems to me, placed the necessity for giving reasons on two broad grounds. The first arose out of the need to exclude or minimize arbitrariness on the part of the authority making the order, and the second arose upon the need to make the order amenable to effective judicial scrutiny by the Supreme Court. It does appear that in some of its decisions, especially Bhagat Raja [A.I.R. 1967 S.C. 1606.] , the Supreme Court laid emphasis almost entirely on the second of the two grounds. The two grounds may also be said to be inter-related, in the sense that the second is intended to achieve the object underlying the first. But I am inclined to the view that even if the order is not open to appeal to the Supreme Court it is necessary that it should state its reasons. It may be that the authority is not a tribunal within the meaning of Art. 136(1) of the Constitution. That I believe, makes little difference. What is relevant, I think, is that the order is made in the exercise of a quasi judicial jurisdiction. As regards such an order, the party against whom it is made is entitled to know the reasons upon which it has been made. And that is apart from the consideration that it enables him to challenge the order in appeal before the Supreme Court. The need for disclosing reasons in quasi judicial orders arises from the ancient maxim integrated into our judicial system, that justice must not only be done but must also appear to be done. It is a principle arising out of the recognition that judicial tribunals must inspire public confidence and safeguard against the suspicion of arbitrariness and partiality. That is an objective which, speaking for myself, I consider to be an essential condition to the functioning of all courts and tribunals, judicial or quasi judicial. It is the glory of the rule of law that it is founded upon reasons. And reasons as opposed to arbitrary when distinguishes the rule of law from the rule of men.

68. But even if, as the respondents contend, the pronouncements of the Supreme Court mentioned above must be confined to tribunals within the meaning of Art. 136(1) of the Constitution I have no hesitation in holding that the State Government exercising jurisdiction under Sec. 7-F of the Act is such a tribunal.

69. It was at one time recognised as settled law that a tribunal falls within the ambit of Art. 136(1) if it derives authority from the sovereign power of the State and if it is invested with any part of the judicial functions of the State as distinct from purely administrative or executive functions if it further enjoys the "trappings of a court." That was the view expressed in Bharat Bank Ltd. v. Employees of Bharat Bank Ltd. [A.I.R. 1950 S.C. 188.] and later in Durga Shankar Mehta v. Raghuraj Singh [A.I.R. 1954 S.C. 241.] . It was reiterated in Jaswant Sugar Mills v. Lakshmi Chand [A.I.R. 1963 S.C. 677.] .

70. In Jaswant Sugar Mills [A.I.R. 1963 S.C. 677.] the Supreme Court examined the question whether a Conciliation Officer, who was empowered under clause 29 of a Government Order under the U.P. Industrial Disputes Act to grant permission to an employer to alter the conditions of service to the prejudice of the workmen during a pending dispute or to discharge or punish them during such dispute, was a tribunal for the purposes of Art. 136(1). The Supreme Court referred to the absence of "the trappings of a court" in the Consiliation Officer. It pointed out that he was not required to sit in public, no formal pleadings were contemplated before him, and he was not expowered to compel the attendance of witnesses nor restricted in making an enquiry to evidence which the parties brought before him. He was not capable of delivering an effective judgment or an award effecting the rights of the parties. He was not invested with powers similar to those of the civil courts under the Code of Civil Procedure for enforcing the attendance of any person and examining him on oath,

compelling production of documents, issuing commissions for the examination of the witnesses and other matters. These considerations prevailed with the Supreme Court in holding that the Conciliation Officer was not a tribunal. But since then the law declared by the Supreme Court has taken a wider sweep. In Associated Cement Companies Ltd. [A.I.R. 1965 S.C. 1595 at p. 1606 (paragraph 33).] the Supreme Court explained that the presence of all or some of the trappings of a court is really not a decisive consideration, that the main and the basic test was

"Whether the adjudicating power, which a particular authority is empowered to exercise, has been conferred upon it by a statute and can be described as a part of the State's inherent power exercised in dis-charging its judicial function." It held that applying this test, the State Government, deciding an appeal under sub-rules (5) and (6) of Rule 6 of the Punjab Welfare Officers Recruitment and Conditions of Service Rules (1952) was a tribunal. It pointed out that the judicial power of the State

"... has been conferred on the State Government by a statutory Rule and it can be exercised in respect of disputes between the management and its Welfare Officers. Where is, in that sense, a lis there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding. Besides, it is an order passed on appeal."

71. Now, an order made by the State Government under Sec. 7-F of the Act has been held by the Supreme Court in Lala Shri Bhagwan [1965 A.L.J. 353.] to effect the rights of the landlord and the tenant. Sec. 3(1) confers upon the tenant a statutory immunity against eviction in the absence of the grounds specified in the sub-section and of permission from the District Magistrate to sue for ejectment. The right of the tenant to that statutory immunity is the subject of proceedings before the District Magistrate and the Commissioner under Sec. 3 of the Act and before the State Government under Sec. 7-F of the Act. The jurisdiction exercised by each of these authorities partakes of the same nature. It was pointed out in Lala Shri Bhagwan [1965 A.L.J. 353.] that there was a lis between the landlord and the tenant in those proceedings, and there can be little doubt that the order of the State Government under Sec. 7-F is binding between the parties and finally adjudicates upon the right of the tenant to statutory immunity against eviction. Moreover, the jurisdiction of the State Government is of a revisional character. It may be mentioned that when considering the relevant provisions of Sec. 3 and Sec. 7-F of the Act in Lala Shri Bhagwan [1965 A.L.J. 353.] the Supreme Court expressly referred to its decision in the Associated Cement Companies [A.I.R. 1965 S.C. 1595 at p. 1606 (paragraph 33).] . I am of opinion that the test laid down in the latter case for determining whether a body is a tribunal within the meaning of Art. 136(1) of the Constitution is fully satisfied by the State Government acting under Sec. 7-F of the Act.

72. At this stage, I may refer to the decisions of the Supreme Court in Nandram Hanatram, Calcutta v. Union of India [A.I.R. 1966 S.C. 1922.] where the argument was rejected that the impugned order was bad because no reasons were stated. That decision was explained later by the Supreme Court in Bhagat Raja v. Union of India [A.I.R. 1967 S.C. 1606.] in the following terms:

"..... it was plain as a pike-staff that the State Government had no alternative but to cancel the lease; the absence of any reasons in the order on review could not possibly leave anybody in doubt as to whether (what the?)

reasons were. As a matter of fact in the setting of facts, the reasons were so obvious that it was not necessary to set them out. There is nothing in this decision which is contrary to 1966-1 S.C.R. 466: (A.I.R. 1966 S.C. 671) (supra). What the decision says is that the reasons for the action of the state were so obvious that it was not necessary, on the facts of the case, to repeat them in the order of the Central Government.

73. The question converged to a sharp focus before the Supreme Court in M.P. Industries Ltd. v. Union of Indian [A.I.R. 1966 S.C. 671.] , Subba Rao, J. explained the necessity for disclosing reasons in a quasi judicial order. In the case before it the Central Government had rejected a revision application under Rule 55 of the Mineral Concession Rules 1955. He observed:

".... Our Constitution posits a welfare State ..... In the context of a welfare State; administrative tribunals have come to stay. Indeed, they are the necessary concomitants of a welfare State. But arbitrariness in their functioning destroys the concept of a welfare State itself. Self-discipline and supervision exclude or at any rate minimize arbitrariness. The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; It gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory Court to keep the tribunals within bounds. A reasoned order is a desirable condition of judicial disposal.

The conception of exercise of revisional jurisdiction and the manner of disposal provided in R. 55 of the Rules, are indicative of the scope and nature of the Government's jurisdiction. If Tribunals can make order without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuse of power. But, if reasons for an order are to be given, it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and its worst be at least a plausible one. The public should not be deprived of this only safeguard.

6. Reliance has also been placed upon the judgment passed by the Hon'ble Supreme Court in the case of ***All Party Hill Leaders Conference Vs. Captain W.A. Sangma*** reported in ***(1977) 4 SCC 161.*** Paragraphs referred are as under:-

23. The earliest decision of this Court as to the ambit of Article 136(1) with reference to the order of a tribunal came up for consideration in Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd. [AIR 1950 SC 188 : (1950) 1 SCR 459 : 950 Lab LJ 21] . The question whether an Industrial Tribunal constituted under the Industrial Disputes Act, 1947, was a tribunal within the scope of Article 136 was raised in that case. By majority the Constitution Bench of this Court held that the Industrial Tribunal was a tribunal for the purpose of Article 136. Having regard to the scheme of Article 136, this Court was not prepared to place a narrow interpretation on the amplitude of Article 136. This Court observed at p. 476/478 of the Report as follows:

"As pointed out in picturesque language by Lord Sankey, L.C. in Shell Co. of Australia v. Federal Commissioner of Taxation [1931 AC 275] , there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power. It seems to me that such tribunals though they are not full-fledged

Courts, yet exercise quasi-judicial functions and are within the ambit of the word "tribunal' in Article 136 of the Constitution.

Tribunals which do not derive authority from the sovereign power cannot fall within the ambit of Article 136. The condition precedent for bringing a tribunal within the ambit of Article 136 is that it should be constituted by the State. Again a tribunal would be outside the ambit of Article 136 if it is not invested with any part of the judicial functions of the State but discharges purely administrative or executive duties. Tribunals, however, which are found invested with certain functions of a Court of justice and have some of its trappings also would fall within the ambit of Article 136 ....

Then after four years, B.K. Mukerjea, J. (as he then was) who was one of the dissenting Judges in Bharat Bank, true to judicial discipline, spoke for the unanimous Court in the Constitution Bench in Durga Shankar Mehta v. Thakur Raghuraj Singh [AIR 1954 SC 520 : (1955) 1 SCR 267] in the following words:

24. The basic principle laid down in the Bharat Bank has not been departed from by this Court and has been reiterated in several later decisions (see J.K. Iron and Steel Co. Ltd., Kanpur v. Iron and Steel Mazdoor Union, Kanpur [AIR 1956 SC 231 : (1955) 2 SCR 1315 : (1956) 1 Lab LJ 227] ; Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhunwala [AIR 1961 SC 1669 : (1962) 2 SCR 339 : (1961) 31 Com Cas 387] ; Jaswant Sugar Mills Ltd., Meerut v. Lakshmichand [AIR 1963 SC 677 : 1963 Supp 1 SCR 242 : 1963 Lab LJ 524] ; Engineering Mazdoor Sabha v. Hind Cycles Ltd., Bombay [AIR 1963 SC 874 : 1963 Supp 1 SCR 625 : (1962) 2 Lab LJ 760] ; and Associated Cement Companies Ltd. v.P.N. Sharma [AIR 1965 SC 1595 : (1965) 2 SCR 366 : (1965) 1 Lab LJ 433]).

25. From a conspectus of the above decisions it will be seen that several tests have been laid down by this Court to determine whether a particular body or authority is a tribunal within the ambit of Article 136. The tests are not exhaustive in all cases. It is also well-settled that all the tests laid down may not be present in a given case. While some tests may be present others may be lacking. It is, however, absolutely necessary that the authority in order to come within the ambit of Article 136(1) as tribunal must be constituted by the State and invested with some function of judicial power of the State. This particular test is an unfailing one while some of the other tests may or may not be present at the same time.

26. It will be profitable to refer to an illuminating decision of the Constitution Bench in Associated Cement Companies Ltd. The question that was raised for decision in that case was as to whether the State Government of Punjab exercising its appellate jurisdiction under Rule 6 of the Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952, was a tribunal within the meaning of Article 136(1) of the Constitution. Section 49(2) of the Factories Act, 1948, provides that the State Government may prescribe the duties, qualifications and conditions of service of Welfare Officers employed in a factory. The State Government framed the Rules under Section 49(2) of the Factories Act and Rule 6(6) provides that a Welfare Officer upon whom a punishment is imposed may appeal to the State Government against the order of punishment and the decision of the State Government shall be final and binding. It is against a certain order passed by the State Government under Rule 6(6) that the company came to this Court by special leave and an objection was raised that the State Government exercising power under Rule 6(6) was not a tribunal within the meaning of Article 136(1). The objection was repelled in the following words:

"Tribunals which fall within the purview of Article 136(1) occupy a special position of their own under the scheme of our Constitution. Special matters and questions are entrusted to them for their decision and in that sense, they share with the courts one common characteristic; both the courts and the tribunals are "constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions'. [Vide Durga Shanker Mehta v. Thakur Raghuraj Singh]. They are both adjudicating bodies and they deal with and finally determine disputes between parties which are entrusted to their jurisdiction. The procedure followed by the courts is regularly prescribed and in discharging their functions and exercising their powers, the courts have to conform to that procedure. The procedure which the tribunals have to follow may not always be so strictly prescribed, but the approach adopted by both the courts and the tribunals is substantially the same, and there is no essential difference between the functions that they discharge. As in the case of courts, so in the case of tribunals, it is the State's inherent judicial power which has been transferred and by virtue of the said power, it is the State's inherent judicial function which they discharge. Judicial functions and judicial powers are one of the essential attributes of a sovereign State, and on considerations of policy, the State transfers its judicial functions and powers mainly to the courts established by the Constitution; but that does not affect the competence of the State, by appropriate measures, to transfer a part of its judicial powers and functions to tribunals by entrusting to them the task of adjudicating upon special matters and disputes between parties. It is really not possible or even expedient to attempt to describe exhaustively the features which are common to the tribunals and the courts, and features which are distinct and separate. The basic and the fundamental feature which is common to both the courts and the tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign Stated.

But as we already stated, the consideration about the presence of all or some of the trappings of a court is really not decisive. The presence of some of the trappings may assist the determination of the question as to whether the power exercised by the authority which possesses the said trappings, is the judicial power of the State or not. The main and the basic test however, is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the State Government exercises under Rule 6(5) and Rule 6(6) is a part of the State's judicial power. It has been conferred on the State Government by a statutory Rule and it can be exercised in respect of disputes between the management and its Welfare Officers. There is, in that sense, a lis; there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding. Besides, it is an order passed on appeal. Having regard to these distinctive features of the power conferred on the State Government by Rule 6(5) and Rule 6(6). we feel no hesitation in holding that it is a Tribunal within the meaning of Article 136(1).

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36. The question which we are required to resolve is as to the character of the Commission in adjudicating this dispute with regard to recognition of APHLC as a continuing recognised political party in the State of Meghalaya. It appears that out of 121 members of the Conference 81 had decided by majority that APHLC stood dissolved and these members joined the INC. Forty members had opposed the move to dissolve the party and actually stayed away from the Conference when the resolution to dissolve the party was passed. That has led to the dispute as to whether, notwithstanding the majority resolution in the Conference, the APHLC could still continue as a recognised political party in the State of Meghalaya for the purpose of allotment of the reserved symbol.

37. There is thus a lis between two groups of the Conference. The Commission is undoubtedly the specified and exclusive adjudicating authority of this lis. The Commission is created by the Constitution and the power to adjudicate the dispute flows from Article 324 as well as from Rule 5 and is thus conferred under the law as a fraction of judicial power of the State. The Commission has prescribed its own procedure in the Symbols Order, namely, to give a hearing to the parties when there is a dispute with regard to recognition or regarding choice of symbols. Para 15 of the Symbols Order makes specific reference to the procedure to be adopted by the Commission in hearing like disputes and it is required to take into account all the available facts and circumstances of the case and to hear such representatives of the sections or the groups and other persons as desire to be heard. The decision of the Commission under para 15 shall be binding on all rival sections or groups in the party. The Commission has followed, and if we may say so, rightly, this very procedure laid down in para 15 in adjudicating the present dispute although the same may not be a dispute contemplated under this paragraph. The dispute with which the Commission was concerned in the present case was a dispute of more serious nature than that which may be envisaged between two rival sections of a political party or between two splinter groups of the same party claiming to be the party, since the respondents' claim, here, was to annihilate the party beyond recognition and for good. When, therefore, the Commission has laid down a reasonable procedure in the Symbols Order in dealing with such a dispute, it was incumbent upon the Commission to choose the same procedure, as, indeed, it actually did, in adjudicating the present dispute. If the Commission were not specially required under the law to resolve this dispute within the framework of the scheme contemplated under Article 324 read with the Rules supplemented by the Symbols Order, the parties would have been required to approach the ordinary courts of law for determination of their legal rights with regard to their recognition or de-recognition. Since, however, a special machinery has been set up under the law relating to this matter and the same has to be decided with promptitude, the State's power of adjudicating such a dispute has been conferred upon the Election Commission in this behalf. It is true that the Election Commission has various administrative functions but that does not mean that while adjudicating a dispute of this special nature it does not exercise the judicial power conferred on it by the State.

38. To repeat, the power to decide this particular dispute is a part of the State's judicial

power and that power is conferred on the Election Commission by Article 324 of the Constitution as also by Rule 5 of the Rules. The principal and non-failing test which must be present in order to determine whether a body or authority is a tribunal within the ambit of Article 136(1), is fulfilled in this case when the Election Commission is required to adjudicate a dispute between two parties, one group asserting to be the recognised political party of the State and the other group controverting the proposition before it, but at the same time not laying any claim to be that party. The fact that the decision is not relevant immediately for the purpose of a notified election and that disputes regarding property rights belonging to the party may be canvassed in civil courts or in other appropriate proceedings, is not of consequence in determination of the present question.

39. It is true that Rule 5(2) and sub-rules (4), (5) and (6) of Rule 10 relate to an election which has been notified under Rule 3 of the Rules. That, however, does not detract from the position that under Rule 5(1), the Election Commission is empowered to specify symbols in general terms and also the restrictions to which the choice of symbols will be subjected. As stated earlier, Rule 5 is in Part II of the Rules under the title "General Provisions". The conferment of judicial power of the State on the Commission in the matter of adjudication of the dispute of the nature with which we are concerned clearly flows from Rule 5(1) read with Article 324 of the Constitution.

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42. Thus the position that emerges from the above discussion is that the Commission is created under the Constitution and is invested under the law with not only administrative powers but also with certain judicial power of the State, however fractional it may be. The Commission exclusively resolves disputes, inter alia, between rival parties with regard to claims for being a recognised political party for the purpose of the electoral symbol.

43. We are, therefore, clearly of opinion that the Commission fulfils the essential tests of a tribunal and falls squarely within the ambit of Article 136(1) of the Constitution. The preliminary objection is, therefore, overruled.

7. Further, reliance has been placed upon the judgment passed by the ***State of Gujarat v. Gujarat Revenue Tribunal Bar Assn., (2012) 10 SCC 353 : (2012) 4 SCC (Civ) 1229 : (2013) 1 SCC (Cri) 35 : (2013) 1 SCC (L&S) 56 : 2012 SCC OnLine SC 874*** at page 365. Paragraphs *referred are as under:-*

18. Tribunals have primarily been constituted to deal with cases under special laws and to hence provide for specialised adjudication alongside the courts. Therefore, a particular Act/set of rules will determine whether the functions of a particular tribunal are akin to those of the courts, which provide for the basic administration of justice. Where there is a lis between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority i.e. a situation where, (a) a statutory authority is empowered under a statute to do any act; (b) the order of such authority would adversely affect the subject; and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject; and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi-judicial decision. An authority may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a "court", but not all. In case certain powers under CPC or CrPC have been

conferred upon an authority, but it has not been entrusted with the judicial powers of State, it cannot be held to be a court. (See Bharat Bank Ltd. v. Employees [AIR 1950 SC 188] , Virindar Kumar Satyawadi v. State of Punjab [AIR 1956 SC 153 : 1956 Cri LJ 326] , Engg. Mazdoor Sabha v. Hind Cycles Ltd. [AIR 1963 SC 874] , Associated Cement Companies Ltd. v. P.N. Sharma [AIR 1965 SC 1595] , Rama Rao v. Narayan [(1969) 1 SCC 167 : AIR 1969 SC 724] , State of H.P. v. Mahendra Pal [(1999) 4 SCC 43 : AIR 1999 SC 1786] , Keshab Narayan Banerjee v. State of Bihar [(2000) 1 SCC 607 : 2000 SCC (Cri) 272] , Indian National Congress (I) v. Institute of Social Welfare [(2002) 5 SCC 685 : AIR 2002 SC 2158] , K. Shamrao v. Asstt. Charity Commr. [(2003) 3 SCC 563] , Trans Mediterranean Airways v. Universal Exports [(2011) 10 SCC 316 : (2012) 1 SCC (Civ) 148] , SCC p. 338, para 53 and Namit Sharma v. Union of India [(2013) 1 SCC 745] .)

19. In Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala [AIR 1961 SC 1669] Hidayatullah, J. (as His Lordship then was) made a distinction between a "court" and a "tribunal" as is explained hereunder: (AIR p. 1680, para 32)

"32. ... These tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary courts of civil judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to courts, but are not courts. When the Constitution speaks of "courts' in Article 136, 227 or 228 or in Articles 233 to 237 or in the Lists, it contemplates courts of civil judicature but not tribunals other than such courts. This is the reason for using both the expressions in Articles 136 and 227.

By "courts' is meant courts of civil judicature and by "tribunals', those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature."

20. To explain the distinction between a court and tribunal, His Lordship further relied upon the judgment in Shell Co. of Australia Ltd. v. Federal Commr. of Taxation [1931 AC 275 : 1930 All ER Rep 671 (PC)] wherein it has been observed as under: (AC p. 297)

"In that connection it may be useful to enumerate some negative propositions on this subject: (1) A tribunal is not necessarily a court in this strict sense because it gives a final decision. (2) Nor because it hears witnesses on oath. (3) Nor because two or more contending parties appear before it between whom it has to decide. (4) Nor because it gives decisions which affect the rights of subjects. (5) Nor because there is an appeal to a court. (6) Nor because it is a body to which a matter is referred by another body."

21. The present case is also required to be examined in the context of Article 227 of the Constitution of India, with specific reference to the Constitution (Forty-second Amendment) Act, 1976, where the expression "court" stood by itself, and not in juxtaposition with the other expression used therein, namely, "tribunal". The power of the High Court of judicial superintendence over the tribunals, under the amended Article 227 stood obliterated. By way of the amendment in clause (1), the words "and

tribunals" stood deleted and the words "subject to its appellate jurisdiction" have been substituted after the words "all courts". In other words, this amendment purports to take away the High Court's power of superintendence over tribunals. Moreover, the High Court's power has been restricted to have judicial superintendence only over judgments of inferior courts i.e. judgments in cases where against the same appeal or revision lies with the High Court. A question does arise as regards whether the expression "courts" as it appears in the amended Article 227, is confined only to the regular civil or criminal courts that have been constituted under the hierarchy of courts and whether all tribunals have in fact been excluded from the purview of the High Court's superintendence. Undoubtedly, all courts are tribunals but all tribunals are not courts.

22.The High Court's power of judicial superintendence, even under the amended provisions of Article 227 is applicable, provided that two conditions are fulfilled; firstly, such tribunal, body or authority must perform judicial functions of rendering definitive judgments having finality, which bind the parties in respect of their rights, in the exercise of the sovereign judicial power transferred to it by the State, and secondly, such tribunal, body or authority should be the subject to the High Court's appellate or revisional jurisdiction.

8. Reliance has also been placed upon the judgment passed in the case of Aidal Singh Vs. Karan Singh reported in AIR 1957 All 414 (FB). Paragraphs referred are as under:-

74. In this connection reference might be made to the case of Hari Vishnu Kamath v. Ahmad Ishaque [A.I.R. 1955 S.C. 233] in which their Lord ships of the Supreme Court held that the court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. It is significant to note that their Lordships of the Supreme Court characterised the power under Article 226 merely as a supervisory power and not a power of superintendence. The word "Superintendence" in Lyer's Law Lexicon means "the act of superintending, care and oversight, for the purpose of direction, and with authority to direct." In Murray's New English Dictionary, Vol. IX (1919 Edition) meaning No. I of the word "superintend' is given as follows:--

"1. Trans, to have or exercise the charge or direction of (operations or affairs); to look after, oversee, supervise the working or management of (an institution, etc.)

75. XXX

76. XXX

77. XXX

78. The most marked difference between Article 226 and Article 227 consists in the method of approach that the Court would adopt in the two cases. Thus, the court V would not act under Article 226 unless there is a breach of some fundamental or other legal right of the party concerned. As observed by his Lordship Kania, C.J. in a decision of the Supreme Court reported in The State of Orissa v. Gopal Rungta [A.I.R. 1952 S.C. 12 (O)] " .... the existence of the right is the foundation of the exercise of jurisdiction of the Court under this Article". Charanjit Lal Chowdhary v. The Union of India [A.I.R. 1951 S.C. 41] also contains observation to the same effect. Both under Art. 226 as well as under Art. 32 which are the two Articles relating to writ powers, the Court acts for the endorcement of legal rights. The only difference is that whereas under Art. 32 the endorsement of rights is confined to fundamental rights enumerated in Part III of the Constitution, the enforcement of rights under Article 226 is not confined to fundamental rights only, but

extends to other legal rights as well. On the other hand, while acting under Article 227, the court is not so much concerned with the enforcement of the legal rights of the parties as with the discharge of its own obligation irrespective of the rights of the parties. As observed in Jodhey v. Stated in reference to clause (1) of Article 227.

"There are no limits, fetters or restrictions placed on this power of superintendence in this clause and the purpose of this Article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned there."

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101. Even prior to the Constitution, the English theory of inherent power was held to be not applicable to India. In Pashupati Bharti v. Secretary of State [1938 (A.I.R.) Federal Court 1] their Lordships of the Federal Court while discussing the nature of the power of superintendence possessed by the Indian High Court made the following significant observations:--

"Nor is any support for the theory of an inherent power to be found in the analogy of the revisional and supervisory jurisdiction of the High Courts in British India. That jurisdiction is entirely a creature of statute, e.g. S. 224 of the Act of 1935 and Sec. 115, Civil P.C. Outside the statutory provisions no High Court has any inherent powers of revision over the Subordinate Courts within its jurisdiction, such for example as the court of King's Bench in England has for centuries exercised over courts inferior to itself."

9. Reliance has also been placed upon the judgment passed in the case of ***Kihoto Hollohan v. Zachillhu*** reported in **1992 Supp (2) SCC**

651at page 706. Paragraphs referred are as under:-

98. But then is the Speaker or the Chairman acting under Paragraph 6(1) a Tribunal? "All tribunals are not courts, though all courts are tribunals". The word "courts" is used to designate those tribunals which are set up in an organised State for the Administration of Justice. By Administration of Justice is meant the exercise of judicial power of the State to maintain and uphold rights and to punish "wrongs". Whenever there is an infringement of a right or an injury, the courts are there to restore the vinculum juris, which is disturbed. (See Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhunwala [(1962) 2 SCR 339 : AIR 1961 SC 1669 : (1961) 31 Comp Cas 387]). In that case Hidayatullah, J. said: (SCR p. 362)

"... By "courts' is meant courts of civil judicature and by "tribunals', those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their procedures may differ but the functions are not essentially different. What distinguishes them has never been successfully established. Lord Stamp said that the real distinction is that the courts have "an air of detachment'. But this is more a matter of age and tradition and is not of the essence. Many tribunals, in recent years, have acquitted themselves so well and with such detachment as to make this test insufficient."

99. Where there is a lis -- an affirmation by one party and denial by another -- and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court. In Associated Cement Companies Ltd. v. P.N. Sharma [(1965) 2 SCR 366 : AIR 1965 SC 1595 : (1965) 1 LLJ 433] this Court said: (SCR pp. 386-87)

"... The main and the basic test however, is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the State Government exercises under Rule 6(5) and Rule 6(6) is a part of the State's judicial power.... There is, in that sense, a lis; there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding."

100. By these well known and accepted tests of what constitute a Tribunal, the Speaker or the Chairman, acting under Paragraph 6(1) of the Tenth Schedule is a Tribunal.

10. *Reliance has also been placed upon the judgment passed* in the case of ***Umaji Keshao Meshram Vs. Radhikabai*** reported in ***1986 (Supp) SCC 401***. Paragraphs referred are as under:-

108. For the reasons aforesaid it must be held that the Full Bench case of Shanker Naroba Salunke v. Gyanchand Lobhachand Kothari [Letters Patent Appeals Nos. 3, 10, 11 and 17 of 1979 of 1979 of 1980, decided on September 3, 1980] was wrongly decided except

for the conclusion reached by the Full Bench that no appeal lies under clause 15 of the Letters Patent of the Bombay High Court against the judgment of a Single Judge of that High Court in a petition under Article 227 of the Constitution but not the reasons given by the Full Bench for reaching this particular conclusion. Accordingly, the said Full Bench decision is hereby overruled to the extent mentioned above and the view taken by the Special Bench in State of Maharashtra v. Kusum [(1981) 83 Bom LR 75 : 1981 Mah LJ 93] is approved.

11. Before coming to conclusion on the issue of maintainability of the present petition, it would be appropriate to consider Section 41 of the Act of 1973, which reads as under:-

"41. Control by State Government.-

(1) The [Authority),the Chairman or the (Vice-Chairman] shall carry out such directions as may be issued to it from time to time by the State Government for the efficient administration of this Act.

(2) If in, or in connection with, the exercise of its powers and discharge of its functions by the [Authority, the Chairman or the Vice-Chairman) under this Act any dispute arises between the authority, the Chairman or the Vice-Chairman) and the State Government the decision of the State Government on such dispute shall be final.

(3) The State Government may, at any time, either on its own motion or on application made to it in this behalf, call for the records of any case disposed of or order passed by the [Authority or the Chairman) for the purpose of satisfying itself as to the legalitv or propriety of any order passed or direction issued and may pass such order or issue such direction in relation thereto as it may think fit:

Provided that the State Government shall not pass an order prejudicial to any person without affording such person a reasonable opportunity of being heard.

(4) Every order of the State Government made in exercise of the powers conferred by this Act shall be final and shall not be called in question in any court."

12. ***Section 12 of U.P. Industrial Development Area Act***, being referred is also to be taken note, which reads as under:-

12. Applications of certain provisions of President's Act XI of 1973. - *The provisions of Chapter VII and Sections 30, 32, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 53 and 58 of the Uttar Pradesh Urban Planning and Development Act, 1973, as re-enacted and modified by the Uttar Pradesh President's Act (Re-enactment with Modifications) Act, 1974, shall mutatis mutandis, apply to the Authority with adaptation that-*

(a) any reference to the aforesaid Act shall be deemed to be a reference to this Act;

(b) any reference to the Authority constituted under the aforesaid Act shall be deemed to be a reference to the Authority constituted under this Act; and

(c) any reference to the Vice-Chairman of the Authority shall be deemed to be a reference to the Chief Executive Officer of the Authority.

13. In Section 12 of Act of 1976, certain provisions including Section 41 of Act of 1973, have been referred and about the provisions of Act of 1973 mentioned, this Section says that the same shall mutatis mutandis, apply to the authority with adaption as mentioned in Section 12 of the Act of 1976 itself. Thus, undisputedly

any decision/order of the 'Authority' or "Chief Executive Officer" under the Act of 1976 can be assailed before the State Government under Section 41 of the Act of 1973.

14. Now coming to Section 41 of the Act of 1973, particularly Sub Section 3 of Section 41. The language used in the Sub Section 3 is similar to the language used in Section 397 of Cr.P.C. and Section 115 of CPC, as applicable in State of U.P., which confers revisional power upon the Sessions/District court and High Court. A plain reading of the provisions show that the State Government has the power to call for the records of any case disposed of or order passed by 'Authority' or 'the Chairman' either on its own motion or on an application made to it in this behalf for the purpose of satisfying itself as to the legality or propriety of any order passed or direction issued and may pass such order or issue such direction in relation thereto as it may think fit. Therefore, the State Government can exercise the power under Sub Section 3 of Section 41 in relation to (i) any case disposed of by the Authority or Chairman, (ii) Order passed by authority and (iii) order passed by the Chairman.

15. Further, it reflects from the proviso to Sub Section 3 of Section 41 that it is mandatory for State Government to provide a reasonable opportunity of hearing to the person concerned before passing an adverse order, in exercise of power conferred of Section 41 of the Act of 1973, against such person.

16. It would be relevant to observe that the 'Forum' under Sub Section 3 of Section 41 of the Act of 1973, has been created by the State for speedy redressal of grievance(s) of person aggrieved.

17. In the judgment passed in the case of ***T.C.Basappa Vs. T.Nagappa and another*** reported in ***AIR 1954 SC 440***. The Hon'ble Supreme Court observed as under:-

"7. One of the fundamental principles in regard to the issuing of a writ of certiorari, is, that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts. Atkin, L.J. thus summed up the law on this point in Rex v. Electricity Commissioners [(1924) 1 KB 171 at 205] :

"Whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

18. Thus, considering the aforesaid, this Court holds that the State Government while exercising power under Section 41(3) of the Act of 1973, does not perform purely ministerial acts and it has to exercise the power conferred upon it under this Section, judicially.

19. Considering the aforesaid including the judgments referred hereinabove, this Court is of the view that in this case for determining that as to whether an "Authority" i.e. "State Government" is a "Tribunal" or not, as in this case the power of State Government under Section 41(3) of the Act of 1973 is in issue, which is as per above observations of this Court is revisional power, the basic test(s)/parameter(s) can be summarized as under:

(a) That the power of adjudication should be conferred on the concerned 'Authority' by a statute.

(b) That such adjudicating power is the part of State's inherent power exercised in discharging its judicial function.

(c) That the 'Authority' concerned is under obligation to act judicially.

(d) That the decision of the 'Authority' on the 'lis' before it is binding between the parties and final.

20. In this case, the power of adjudication is conferred upon 'State Government' by the statute, the 'State Government' is under obligation to act judicially and is also required to follow principle of natural justice, as appears from the proviso to Sub Section 3 of Section 41 of the Act of 1973, the State Government in this Sub Section decides the lis between the parties and decision of 'State Government', as per Sub Section 4 of Section 41 is binding and final. Thus, all test(s)/ parameter(s), aforesaid, are satisfied and being so it is held that the 'State Government' under Section 41 Sub Clause 3 of the Act of 1973, is a 'Tribunal'.

21. It would be appropriate to refer Article 227 of Constitution of India, which reads as under:-

"227. [(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.]

(2) Without prejudice to the generality of the foregoing provision, the High Court may--

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein: Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces. Power of superintendence over all courts by the High Court.

22. In the case of ***Manmohan Singh Jaitla v. Commr., Union Territory of Chandigarh,*** reported in ***1984 Supp SCC 540 : 1985 SCC (L&S) 269 at page 545*** . The Hon'ble Supreme Court observed as under:-

"7. The High Court declined to grant any relief on the ground that an aided school is not "other authority" under Article 12 of the Constitution and is therefore not amenable to the writ jurisdiction of the High Court. The High Court clearly overlooked the point that Deputy Commissioner and Commissioner are statutory authorities operating under the 1969 Act. They are quasi-judicial authorities and that was not disputed. Therefore, they will be comprehended in the expression "Tribunal' as used in Article 227 of the Constitution which confers power of superintendence over all courts and tribunals by the High Court throughout the territory in relation to which it exercises jurisdiction. Obviously, therefore, the decision of the statutory quasi-judicial authorities which can be appropriately described as tribunal will be subject to judicial review namely a writ of certiorari by the High Court under Article 227 of the Constitution. The decision questioned before the High Court was of the Deputy Commissioner and the Commissioner exercising

powers under Section 3 of the 1969 Act. And these statutory authorities are certainly amenable to the writ jurisdiction of the High Court."

23. From the Article 227 of Constitution of India as also the judgments referred in this judgment it is apparent that "Tribunal" is under supervisory jurisdiction of this Court, which should be exercised within the restriction and limitations explained by the Hon'ble Supreme Court in various pronouncements. In brief, the power should be exercised to correct the errors of jurisdiction and not to upset pure prior findings of facts, as the High Court exercising the power/jurisdiction under Article 227 of Constitution of India, is not an appellate authority.

24. Thus, for all the reasons recorded hereinbefore, this Court is of the view that present petition under Article 227 of Constitution of India, is maintainable before this Court. As such the objection pointed out by the Registry of this Court that "Proper group is Miscellaneous Bench U/A 226 as revision petition mentioned in prayer is pending before administrative Body", is thus overruled.

25. After holding aforesaid, the court feels it appropriate to refer certain pronouncements, wherein the Hon'ble Supreme Court has explained the jurisdiction and power of this Court while considering a petition under Article 227 of Constitution of India.

26. In ***Waryam Singh v. Amarnath, AIR 1954 SC 215***, a Constitution Bench of the Hon'ble Supreme Court, after examining the scope of Article 227 of the Constitution, observed as under:--

"This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J. in Dalmia Jain Airways Ltd. v. Sukumar Mukherjee, 1951 AIR (Cal) 193 to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors."

27. In ***Hari Vishnu Kamath v. Ahmad Ishaque, AIR 1955 SC 23***3, the Hon'ble Supreme Court, in the context of the scope, power and jurisdiction exercised by the High Court, under Articles 226 & 227 of the Constitution of India, observed as under:

"20. We are also of opinion that the Election Tribunals are subject to the superintendence of the High Courts under Article 227 of the Constitution, and that that superintendence is both judicial and administrative. That was held by this Court in "Waryam Singh v. Amarnath', AIR 1954 SC 215 (K) , where it was observed that in this respect Article 227 went further than section 224 of the Government of India Act, 1935, under which the superintendence was purely administrative, and that it restored the position under section 107 of the Government of India Act, 1915. It may also be noted that while in a "certiorari' under Article 226 the High Court can only annul the decision of the Tribunal, it can, under Article 227, do that, and also issue further directions in the matter. We must accordingly hold that the application of the appellant for a writ of "certiorari' and for other reliefs was maintainable under Articles 226 and 227 of the Constitution.

21. Then the question is whether there are proper grounds for the issue of "certiorari' in the present case. There was considerable argument before us as to the character and scope of the writ of "certiorari' and the conditions under which it could be issued. The question has been considered by this Court in "Parry and Co. v.Commercial Employees' Association, Madras', AIR 1952 SC 179 (L):- "Veerappa Pillai v. Raman and Raman Ltd.'

AIR 1952 SC 192 (M); - "Ebrahim Aboobaker v. Custodian General of Evacuee Property New Delhi' AIR 1952 SC 319 (N), and quite recently in AIR 1954 SC 440 (C). On these authorities, the following propositions may be taken as established: (1) "Certiorari' will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it. (2) "Certiorari' will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice. (3) The Court issuing a writ of "certiorari' acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings or fact reached by the inferior Court or Tribunal, even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and when the Legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy if a superior Court were to re-hear the case on the evidence, and substitute its own findings in "certiorari." These propositions are well settled and are not in dispute."

28. In the case of ***M.L.Sethi Vs. R.P. Kapur,*** reported in ***(1972) 2 SCC 427.*** The Hon'ble Supreme Court observed as under:-

"12. ..... The word "jurisdiction" is a verbal cast of many colours. Jurisdiction originally seems to have had the meaning which Lord Baid ascribed to it in Anisminic Ltd. v. Foreign Compensation Commission, (1969) 2 AC 147, namely, the entitlement "to enter upon the enquiry in question". If there was an entitlement to enter upon an inquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made byLord Denman in R. v. Bolton, (1841) 1 QB 66. He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. In Anisminde Ltd., (1969) 2 AC 147 Lord Reid said:

"But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive".

In the same case, Lord Pearce said:

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fall to make the inquiry which

the Parliament did direct. Any of these things would cause its purported decision to be a nullity."

The dicta of the majority of the House of Lords, in the above case would show the extent to which "lack' and "excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. They comes perilously close to saying that there is a jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "imposing an unwarranted condition" or "addressing themselves to a wrong question". The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only construing the empowering statute which will give little guidance. It is really a question of how much latitude the Court is prepared to allow in the end it can only be a value judgment (See H.W.R. Wade, "Constitutional and Administrative Aspects of the Anismenic case", Law Quarterly Review, Vol. 85, 1969, P. 198). Why is it that a wrong decision on a question of limitation or res judicata was treated as a jurisdictional error an liable to be interfered with in revision? It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the Court. And there is no yardstick to determine the magnitude of the error other than the opinion of the Court."

29. In the case of ***Chandrasekhar Singh Vs. Siya Ram Singh,*** reported in ***(1979) 3 SCC 118.*** The Hon'ble Supreme Court observed as under:-

"11. The only other question that remains to be considered is whether an order under Section 146(1B) can be interfered with by the High Court in the exercise of its powers under Article 227 of the Constitution. It is admitted that the powers conferred on the High Court under Art. 227 of the Constitution cannot in any way be curtailed by the provisions of the Criminal Procedure Code. Therefore, the powers of the High Court under Art. 227 of the Constitution can be invoked in spite of the restrictions placed under Section 146(1D) of the Criminal Procedure Code. But the scope of interference by the High Court under Art. 227 is restricted. This Court has repeatedly held that "the power of superintendence conferred by Article 227 is to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors vide 1954 S.C.R. 565 (Waryam Singh v. Amar Nath). In a later decision, (Nagendra Nath Bora v. The Commissioner of Hills Division, and Appeals, Assam, the view was reiterated and it was held that the power of judicial interference under Article 227 of the Constitution are not greater than the power under Article 226 of the Constitution, and that under Art. 227 of the Constitution, the power of interference is limited to seeing that the tribunal functions within the limits of its authority. In a recent decision, (Babhutmal Raichand Oswal v. Laxmibai R. Tarts (2) this Court reiterated the view stated in the earlier decisions referred to and held that the power of superintendence under Article 227 of

the Constitution cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as the Court of appeal and that the High Court cannot in exercise of its jurisdiction under Art. 227 convert itself into a court of appeal."

30. In ***Mohd. Yunus v. Mohd. Mustaquim, (1983) 4 SCC 566,*** Hon'ble Supreme Court held that High Court has very limited scope under Article 227 of the Constitution and even errors of law cannot be corrected in exercise of power of judicial review while exercising such power. The powers can be used sparingly only when High Court comes to the conclusion that the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction. It further held that the High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For interference, there must be a case of flagrant abuse of fundamental principles of law or where order of Tribunal etc. has resulted in grave injustice.

31. In ***Rena Drego v. Lalchand Soni, (1998) 3 SCC 341***, the Hon'ble Supreme Court has categorically held that the power under Article 227 of the Constitution is of the judicial superintendence which cannot be used to up-set the conclusions of facts, howsoever erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could have ever.

32. ***In Baby v. Travancore Devaswom Board, (1998) 8 SCC 310***, the Hon'ble Supreme Court has held that even if revisional jurisdiction was not available to the High Court, it still have powers under Article 227 of the Constitution of India to set aside the orders so passed by the Tribunal if the finding of fact arrived at was perverse.

33. In ***Ajaib Singh v. Sirhind Co-operative Marketing cum Processing Service Society Ltd.,(1999) 6 SCC 82***, the Hon'ble Supreme Court held that High Court is not to substitute its view for the opinion of Authorities/Courts below as the same is not permissible in proceedings under Articles 226/227 of the Constitution.

34. The ***Hon'ble Supreme Court in Shalini Shyam Shetty v.Rajendra Shankar Patil, (2010) 8 SCC 329,*** culled out the following principles:

"(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by

subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, theHigh Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, ''within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of L. Chandra Kumar v. Union of India, (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does notcorrespondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive

and will divest this extraordinary power of its strength and vitality."

35. The Hon'ble Supreme Court in ***Madras Bar Association v. Union of India, (2014) 10 SCC 1***, while dealing with the constitutional validity of the National Tax Tribunal Act, 2005, held Judicial Review, under Articles 226 & 227 of the Constitution of India, to be part of the Basic Structure of the Constitution. Even earlier, in Kartar Singh v. State of Punjab, (1994) 3 SCC 569, the Court had observed as such.

36. In ***Radhey Shyam v. Chhabi Nath, (2015) 5 SCC 423*** while holding that orders of Civil Courts are not amenable to writ jurisdiction under Article 226 of the Constitution of India, it further held that jurisdiction under Article 227 of the Constitution of India was distinct from the jurisdiction under Article 226 of the Constitution of India. To this extent, it also overruled its contrary view in Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675. In para 28 of the judgment in Radhey Shyam's case, Hon'ble Supreme Court observed that:

"28. We may also deal with the submission made on behalf of the respondent that the view in Surya Dev Rai stands approved by larger Benches in Shail, Mahendra Saree Emporium and Salem Advocate Bar Assn and on that ground correctness of the said view cannot be gone into by this Bench. In Shail, though reference has been made to Surya Dev Rai, the same is only for the purpose of scope of power under Article 227 as is clear from para 3 of the said judgment. There is no discussion on the issue of maintainability of a petition under Article 226. In Mahendra Saree Emporium, reference to Surya Dev Rai is made in para 9 of the judgment only for the proposition that no subordinate legislation can whittle down the jurisdiction conferred by the Constitution. Similarly, in Salem Bar Assn. in para 40, reference to Surya Dev Rai is for the same purpose. We are, thus, unable to accept the submission of learned counsel for the respondent."

37. The aforesaid principles stand reiterated by the Hon'ble Supreme Court in ***Ram Kishan Fauji v.State of Haryana, (2017) 5 SCC 533***.

38. Now, adverting to merits of the case. For the reliefs sought in this petition, learned Counsel for the petitioner submitted that petitioner is invoking the supervisory jurisdiction of this Hon'ble Court under Article 227 of the Constitution of India, being aggrieved by the inaction on the part of the respondent no. 1 in hearing and deciding statutory revision preferred by the petitioner under Section 41(3) of the U.P. Urban Planning and Development Act, 1973 read with Section 12 of U.P. Industrial Area Development Act, 1976. The petitioner in his statutory revision has challenged the order dated 06.03.2018 whereby the respondent no. 2 raised demand for time extension charges and denied the benefit of zero period from 28.10.2013 to 15.08.2015. The petitioner is constrained to approach this Hon'ble Court as the respondent no. 1 has not fixed any date for hearing of the statutory revision till date and the respondent no. 2 is threatening to take coercive measures including a levy of penalty and revocation of the lease related to the plot, which was executed on 12.10.2009 by respondent no. 2 in favour of the petitioner. The total cost of the plot in issue at the time of execution of lease deed was Rs. 1500627787/- out of which 10% had been paid by the petitioner.

39. He also stated that after completion of certain formalities the construction was started over the plot leased out by the respondent no. 2 in favour of the petitioner. However, during the course of raising construction and carrying out the development work over the plot in question, some petitions were filed before Hon'ble

National Green Tribunal, Principal Bench, New Delhi (hereinafter referred to as 'NGT') seeking directions to stop construction works undertaken by developers within 10 km. radius of Okhla Bird Sanctuary and on account of certain order passed by NGT, the development work over the plot in question could not be carried out.

40. It is also stated that considering the fact that on account of orders passed by NGT construction work could not be carried out by the developers, the respondent no. 2 framed a policy for declaration of a particular period as 'zero period'.

41. Thereafter, based upon the policy/guidelines for declaring 'zero period', the petitioner made a representation before respondent no. 2, which was rejected in an arbitrary manner vide order dated 06.03.2018 and also issued recovery certificate dated 12.09.2019.

42. He further submitted that in the writ petition 940 of 2017 ***(Bikram Chatterji and other vs Union of India and others)*** and others the Hon'ble Supreme Court after considering the plight of home buyers, state of the real estate and exorbitant rate of interest being imposed by the authorities passed order(s) dated 10.06.2020,10.07.2020 and 19.08.2020 and considering the order(s) passed by the Hon'ble Supreme Court the petitioner approached the respondent no. 2 for recalculation of dues in the light of the observations made by the Hon'ble Supreme Court. When no decision was taken, the petitioner approached the State Government under Section 41(3) of the Act of 1973, by means of filing of revision on 18.10.2021. The order dated 06.03.2018 and recovery certificate 12.09.2021 are in issue before the State Government in pending revision. Other prayer based upon the orders of the Hon'ble Supreme Court have also been sought in the revision. He also stated that revision before the State Government was filed alongwith the applicants for interim relief. However, till date, neither the revision nor the interim relief application has been desposed of by the State Government.

43. Further, submitted that despite of having knowledge of pendency of revision in issue, the authority concerned is adamant to recover the amount as also proceedings for cancellation of lease executed in favour of the petitioner on 12.10.2009 and if the authority concerned succeeds then in that event the revision petition would be rendered infructuous. He submitted that if the revision or application for interim relief is not decided within stipulated time then the petitioner would suffer irreparable loss and injury.

44. In these circumstances, the indulgence of this court is required.

45. Learned Counsel for the side opposite could not, on the basis of record, could not dispute the aforesaid factual aspect of the case.

46. Considering the entirety of the case and without entering into the merits of the case, opposite party no.1 i.e. Additional Chief Secretary, Department of Infrastructure and Industrial Development, Civil Secretariat, Lucknow, is directed to decide the interim relief application of the petitioner, after providing proper opportunity of hearing to the parties with expedition, say within a period of three months, from the date of receipt of the certified copy of this order, if possible and if there is no other legal impediment. It is also open for opposite party no. 1 to decide the revision petition of the petitioner in the aforesaid period.

47. At this stage, learned Counsel for the petitioner stated that till decision of application for interim relief pending before opposite party no. 1, some protection be provided, as the authority concerned is adamant to take coercive

action against the petitioner and in similar circumstances this Court has provided the interim protection, as appears from annexure Nos. 2 to 5, which are the order(s) dated 13.09.2021, 11.02.2019 and 20.09.2021 passed in Matters Under Article 227 No. 4322 of 2021, Writ C No. 4220 of 2019, Writ C No. 23624 of 2019 and Writ C No. 19588 of 2021, respectively.

48. Considering the aforesaid, this Court provides that for a period of three months from today or till the passing of order on interim relief application, which ever is earlier, no coercive action shall be taken against the petitioner.

49. The present petition is ***disposed of*** finally in the above terms.

(2021)12ILR A752
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.12.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Misc. Single No. 28498 of 2021

Virendra Singh ...Petitioner
Versus
Session Judge, Barabanki & Ors. ...Respondents

Counsel for the Petitioner:
Dr. Monica Priyadarshini, Rakesh Kumar

Counsel for the Respondents:
Uma Shankar Sahai,Beena Kishor,Madhav Srivastava,Uma Shankar Sahai

A. Civil Law - Will - Criminal Procedure Code, 1973: Section 145, 146 - The Court observed that where the respondents were in settled possession since the life time of the recorded tenure holder and by virtue of her will they continued with their possession over the land, having been duly mutated after the death of recorded tenure holder as testamentary successors. The use and enjoyment of the property possessed by them could not be disturbed in exercise of power under Section 145/146 of Cr.P.C. by the Sub- Divisional Magistrate. The Executive Magistrate cannot unnecessarily exercise the power and put a clog upon the righteous use and enjoyment of an immovable property, unless a competent court of civil jurisdiction has ordered adversely to his right, title and possession and/or there is and emergent position of dispute between the rival claimant with regard to land's title and possession causing serious breach of peace. (Para 20, 21)

Petition Rejected. (E-10)

List of Cases cited:

1. Sharvan kumar Kaushal Vs Sub Divisional Magistrate, Tehsil Utraula, Balarampur & ors. 2021 SCC Online All 782

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. Heard learned counsels for appellant, Sri Rakesh Kumar and respondent, Sri U.S. Sahai, Advocates.

2. The instant petition in hand is filed under Article 227 of the Constitution of India invoking the supervisory jurisdiction of this court over the order dated 30.7.2020 of learned Session Judge of District 'Barabanki' passed in exercise of his revisional power over the order dated 22.10.2020 of S.D.M., Nawabganj under Section 145/146 of the Criminal Procedure Code, 1973.

3. Briefly stating, the matter is with regard to dispute as to the harvesting of paddy crop in Plot no.950 situated in village Rustampurwa, Khaspariya, District Barabanki between two brothers, natural heirs of recorded owner Late Krishna Kumari wife of Late Sri Shivpal Singh her sons, namely the petitioner Virendra Singh and opposite party no.6, Brijendra Singh with opposite party no.2 to 5, her grand sons, the sons of opposite party no.6. Late Krishan Kumari

who died on 14.8.2020 had executed a registered will on 4.7.2013 in her life time bequeathing all her properties movable and immovable to the grand sons opposite parties no.2 to 5. Since, Late Krishna Kumari was residing with her son Brijendra Singh (opposite party no.6) therefore, after the death the grandsons by virtue of the registered will dated 4.7.2013 came into possession of above said plot no.950 as rightful title holder and their name is also mutated in the revenue records in place of recorded tenure holder Late Krishna Kumari on the basis of her will.

4. Petitioner aggrieved from the 'will' dated 4.7.2013 filed a suit for cancellation of the same and for injunction bearing original suit no.1032 of 2020 on 1.10.2020 in the court of Civil Judge Junior Division which is pending for decision. Since he, was allegedly causing interference in use and enjoyment of property to the opposite parties therefore, they approached to the superintendent of Police, 'Barabanki' on 7.10.2020 who referred the matter to the local Police Chowki of Mohammadpur, P.S. Kotwali Nagar. A report was submitted by the Inspector in-charge of the said police post before Sub Divisional Magistrate that a dispute is running between the parties with regard to harvesting of paddy crops and they are made bound of order under Section 107/116 Cr.P.C. The Sub Divisional Magistrate passed order under Section 145 (1) Cr.P.C. and subsequently under Section 146 Cr.P.C. on 22.10.2020.

5. The order dated 22.10.2020 aforesaid was challenged by the opposite parties no.2 to 6 in revision before the court of District and Sessions Judge, whose decision allowing the revision is under challenge before this Court quoting Section 146 of the Cr.P.C. the learned Sessions Judge has observed:-

"Learned SDM has to record his satisfaction regarding emergency of situation and dilemma to the actual possessor over the disputed property. Learned SDM may exercise the power under Section 146(1) Cr.P.C. only after satisfaction to the emergent situation and unable to satisfy himself regarding the actual possessor of the disputed property. The power under Section 146(1) CrPC may not be exercised without satisfaction of an emergency.

Learned SDM has no jurisdiction to decide the right and title of parties. Any dispute in regard to right and title of the parties may only be decided by the Civil Court. In case of pendency of Civil Suit regarding right and title of parties in spite of issuance of injunction order by the Civil Court, the collateral proceeding under Sections 145, 146 CrPC is not proper.

Learned SDM has passed the order of attachment under section 146(1) CrPC merely on the ground of apprehension to breach of peace. Learned SDM has not recorded any finding or observation in regard to emergent situation. Learned SDM has not exercised jurisdiction properly while passing the impugned order. Mere apprehension of breach of peace is not sufficient for attachment proceeding under Section 146(1) CrPC."

6. To see whether the impugned order passed by the learned Sessions Judge in revision application is illegal or beyond the precedence of law laid down by Hon'ble Apex Court and our High Court on the subject two issues required to be carved out in the context of present case.

(i) whether the learned Sub Divisional Magistrate was right in passing order under Section 145(1) and subsequent order under Section 146 of the Cr.P.C.

(2) who just prior to the passing of the order by Sub Divisional Magistrate under Section 145 Cr.P.C. was in possession.

7. The two relevant Section viz. Section 145 and Section 146 of Cr.P.C. are quoted herebelow for the purpose of easy reference in discussion

"145. Procedure where dispute concerning land or water is likely to cause breach of peace.

(1) Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

146. Power to attach subject of dispute and to appoint receiver.

(1) If the Magistrate at any time after making the order under sub- section (1) of section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof: Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.

(2) When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangements as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908);

Provided that in the event of a receiver being subsequently appointed in relation to the subject of dispute by any Civil Court, the Magistrate-

(a) shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him;

(b) may make such other incidental or consequential orders as may be just."

8. Before discussing the issue no.1, it would be relevant to state about the report of Inspector In-charge of Police Post Mohammadpur, District Barabanki. He reported to the Sub Divisional Magistrate, "the title and possession of Plot No.947 belongs to the petitioner Virendra Singh, plot No.947 to Brijendra Singh and Plot No.950 to Late Krishna Kumari, their mother. The mother Krishna Kumari used to reside with Brijendra Singh. The dispute between the two sons of Late Krishna Kumari is with regard to the harvesting of riped paddy crops from the field of mother, late Krishna Kumari bearing Plot No.950. The paddy is sown by Brijendra Singh in the field of mother. Action under Section 107/116 and 116(3) has been against two rival brothers. Looking into the apprehension of breach of peace in future, he recommended action under Section 145/146 Cr.P.C. also." **(Translated from Hindi version)**

9. The Sub Divisional Magistrate sitting in judicial side to take decision for action under

Section 145 Cr.P.C. has to apply it's mind and to see preliminarily as to which one of the two contesting parties was in actual and factual possession of the subject of dispute prior to the dispute/eviction.

10. Even the report of the local police itself shown the crops in dispute of harvesting were sown by the opposite party no.6 in the field of mother Late Krishna Kumari bearing plot no.950 in dispute. It is also shown in the said report that mother Late Krishna Kumari used to reside with her son Brijendra Singh. So far as apprehension of breach of peace is concerned, the report has also shown that parties to the dispute had been already bound down under Section 107/116 and Section 116 (3) for keeping peace. As such there was no occasion to pass order under Section 145(1) with regard to plot No.950, especially when the civil suit titled by the petitioner for the relief of cancellation of will and permanent prohibitory injunctions was pending for decision. Likewise, there was no occasion to pass order under Section 146(1) Cr.P.C.

11. Possession of the field (Araji Kashtkari) is implicit in the present matter by mutation in Khatauni and in the record of possession the Khasra in place of earlier recorded tenure holder not by natural succession but otherwise by a legal means of transfer by way of the will.

12. Possession of a field (Araji Kashtkari) is also factual and actual by means of peacefully sowing it. Harvesting is later and consequent part of sowing the paddies in the disputed plot no.950 by opposite party no.6 Brijendra Singh, as reported by the local police. If one applies mind over the above said facts which are admitted state of things, there would have no doubt as to the fact who was in actual possession of Arazi No.950 and the subject of dispute at that time of harvesting of crops.

13. The pendency of original suit no.1032/21 in the civil court also does not change the status of possession holder over the land, plot no.950 bequeathed by the recorded tenure holder in favour of her grandsons opposite parties no.2 to 5 and their father, Brijendra Singh (opposite parties no.2). The will was executed and registered far back on 4.7.1973 by the testator Smt. Krishna Kumari who was jointly living with the family of his son Brijendra Singh. The opposite parties no.2 to 6. The will for the purpose of title only has come into effect after the death of testator on 14.8.2020, otherwise factual possession of the plot no.950 of Late Krishna Kumari since her life time by reason of her residing jointly with them. It would be relevant to keep into mind the nature of posthumous transfer by will.

14. Will is a document spells out who should get one's assets after his/her death. It comes into effect and operation after it's maker posthumously and excludes all other natural heirs except the beneficiary under the testament. A will made by a Hindu, Buddhist, Sikh or Jain is governed by the provisions of Indian Succession Act, 1925. It's Section 2 (h) runs as under:-

"Section 2(h) "Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."

15. A will is, thus a legal declaration of the intention of a person with respect to his property, which he deserves to take effect after his death. Will has been defined as corpus juris secundum A "Will" is the legal declaration of a person's intention, which he wills to be performed after his death, or an instrument by which a person makes a disposition of his property to take effect after his death. A signed and duly witnessed will whether registered or unregistered will have effect and legal force for

implementation of testator's intention after death. There is strong presumption in favour of genuineness of the will. If a party blames the will to be in-genuine by any reason viz. Fraud, forgery, coercion, incapacity or lack of competence or otherwise the initial burden of proof of such disqualification and suspicious circumstance lies on that person in accordance with Section 101 of the Evidence Act, which runs as under.

16. Section 101 of the Indian Evidence Act, 1872 runs as under:-

"*101. Burden of proof.--Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

17. Unless will is declared by a competent civil court to be null and void by any reason of suspicion as to it's genuineness, it passes of title and rightful possession to the beneficiary over the property bequeathed to him. The "Civil Court' is the competent court to decide such issues.

18. Summing up the decisions on the two issues carved down hereinabove, the opposite parties no.2 to 5 were in rightful possession of the property plot no.950 aforesaid and there was no occasion for the Sub Divisional Magistrate either for passing preliminary order under Section 145(1) Cr.P.C. or subsequent order under Section 146(1) Cr.P.C.

19. This Court earlier in ***Sharvan Kumar Kaushal Vs. Sub Divisional Magistrate, Tehsil Utraula, Balrampur & Ors. (Misc. Single Writ No.24785 of 2021*** decided on October 27, 2021) ***2021 SCC Online All 782*** has held as under:-

"19. Civil Court, is the only Court to decide the right, title and interest of the parties to have rightful possession over the property so far as Sub Divisional Magistrate's Court (Criminal Court) working under Section 145 Cr.P.C. is concerned, it can only decide possession of the party on the date of dispute. During the pendency of the civil suit with regard to the right, title and interest and right to possession over the property is pending, Criminal proceeding neither can be initiated nor decided prior to the decision of the Civil Court.

20. In Ram Sumer Puri Mahant Vs. State of U.P. and Others reported in (1985) 1 SCC 427, it is held:-

"When a civil litigation is pending for the same property wherein the question of possession is involved and the parties are in a position to approach the civil court for interim orders such as injunction or appointment of receiver for adequate protection of the property during pendency of the dispute, there is no justification for initiating a parallel criminal proceeding under Section 145 Cr.P.C. Multiplicity of litigation is not in the interest of the parties nor should pubic time be allowed to be wasted over meaningless litigation. Therefore, the parallel proceeding should not continue and the order of the Magistrate directing initiation of such a proceeding under Section 145 Cr.P.C. must be quashed."

20. The Executive Magistrate cannot exercise the power conferred under Section 145 and 146 Cr.P.C. so as to put a clog upon the righteous use and enjoyment of an immovable property of which the holder is in peaceful and settled possession, unless a competent court of civil jurisdiction has ordered adversely to his right, title and possession and/or there is an emergent position of dispute between the rival claimants with regard to land's title and possession causing serious breach of peace.

21. In the present case where the respondents were in settled possession since the life time of the recorded tenure holder and by virtue of her will they continued with their possession over the land, having been duly mutated after the death of recorded tenure holder as testamentary successors. Thus use and enjoyment of the property possessed by them could not be disturbed in exercise of power under Section 145/146 of Criminal Procedure Code, 1973 by the S.D.M.

22. On the discussions made hereinabove, the judgment delivered by learned Sessions Judge in Criminal Revision No.54/2020, (Brijendra Singh Vs. Virendra Singh) does not suffer with error of law and the petition under Article 227 is devoid of legal grounds attracting interference of the Court in the revisional judgment, therefore, the petition deserves to be dismissed.

23. With the aforesaid observations, the writ petition is **dismissed.**

(2021)12ILR A757
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.12.2021

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.
THE HON'BLE SHAMIM AHMED, J.

Misc. Bench No. 29669 of 2021

Jang Bahadur Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Nirmal Singh Yadav, Adarsh Srivastava, Divya Yadav

Counsel for the Respondents:
C.S.C., Anurag Kumar Singh

A. Practice & Procedure - Locus Standi - Indian Constitution, 1950: Article 226 - The Court held that since petitioner is a complainant and no legal right have been infringed therefore, he has no right to invoke extraordinary jurisdiction of the Court under Article 226 of the Constitution. (Para 8)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Jasbhai Motibhai Desai Vs Roshan Kumar, Haji Bashir Ahmed (1976) 1 SCC 671

2. Ayaaubkhan Noorkhan Pathan Vs St. of Mah. (2013) 4 SCC 465

3. Ravi Yashwant Bhoir Vs Collector (2012) 4 SCC 407

(Delivered by Hon'ble Rakesh Srivastava, J.
&
Hon'ble Shamim Ahmed, J.)

1. Heard Sri Nirmal Singh Yadav, learned counsel for the petitioner.

2. This writ petition has been filed praying inter alia the following relief:-

i) issue a writ, order or direction in the nature of mandamus commanding the opposite parties to consider the representation of the petitioner and lodge the criminal case against the opposite party no. 5-Pradhan after investigate the matter and seize the powers of the opposite party no. 5 on the basis of submitting false and forged paper and concealment of fact by him in election process.

3. Kishan Pal, respondent no. 5 herein, is the Pradhan of Village Bachgawan, P.O. Bankagaon, Block and P.S. Pasgaon, Tehsil Mohamdi, District Lakhimpur Kheri. The petitioner, it is alleged, is simple, gentle and law abiding person and voter of the said Gram Panchayat. On 20.10.2021 the petitioner lodged a complaint before the State Election Commission, UP, Lucknow to the effect that the respondent no. 5 is not the resident of the village and as such his election to the post of Gram

Pradhan was illegal. It was prayed that action be taken against him.

4. 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.

5. 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.

6. 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)

7. In paragraph 5 of the present writ petition, the petitioner has stated his cause of action as follows:

"5. That the petitioner is running pillar to post for his grievance which are also in the large interest of Gram Panchayat as the public fund is utilizing by the wrong person who is not residing in the village Gram Panchayat Bachgawan, Pasgaon Kheri and he is residing at Maholi-Mathura District since last 20-25 years even then the opposite parties are not considering the complaints of the petitioner which is wrong, arbitrary and illegal."

8. As is evident from the facts narrated above, no legal right of the petitioner has been infringed. He is at the most a complainant.

9. 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)

10. 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)

11. 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).*

12. 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.

(2021)12ILR A760
ORIGINAI JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.10.2021

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 511 of 2017

M/s Ansaldo STS Transport System India Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nishant Mishra

Counsel for the Respondents:
C.S.C., Sri Manu Ghildayal, Sri C.B. Tripathi

A. Interpretation of Statute - Limitation - U.P. V.A.T. Act, 2008: Section 29(6), 32 - If second or any subsequent ex-parte assessment order was set aside (under section 32 of the Act), on or before 30th September of an Assessment Year, the limitation to pass a fresh assessment order thereafter, would exist up to 31st March of that Assessment Year. However, if the order to set aside the second or the subsequent ex-parte assessment order was passed on or after 1st October of an Assessment Year, the limitation to pass fresh assessment order would stand extended upto 30th September of the next Assessment Year. (Para 37)

The limitation to pass the fresh/second assessment order/s existed up to the end of the Assessment Year in which such (first) ex-parte assessment order was set aside. Since the first ex-parte assessment order

was set aside on 11.01.2013, such limitation existed up to 31.03.2013. However, by virtue of the first proviso to Section 29(6), that limitation stood extended upto 31.09.2013. (Para 35)

Writ Petition Allowed. (E-10)

List of Cases cited:

1. CST Vs Sukhlal Ice & Cold Storage Co. 2008 NTN (Vol. 36) 30 *(distinguished)*

2. Padma Sundara Rao (Dead) & ors. Vs St.of T.N. & ors. (2002) 3 SCC 533 *(followed)*

3. Supdt. Of Taxes, Dhubri & ors. Vs Onkarmal Nathmal Trust (1976) 1 SCC 766 *(distinguished)*

4. Baswaraj & anr. Vs Special Land Acquisition Officer (2013) 14 SCC 81 *(distinguished)*

5. P. Ramachandra Rao Vs St.of Karnataka (2002) 4 SCC 578 *(distinguished)*

6. Director of Inspection of Income Tax (Investigation), New Delhi & anr. Vs Pooran Mal & Sons & Anr. (1975) 4 SCC 568 *(distinguished)*

7. Grindlays Bank Ltd. Vs Income Tax Officer, Calcutta & ors. (1980) 2 SCC 191 *(followed)*

8. S.K. Traders Vs Additional Commissioner 2007 NTN (Vol. 34) 345

9. Ram Nivas Vs St.of U.P. & ors. (2019) SCC OnLine All 3537 *(distinguished)*

10. Deva Metal Powders (P) Ltd. Vs CTT (2008) 2 SCC 439

11. Thungabhadra Industries Ltd. Vs The Government of Andhra Pradesh AIR 1964 SC 1372

12. T.S. Balram Vs Volkart Bros. (1971) 2 SCC 526 (SC)

13. CIT Vs Hero Cycles Pvt. Ltd. (1997) 8 SCC 502

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Nishant Mishra, learned counsel for the petitioner and Sri Manu Ghildayal, learned counsel for the Revenue.

2. Originally, the present petition was filed to challenge the notice dated 29.05.2017 issued to the petitioner by its assessing authority, under Section 31 of the U.P.V.A.T. Act, 2008 (hereinafter referred to as the "Act") for the A.Y. 2008-09, seeking to rectify the order dated 22.02.2014 passed by the then assessing authority of the petitioner, under Section 32 of the Act. During pendency of this petition, proceedings pursuant to that notice concluded. Thus, the order dated 21.06.2017 came into existence. Thereby, the assessing authority of the petitioner concluded, the order dated 22.02.2014 and consequentially, the orders dated 18.07.2014 and 3.10.2015 [for A.Y. 2008-09 (U.P., Central and, Entry Tax)] suffered from a mistake apparent on the face of record. The order dated 21.06.2017 has been challenged through amendment made to this writ petition. It may be noted, by composite order dated 18.07.2014 the third *ex-parte* assessment order had been framed against the petitioner. That *ex-parte* order had been recalled by the order dated 03.10.2015. Thus, at present, the second composite ex-parte assessment order dated 18.09.2013, framed in the case of the petitioner for A.Y. 2008-09 (U.P., Central and, Entry Tax), has been revived.

3. Briefly, the petitioner is a duly incorporated company. It is a registered dealer engaged in executing works contracts, mainly for the Indian Railways. For the A.Y. 2008-09, it was first subjected to *ex-parte* assessment orders, all dated 30.6.2012, framed under the Act, the Central Sales Tax Act, 1956 (hereinafter referred to as the "Central Act") and the Uttar Pradesh Tax on Entry of Goods Act, 2007 (hereinafter referred to as the "Entry Tax Act"). The petitioner filed applications under Section 32 of the Act, to set aside the aforesaid first *ex-*

parte assessment orders dated 30.06.2012. Those applications were allowed by orders dated 11.01.2013. The *ex-parte* assessment orders dated 30.06.2012 were set aside. Thereafter, on 18.09.2013, the second - composite *ex-parte* assessment order was framed against the petitioner, for the A.Y. 2008-09 (U.P., Central and, Entry Tax Act). Thereby, tax was assessed - under the Act, Rs. 18,20,000/-; under the Central Act, Rs. 1,08,40,000/- and under the Entry Tax Act, Rs. 52,01,708/-. Against that order, the petitioner filed (within time), another application under Section 32 of the Act. It was allowed on 22.02.2014 and the aforesaid second-composite ex parte order dated 18.09.2013 was set aside. Consequently, the third - composite *ex-parte* assessment order came to be framed against the petitioner for the A.Y. 2008-09 (U.P., Central and, Entry Tax), on 18.07.2014. Upon further application filed by the petitioner under Section 32 of the Act, that *ex-parte* assessment order was also set aside by order dated 03.10.2015. Apparently, no further assessment order/s was/were framed in the case of the petitioner for A.Y. 2008-09 (U.P., Central and, Entry Tax) up to 30.09.2016. Thereafter, those assessment proceedings became time barred.

4. In these facts, on 19.12.2017, the petitioner was served with an *ex-parte* order dated 16.08.2016 passed under Section 31 of the Act referable to the power of the assessing authority to rectify mistakes apparent on the face of the record - in the order dated 22.02.2014 i.e., the order passed under Section 32 of the Act, to recall the second - composite *ex-parte* assessment order for A.Y. 2008-09 (U.P., Central and, Entry Tax). Therein, the petitioner's assessing authority took a view that the order dated 22.02.2014 had been passed outside the prescribed period of limitation to frame a fresh/second assessment order. It was therefore, time barred. Consequently, the assessing authority also passed order under Section 32 of the Act (referable to the power of the assessing authority to recall an ex-parte order), and dismissed the further applications filed by the petitioner to recall the order dated 18.09.2013. If sustained, those orders would attach finality to the second - composite ex-parte assessment order dated 18.09.2013.

5. That order dated 16.08.2016, was challenged by the petitioner in Writ Tax No.97 of 2017 (M/S Ansaldo STS Transports System India Pvt. Ltd. Noida Vs. State of U.P. And 3 Others). It was allowed vide order dated 21.2.2017. For ready reference that order is quoted below:

"We have heard Sri Nishant Mishra, learned counsel for the petitioner and Sri C.B. Tripathi, the special counsel for the State.

An ex parte assessment order was passed on 18.09.2013 for the year 200809. The said ex parte assessment order was set aside by the order dated 22.02.2014, on the ground that it was an ex parte order and no notice was given to the petitioner.

Subsequently, assessment order of 18.07.2014 the petitioner again moved recall application which was allowed and the ex parte assessment order dated 18.07.2014 was set aside by an order dated 03.10.2015. Subsequently, the Assessing Authority passed ex parte two orders dated 16.08.2016. One of them is purported to an order under Section 31 of the U.P Vat Act, 2008 modifying the earlier order.

In paragraph 41 of the writ petition, it has been stated that the impugned orders passed under Section 31 & 32 are ex parte orders without issuing any notice to the petitioner and without giving any opportunity of hearing.

Sri C.B. Tripathi, learned counsel for the State upon instructions received to him and upon a perusal of the impugned order fairly

concedes that the impugned orders have been passed ex parte without giving opportunity of hearing to the petitioner.

It is settled law that when an order has been passed and if the same requires modification, it is necessary for the Assessing Authority to issue a notice and give an opportunity of hearing before recalling the order or modifying the said order. Since the same was not given the impugned orders are clearly in violation of the principles of natural justice as embodied under Article 143 of the Constitution of India.

Consequently, without going into any other grounds, we allow the writ petition at the admission stage itself.

We quash the impugned orders at the admission stage itself without calling for a counter affidavit.

The writ petition is allowed.

It would be open to the Assessing Authority to pass fresh order after giving due notice and opportunity of hearing to the petitioner."

6. Thereafter, the petitioner's assessing authority issued fresh/impugned notice to the petitioner, on 29.05.2017, under Section 31 of the Act, again seeking to rectify the order dated 22.02.2014. No other order was sought to be set-aside or rectified. By the impugned order dated 21.06.2017, the assessing authority has reasoned, since the limitation to frame the second assessment order for A.Y. 2008-09 (U.P., Central and, Entry Tax), expired on 30.09.2013, the order dated 22.02.2014 passed thereafter, was beyond the time limitation prescribed under Section 29(6) of the Act. Hence, the further assessment proceedings (reopened in the case of the petitioner) for the A.Y. 2008-09 (U.P., Central and, Entry Tax) were *void-ab-initio.* Consequently, he has cancelled the subsequent orders dated 18.07.2014 & 03.10.2015. Thus, the second - composite *ex-parte* assessment order dated 18.09.2013, for A.Y. 2007-08 (U.P., Central, and, Entry Tax) has been revived and rendered final.

7. Relying on the provisions of Section 31, 32 & 29(6) of the Act, learned counsel for the petitioner first submitted, the order dated 21.06.2017 was passed well beyond the statutory period of three years prescribed under Section 31(1) of the Act. It is time barred. Then, it is his submission, while allowing the earlier writ petition vide order dated 21.02.2017, this Court did not grant or create any fresh period of limitation as may have allowed the assessing authority to pass any order under Section 31 of the Act, beyond the original period of limitation that expired on 22.02.2017. In the context of suo moto exercise of power, the limitation of three years must be computed from the date 22.02.2014 when the order sought to be rectified was passed. In absence of consent or waiver by the petitioner, such limitation did not exist/survive. Therefore, the order dated 21.06.2017 is wholly time barred, for reason of it being passed after the date 22.02.2017.

8. Reliance has been placed on a division bench decision of this Court in the case of **CST Vs. Sukhlal Ice & Cold Storage Co., 2008 NTN (Vol. 36) 30**, wherein, a co-ordinate bench had, in the context of *pari materia* provisions of Section 22 of the U.P. Trade Tax Act, 1948, held - power to rectify any order could be exercised *suo-motu,* by the competent authority/Court within a period of three years from the date of such order being passed.

9. Next, reliance has also been placed on a five-Judge Constitution bench decision of the Supreme Court in **Padma Sundara Rao (Dead) & Ors. Vs. State of T.N. & Ors., (2002) 3 SCC**

533 to submit, a Writ Court could not, and, in the present facts, it did not create any fresh period of limitation, while allowing the petitioner's earlier writ petition on 21.2.2017.

10. Then, reliance has been placed on another five-Judge Constitution bench decision of the Supreme Court in **Supdt. Of Taxes, Dhubri & Ors. Vs. Onkarmal Nathmal Trust, (1976) 1 SCC 766** to submit, jurisdiction could neither be waived nor created and that, issue of notice under the provisions of an Act relates to exercise of jurisdiction. In the present facts, the limitation expired on 22.02.2017. The notice dated 29.05.2017, issued thereafter was wholly without jurisdiction.

11. Also, reliance has been placed on another decision of the Supreme Court in **Baswaraj & Anr. Vs. Special Land Acquisition Officer, (2013)14 SCC81** to submit, the Courts cannot extend the period of limitation that had otherwise expired.

12. Next, reliance has been placed on a seven-Judge Constitution bench decision of the Supreme Court in **P. Ramachandra Rao Vs. State of Karnataka, (2002) 4 SCC 578,** to submit, the Court cannot legislate - specifically, to provide for the period of limitation, that may otherwise not exist.

13. In view of the above law, a distinction has been claimed to the ratio in **Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal & Sons and Another, (1975) 4 SCC 568.** Therein, the bar of limitation was found to have been specifically waived by the assessee. It has been thus submitted, in absence of any consent or waiver granted by the present petitioner, the bar of limitation exists in the undisputed facts of the present case.

14. With reference to the decision in the case of the Supreme Court in **Grindlays Bank Limited Vs. Income Tax Officer, Calcutta & Ors., (1980) 2 SCC 191,** it has been submitted, the said decision may not come to the aid of the revenue in face of the clear position of law arising from the larger/Constitution bench decision of the Supreme Court.

15. Then, with respect to the decision of another coordinate bench of this Court, in the case of **S.K. Traders Vs. Additional Commissioner 2007 NTN (Vol. 34) 345**, it has been similarly submitted, that decision is also distinguishable. According to learned counsel for the petitioner, the correct position of law was laid down in another division bench decision of this Court in **Ram Nivas Vs. State of U.P. and Others (2019) SCC OnLine All 3537**. Therein, after taking note of the entire gamut of law, the division bench applied the law laid down by the Constitution bench of the Supreme Court, in **Padma Sundara Rao (supra)** and distinguished the ratio arising from the decision of the Supreme Court in Director of Inspection of **Income Tax Vs. Pooran Mal (supra)** and the division bench decision of this Court in **S.K. Traders (supra).**

16. Further, it has been submitted, even otherwise, the order dated 22.02.2014 did not suffer from any mistake apparent from the face of record. Reliance has been placed on a decision of the Supreme Court in **Deva Metal Powders (P) Ltd. Vs. CTT (2008) 2 SCC 439** to submit, a debatable question cannot be subjected to proceedings to rectify a mistake apparent from the face of record.

17. Last, it has been submitted, the limitation to frame the third and all subsequent assessment order/s in consequence of order/s passed under Section 32 of the Act, would be the same as prescribed to frame the second assessment order, under Section 29(6) of the Act read with the first and the second provisos thereto. The order to set-aside the first ex-parte

orders (dated 30.06.2012) was passed on 11.01.2013. Therefore, the limitation to frame the fresh/second assessment order existed up to 30th September 2013. The second - composite ex-parte assessment order was framed on 18.09.2013. Upon the application to set aside that assessment order/s filed within time, the assessing authority did not commit any jurisdictional error in setting aside that order on 22.02.2014. Occasioned by that order, the limitation to pass the fresh/third assessment order/s for A.Y. 2008-09 (U.P., Central and Entry Tax), existed up to 30.09.2014. The third composite assessment order was framed on 18.07.2014. Similarly, upon a further application filed by the petitioner (within time), under section 32 of the Act, the assessing authority did not commit any mistake in setting aside that order on 03.10.2015.

18. Opposing the writ petition, learned standing counsel for the revenue has strongly urged - in the present case, the order dated 28.07.2017 did not suffer from any lack of limitation. This Court had clearly permitted the assessing authority to pass a fresh order in accordance with law. That direction had been issued by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. Therefore, indisputably, the consequential notice was issued within reasonable time therefrom i.e., almost within three months. Hence, the bar of limitation claimed by the petitioner, did not exist, or arise. He would also submit, by virtue of the second proviso to section 29 (6) of the Act, the limitation to frame the third assessment order (after the second - composite ex-parte assessment order had been set aside), would stand curtailed to the balance period of limitation that survived on the date of the second ex-parte assessment order being framed i.e., up to 30.09.2013, only. Therefore, the application to set aside the second - composite ex-parte assessment order dated 18.09.2013 could not be allowed after the date 30.09.2013.

19. In short, it has been submitted, in absence of surviving period of limitation to frame a fresh assessment order, the order seeking to recall the second - composite ex-parte assessment order could not be passed, beyond the date 30.09.2013. Consequentially, the order dated 22.02.2014 setting aside the second - composite ex-parte assessment order dated 18.09.2013 was wholly time barred and therefore lacking in jurisdiction. Hence, the assessing authority has not committed any error in setting aside such order. That mistake was clearly a mistake apparent on the face of record.

20. Having heard learned counsel for the parties and having perused the record, as to the first limb of submission advanced by learned counsel for the petitioner, it is true, there was no express consent given or waiver granted by the petitioner and no such consent or waiver may be inferred from a plain reading of the order dated 21.02.2017 passed in Writ Tax No. 97 of 2017. Therefore, that part of the ratio of the decision of the Supreme Court in **Director of Inspection of Income Tax Vs. Pooran Mal & Sons (supra)** is inapplicable to the facts of the present case. However, this reasoning was taken note of in **Grindlays Bank Limited Vs. ITO (supra)**. It may be discussed a little later.

21. At the same time, the five-Judge Constitution bench decision of the Supreme Court in the case of **Padma Sundara Rao (Dead) Vs. State of Tamil Nadu and Ors. (supra)** had arisen on different facts and law. There, an issue had arisen, whether upon the High Court having set aside the earlier declaration made under Section 6 of the Land Acquisition Act 1894, any fresh or further period of limitation existed or could be claimed under Clause (ii) of the first proviso to Section 6 (1) of that Act. For ready reference, provisions of Section 6 of that Act are quoted below:

"6. Declaration that land is required for a public purpose.

(1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under section 5A, subsection (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorized to certify its orders and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under section 4 subsection (1), irrespective of whether one report or different reports has or have been made (wherever required) under section 5A subsection (2)

Provided that no declaration in respect of any particular land covered by a notification under section 4 subsection (1) -

(i) published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967 but before the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of three years from the date of the publication of the notification; or

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification:

Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

Explanation. - In computing any of the periods referred to in the first proviso, the period during which any action or proceeding to be taken in pursuance of the notification issued under section 4 subsection (1), is stayed by an order of a Court shall be excluded."

22. Considering that language of the proviso to Section 6 of the Land Acquisition (Amendment) Act, 1894 and the complete absence of any statutory remedy of appeal etc. provided against a declaration made under Section 6 of the Act, the Supreme Court reasoned - it was a distinctive feature viz-a-viz Section 132(5) read with Section 132 (11) of the Income Tax Act, 1961. It was held, under the Income Tax Act, a power existed to remit a case to the original authority or, for a fresh order to be passed. Thus, besides the distinction arising on account of lack of consent or waiver granted by the petitioner (in that case), it was recognized, even otherwise, the period of limitation may survive in the context of a proceeding under Section 132 (5) of the Income Tax Act. Thus, it was observed as under:

"Learned counsel for the respondents referred to some observations in Pooran Mal case [(1975) 4 SCC 568 : 1975 SCC (Tax) 346 : (1975) 2 SCR 104] which form the foundation for decisions relied upon by him. It has to be noted that Pooran Mal case [(1975) 4 SCC 568 : 1975 SCC (Tax) 346 : (1975) 2 SCR 104] was decided on entirely different factual and legal backgrounds. The Court noticed that the assessee who wanted the Court to strike down the action of the Revenue Authorities on the ground of limitation had himself conceded to the passing of an order by the Authorities. The Court, therefore, held that the assessee cannot take undue advantage of his own action. Additionally, it was noticed that the time-limit was to be reckoned with reference to the period prescribed in respect of Section 132(5) of the IT Act. It was noticed that once the order has been

made under Section 132(5) within ninety days, the aggrieved person has got the right to approach the notified authority under Section 132(11) within thirty days and that authority can direct the Income Tax Officer to pass a fresh order. That is the distinctive feature vis-à-vis Section 6 of the Act. The Court applied the principle of waiver and inter alia held that the period of limitation prescribed therein was one intended for the benefit of the person whose property has been seized and it was open to that person to waive that benefit. It was further observed that if the specified period is held to be mandatory, it would cause more injury to the citizens than to the Revenue. A distinction was made with statutes providing periods of limitation for assessment. It was noticed that Section 132 does not deal with taxation of income. Considered in that background, ratio of the decision in Pooran Mal case[(1975) 4 SCC 568 : 1975 SCC (Tax) 346 : (1975) 2 SCR 104] has no application to the case at hand."

23. That view had been taken by the Supreme Court in its earlier decision in **Grindlays Bank Limited Vs. ITO (supra)** in the context of a proceeding under the Income Tax Act, 1961. Therein, after taking note of its earlier decision in Director of Inspection of **Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal & Sons (supra),** with reference to an assessment order passed consequent to an earlier direction issued by the High Court, in writ jurisdiction, the Supreme Court reasoned as under:

"7. .....Ordinarily, the High Court does not substitute its own order for the order quashed by it. It is, of course, a different case where the adjudication by the High Court establishes a complete want of jurisdiction in the inferior court or tribunal to entertain or to take the proceeding at all. In that event on the quashing of the proceeding by the High Court there is no revival at all. But although in the former kind of case the High Court, after quashing the offending order, does not substitute its own order it has power nonetheless to pass such further orders as the justice of the case requires. When passing such orders the High court draws on its inherent power to make all such orders as are necessary for doing complete justice between the parties. The interests of justice require that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court, by the mere circumstance that it has initiated a proceeding in the court, must be neutralised. The simple fact of the institution of litigation by itself should not be permitted to confer an advantage on the party responsible for it. The present case goes further. The appellant would not have enjoyed the advantage of the bar of limitation if, notwithstanding his immediate grievance against the notice under s. 142(1) of the Income Tax Act, he had permitted the assessment proceeding to go on after registering his protest before the Income Tax Officer, and allowed an assessment order to be made in the normal course. In an application under section 146 against the assessment order, it would have been open to him to urge that the notice was unreasonable and invalid and he was prevented by sufficient cause from complying with it and therefore the assessment order should be cancelled. In that event, the fresh assessment made under section 146 would not be fettered by the bar of limitation. Section 153(3)(i) removes the bar. But the appellant preferred the constitutional jurisdiction of the High Court under Article 226. If no order was made by the High Court directing a fresh assessment, he could contend as is the contention now before us, that a fresh assessment proceeding is barred by limitation. That is an advantage which the appellant seeks to derive by the mere circumstance of his filing a writ petition. It will be noted that the defect complained of by the appellant in the notice was a procedural lapse at best and one that could be readily corrected by

serving an appropriate notice. It was not a defect effecting the fundamental jurisdiction of the Income tax Officer to make the assessment. In our opinion, the High Court was plainly right in making the direction which it did. The observations of this court in Director of Inspection of Income Tax (Investigation), New Delhi vs. Pooran Mall & Sons are relevant. It said:

"The court in exercising its powers under Article 226 has to mould the remedy to suit the facts of a case. If in a particular case a court takes the view that the Income Tax Officer, while passing an order under section 132(5), did not give an adequate opportunity to the party concerned it should not be left with the only option of quashing it and putting the party at an advantage even though it may be satisfied that on the material before him the conclusion arrived at by the Income Tax Officer was correct or dismissing the petition because otherwise the party would get an unfair advantage. The power to quash an order under Article 226 can be exercised not merely when the order sought to be quashed is one made without jurisdiction in which case there can be no room for the same authority to be directed to deal with it. But, in the circumstances of a case, the court might take the view that another authority has the jurisdiction to deal with the matter and may direct that authority to deal with it or where the order of the authority which has the jurisdiction is vitiated by circumstances like failure to observe the principles of natural justice, the court may quash the order and direct the authority to dispose of the matter afresh after giving the aggrieved party a reasonable opportunity of putting forward its case. Otherwise, it would mean that where a court quashes an order because the principles of natural justice have not been complied with, it should not while passing that order permit the tribunal or the authority to deal with it again irrespective of the merits of the case."

The point was considered by the Calcutta High Court in Cachar plywood Ltd. v. Income Tax Officer and the High court, after considering the provisions of section 153 of the Income Tax Act, considered it appropriate, while deposing of the writ petition, to issue a direction to the Income Tax Officer to complete the assessment which, but for the direction of the High court, would have been barred by limitation." (emphasis supplied)

24. the Supreme Court in **Padma Sundar Rao (Dead) Vs St. of Tamil Nadu (supra)** is material and pertinent to the facts of the present case, as well. In the context of an order passed under Section 32 of the Act, there clearly existed a remedy of appeal under Section 55 of that Act. In such appeal (where preferred), by virtue of Section 55 (5)(b)(ii) of the Act, the appellate authority would be vested with jurisdiction and power to set aside the order impugned before it and to direct the assessing authority to pass a fresh order, after conducting such inquiry as may be specified by the appeal authority. For ready reference, provisions of Section 55 of the Act may be noticed as under:

Section 55. Appeal

(1) Any dealer or other person aggrieved by an order made by the assessing authority, other than an order mentioned in subsection (7) of section 48 may, within thirty days from the date of service of the copy of the order, after serving a copy of appeal memo on the assessing authority or the Commissioner, appeal to such authority (hereinafter referred to as appellate authority), as may be prescribed:

Provided that where due to any reason, any appellant fails to serve a copy of appeal memo on the assessing authority before filing appeal, he may serve copy of such appeal memo within a time of one week from the date on which appeal has been filed or within such

further time as the appellate authority may permit.

(2) Where an appeal has been filed against an order referred to in subsection (1), the Commissioner may apply to the appellate authority to examine the legality and propriety of such order on such point as may be mentioned in the application. A copy of such application shall be served on the appellant and shall be decided along with the appeal filed by the appellant:

Provided that no application for examination of legality and propriety shall be entertained after the disposal of appeal:

Provided further that where the Commissioner has filed an application, the appellant shall not be entitled to withdraw appeal filed by him.

Explanation For the purposes of this section Commissioner includes an officer authorised to file appeal on behalf of the Commissioner before the Tribunal under section 57.

(3) No appeal against an assessment order under this Act shall be entertained unless the appellant has furnished satisfactory proof of the payment of the amount of tax or fee due under this Act on the turnover of sale or purchase, or both, as the case may be, admitted by the appellant in the tax returns filed by him or at any stage in any proceedings under this Act, whichever is greater.

(4)The appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(5)The appellate authority may, after calling for and examining the relevant records and after giving a reasonable opportunity of being heard to the appellant and the Commissioner

(a) in the case of an order of assessment and penalty.

(i) confirm or annul such order ; or

(ii)vary such order by reducing or enhancing the amount of assessment or penalty, as the case may be, whether such reduction or enhancement arises from a point raised in the grounds of appeal or otherwise ; or

(iii) set aside the order and direct the assessing authority to pass a fresh order after such inquiry as may be specified; or

(iv) direct the assessing authority to make such inquiry and to submit its report within such time as may be specified in the direction or within such extended time as it may allow from time to time, and on the expiration of such time the appellate authority may, whether the report has been submitted or not decide the appeal in accordance with the provisions of the preceding sub-clauses; or

(b) in the case of any other order

(i) confirm, cancel or vary such order; or

(ii) set aside the order and direct the assessing authority to pass a fresh order after such inquiry as may be specified:

Provided that nothing in this subsection shall preclude the appellate authority from dismissing the appeal at any stage with such observations as it deems fit where the appellant applies for withdrawal of the same and no request for examination of legality or propriety of order under appeal has been made by the Commissioner.

(6) The appellate authority, may, on the application of the appellant and after giving

the Commissioner a reasonable opportunity of being heard stay, except the operation of order appealed against, the realisation of the disputed amount of tax, fee or penalty payable by the appellant till the disposal of the appeal :

Provided that -

(i) where an order under appeal involves dispute about tax, fee or penalty, no stay order shall remain in force after thirty days from the date on which the same has been granted, if the appellant does not furnish security to the satisfaction of the assessing authority for payment of the amount, the realisation whereof has been stayed within the aforesaid period of thirty days;

(ii) no such application shall be entertained unless it is filed along with the memorandum of appeal under subsection (1);

(7) Section 5 of the Limitation Act, 1963, shall apply to appeals or other applications under this section.

(8)The appellate authority shall be under the superintendence and control of the Commissioner:

Provided that in the exercise of such superintendence and control, no order, instructions or directions shall be given by the Commissioner so as to interfere with the discretion of the Appellate Authority in the exercise of its appellate functions.

(9) For the purposes of this section service of an order passed by appellate authority under this section and service of memo of appeal on the State Representative, as defined in the rules framed under this Act, shall be deemed to be service on the Commissioner.

(10) All appeals arising out of the same cause of action in respect of an assessment year, as far as possible, shall be heard and decided together."

25. Thus, it cannot be disputed, the petitioner had a remedy of appeal against the orders dated 16.08.2016. Therefore, it also cannot be further disputed, if those appeals had been filed, the appellate authority would have been within its jurisdiction to set aside the orders dated 16.08.2016 on a reasoning similar to that adopted by this Court, in its order dated 21.02.2017. The consequence of such a finding would naturally be - the matter would have been remitted to the assessing authority to pass a fresh order. Merely because the petitioner chose to approach this Court under Article 226 of the Constitution of India against the order dated 16.08.2016, it can never be said, the petitioner was entitled to any better or other relief or rights.

26. It would have been one thing if while quashing the order dated 16.08.2016, this Court had found, the said order suffered from an inherent lack of jurisdiction. In that case, there would be no question or occasion for any further proceedings to arise. That is not the case here. On the contrary, the order dated 21.02.2017 passed by this Court distinctly records - the order dated 16.08.2016 was laconic on account of non-compliance of the rules of natural justice. Logically therefore, that order was found competent in jurisdiction, but defective on procedural aspects.

27. Looked in that light, the further direction issued by the Court requiring the assessing authority to conduct fresh proceeding in accordance with law clearly is an order that drew on the inherent powers of this Court, consistent to the statutory scheme arising from the plain language of Section 55 (5)(b)(ii) of the Act. Therefore, that further direction would inhere in and it would automatically attach to the order passed by the Writ Court. The rule of

expiry of limitation to pass the impugned order dated 21.06.2017 (invoked by the petitioner), has no applicability to the present facts.

28. Next, the ratio of the five-Judge Constitution bench of the Supreme Court in **Supdt. Of Taxes, Dhubri & Ors. Vs. Onkarmal Nathmal Trust (supra)** is also inapplicable and distinguishable to the facts of the present case. There an issue arose, if assessment notices could be first issued beyond the statutory period prescribed. The State contended, the stay/injunction against the assessment proceedings protected the statutory period of limitation. Rejecting that objection, the Supreme Court reasoned, an injunction order did not amount to waiver of the statutory provisions. Further, issuance of notice to assess was held to be related to exercise of jurisdiction. Only the conduct or continuance of the assessment proceedings was stayed/injuncted but not the exercise of jurisdiction to undertake that journey. That not done during the available limitation, the assessment notices subsequently issued were found not protected on principle of waiver or consent. Illustratively, it was held in paragraph 28 to 30 of that decision, as below:-

"28. In the present case, the respondent cannot be said to have waived the provisions of the statute. There cannot be any waiver of a statutory requirement or provision which goes to the jurisdiction of assessment. The origin of the assessment is either an assessee filing a return as contemplated in the Act or an assessee being called upon to file a return as contemplated in the Act. The respondents challenged the Act. The order of injunction does not amount to a waiver of the statutory provisions. The issue of a notice under the provisions of the Act relates to the exercise of jurisdiction under the Act in all cases. Revenue statutes are based on public policy. Revenue statutes protect the public on the one hand and confer power on the State on the other.

29. The decision in William Shepard v. O.E.D. Barron on which the Solicitor general relied for the proposition that the constitutionality of a rule of assessment can be waived does not have any application in the present case. In the American decision (supra) an objection against the frontage rule of assessment for a public improvement, prescribed by the State laws, was not allowed to be urged to defeat the collection of the assessments. The reason was that the abutting owners who petitioned for the improvement under the Act, actively participated in carrying out the work, recognized the justice of the assessments from time to time during its progress, and signed a statement for the purpose of inducing the issuance and purchase of country improvement bonds to the effect that the work had been properly done. In the American decision the work was done at the instance and request of the owners. The Court found an implied contract arising from facts that the party at whose request and for whose benefit the work had been done would pay for it in the manner provided for by the Act under which the work was done.

30. It is against principle to suggest that the appellants did anything wrong or, they are taking advantage of anything wrong Jessel, M.R. In Re. Hallett's Estate Knatchbull v. Hallett said:

Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that act was intentionally and in fact done wrongly.

The respondents were entitled to impeach the statue under which they were made liable. The respondents have done no wrong. The respondents are not taking any advantage of any act of theirs. The State was entitled to resist the respondents. The State did so by contending

that the Act was valid, but the State took no steps during the pendency of the litigation to take directions from the Court to serve notices of demand upon the appellants to keep alive the right of the respondents." (emphasis supplied)

29. In the present case, undisputedly, the prior notices leading to the orders dated 16.08.2016 were issued well within time. Those were not quashed by this Court in Writ Tax No. 97 of 2017. Such notices were therefore valid. Thus, the jurisdiction had been exercised within time prescribed by law. Upon the resulting orders dated 16.08.2016 being set aside by this Court on 21.02.2017 and, the matter being remitted to the assessing authority, strictly, there did not arise an issue or question of jurisdiction being exercised outside limitation. Therefore, the ratio in **Supdt. Of Taxes, Dhubri & Ors. Vs. Onkarmal Nathmal Trust (supra)** is wholly inapposite.

30. As already discussed above, owing to completely dissimilar legislative scheme under the Act and the Land Acquisition Act, 1894, the reasoning obtaining with respect to limitation to conduct proceedings in remand under the Land Acquisition Act, 1894 is wholly inapplicable to the facts of the present case. Thus, the ratio obtaining in **Baswaraj & Anr. Vs. SLAO (supra)** as also the division bench decision of the Court in **Ram Nivas Vs. State of U.P. and Others (supra)**, are wholly distinguishable and inapplicable to the present case.

31. Consequently, the ratio in the seven-Judge Constitution Bench decision of the Supreme Court in **P. Ramachandra Rao Vs. State of Karnataka (supra)** relied upon by learned counsel for the petitioner to submit - limitation cannot be created and the Court cannot legislate to fill up casus omissus is found to be distinguishable in the context of the clear and undisputed facts of the present case discussed above and the clear language of the provisions of Section 32 read with Section 29(6) of the Act.

32. For the above reasons, we do not find the proceedings instituted by notice dated 29.05.2017 or the consequent order dated 28.07.2017 to be lacking in inherent jurisdiction, on account of the bar of limitation.

33. As to the next submission of learned counsel for the petitioner, there can be no two opinions on the issue. A disputed or debatable question cannot be gone into in a proceeding seeking to rectify a mistake apparent on the face of record. Such a mistake or error must be glaring or self-apparent and not one that may be established upon elaborate argument or debate. This principle was recognized and applied in the context of taxation laws in Th**ungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh, AIR 1964 SC 1372**. It has been consistently followed and applied in **T.S. Balram Vs. Volkart Bros. (1971) 2 SCC 526 (SC) and CIT Vs. Hero Cycles Pvt. Ltd. (1997) 8 SCC 502**, amongst others. Applying that rule, we now consider the reasoning adopted by the assessing authority - the limitation to pass the order to recall the second composite ex-parte order would be the balance period of limitation that survived upon the second-composite ex-parte assessment order being passed on 18.09.2013 i.e., up to 30.09.2013 only. Here, it would be apposite to take note of the language of Section 29(6) and Section 32(1) of the Act. For ready reference, Section 32(1) of the Act reads as under:

*"**Section 32. Power to set aside ex-parte order of assessment or penalty***

(1) In any case in which an order of assessment or reassessment or rejection of application for registration or order of penalty is passed ex-parte, the dealer may apply to the assessing authority within thirty days of the

service of the order to set aside such order and reopen the case; and if such authority is satisfied that the applicant did not receive notice or was prevented by sufficient cause from appearing on the date fixed, it may set aside the order and reopen the case for hearing:

Provided that no such application for setting aside an ex-parte assessment order shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax to be due under this Act on the turnover of sales or purchases, or both, as the case may be, admitted by the dealer in the returns filed by him or at any stage in any proceeding under this Act, whichever is greater".

34. Then, Section 29(6) of the Act reads as under:

*"**29. Assessment of tax of turnover escaped from assessment. (6).** Where an order of assessment or re-assessment has been set aside by the assessing authority himself under section 32, a fresh order of assessment or re-assessment may be made before expiry of the assessment year in which such order of assessment or reassessment has been set aside:*

Provided that if an order of assessment or re-assessment made ex parte is set aside on or after first day of October in any assessment year, fresh order of assessment or re-assessment may be made on or before thirtieth day of September of the assessment year succeeding the assessment year in which such ex parte order of assessment or re-assessment was set aside.

ssessment is made ex parte and where such second or subsequent ex parte order of assessment or reassessment is to be set aside and a fresh order of assessment or reassessment may be made within the time aforementioned when the first ex parte order is set aside."

35. Thus, in the first place, under the Section 29(6) of the Act, the limitation to pass the fresh/second assessment order/s existed up to the end of the Assessment Year in which such (first) ex-parte assessment order was set aside. Since the first ex-parte assessment order was set aside on 11.01.2013, such limitation existed up to 31.03.2013. However, by virtue of the first proviso to Section 29(6), that limitation stood extended up to 30.09.2013. It was so because of the language of the first proviso to Section 29(6) of the Act and the fact the order dated 11.01.2013 was passed after the cut-off date 1st October day of the A.Y. 2013-14, prescribed under Sub-Section (6) of Section 29 of the Act.

36. The second proviso to Section 29(6) of the Act is only clarificatory. It enforces that rule of limitation as exists under Section 29(6) of the Act read with the first proviso thereto, to all the subsequent assessment orders that may be passed, upon further orders to set aside any/all subsequent or successive *ex-parte* assessment order/s. Thus, the limitation to pass the fresh assessment order/s after setting aside the second, third, fourth or any other subsequent *ex-parte* assessment order would be determined applying the rule contained in Section 29(6) of the Act read with the first proviso thereto. The second proviso to Section 29(6) of the Act does not prescribe a new or different period of limitation.

37. Thus, as explained above, if the second or any subsequent *ex-parte* assessment order was set aside (under Section 32 of the Act), on or before 30th September of an Assessment Year, the limitation to pass a fresh assessment order thereafter, would exist up to 31st March of that Assessment Year. If, however, the order to set aside the second or the subsequent ex-parte assessment order was passed on or after 1st October of an Assessment Year, the limitation to pass the fresh assessment order would stand extended up to 30th September of the next Assessment Year.

38. Clearly, the above rule is a rule of prudence and procedure to ensure compliance of rules of natural justice and to ensure a minimum time of six months to the concerned assessing authority, to conclude an assessment proceeding/s, reopened upon an earlier *ex-parte* assessment order being set aside under Section 32 of the Act. Unless that reasonable time is allowed, the power/authority of such an assessing authority to pass a third or other subsequent assessment order would be defeated. Also, an undue benefit would arise to the concerned assessee, unintendedly as no assessment order may come to be framed in his case, owing to absence of time.

39. At the same time, the exercise of power to set aside an *ex parte* assessment order, is statutorily governed by provisions of Section 32(1) of the Act. It has been quoted above. Plainly, that provision does not provide for any period of limitation to pass the order on an application filed to recall an *ex parte* assessment order. It only prescribes for a fixed limitation of thirty (30) days (computed from the date of service), to file an application to recall an *ex-parte* assessment order.

40. That provision does not restrict the right of an assessee to seek recall of an *ex parte* assessment order, only once or twice, with respect to an Assessment Year. In fact, the statute contemplates or allows the assessee to seek recall of each and every *ex parte* assessment order, every time such an order comes into existence, irrespective of and, unaffected by the fact that the assessee may have suffered such an *ex parte* assessment order, for that Assessment Year, many times earlier. Thus, every time an ex parte assessment order was framed against the petitioner, for the A.Y. 2008-09 (U.P., Central and, Entry Tax), a right accrued to the petitioner to seek its recall, subject to the condition that such application seeking recall be filed within thirty (30) days of service of such an *ex parte* order.

41. There is nothing in the language of Section 32 and/or Section 29(6) of the of the Act as may be read to introduce a time limit on the power of the assessing authority to deal with and/or allow an otherwise validly filed application. In the instant case, it is not even alleged by the revenue that the application filed by the petitioner to recall the *ex parte* order dated 18.09.2013 was filed beyond thirty (30) days of that order being served. Therefore, it may be safely assumed that that application was filed in time. Consequently, it had to be dealt with and decided on its own merits, unaffected by any other or further consideration of limitation to frame a fresh assessment order. That stage had not yet arrived. That limitation would arise under Section 29(6) of the Act, only in the event and at the stage of the application filed under Section 32 being allowed. It would be governed by Section 29(6) (read with the first proviso thereto), of the Act.

42. Thus, both for reason of grammar as also to keep the provision workable, the interpretation made by the assessing authority and as canvassed by the learned Standing Counsel cannot be accepted. An interpretation that makes the provision unworkable or leads to absurd results must always be rejected. In view of the above, we find that the assessing authority had not committed any mistake less so a mistake apparent on the face of record in passing the order dated 22.02.2014.

43. The last date to pass the second-composite *ex-parte* assessment order was 30.09.2013. That order was passed within time, on 18.09.2013. At the same time, those dates and facts did not limit the exercise of power of the assessing authority to set-aside that second-composite *ex-parte* order, on or before the date

30.09.2013. There being no allegation of the application dated 21.02.2014 filed beyond the period of thirty days from the date of service of the order dated 18.09.2013, the order dated 22.02.2014 was wholly within time.

44. As noted above, no limitation was prescribed under Section 32 of the Act - to pass an order on an application filed within time, under that Section, to recall the second-composite *ex parte* assessment order dated 18.09.2013, for the A.Y. 2008-09 (U.P., Central and Entry Tax). Therefore, the order dated 22.02.2014 was not time barred, on any count.

45. The time limitation to pass the subsequent/third set of assessment order/s arose under Section 29(6) of the Act only upon the order dated 22.02.2014 being passed. That limitation arose with reference to that date, under Section 29(6) read with the first and the second provisos thereto. As discussed above it existed up to 30.09.2014. Hence, the surviving period of limitation to pass the second set of assessment orders was wholly extraneous to the issue involved in this case.

46. Consequently, the ratio in **CST Vs Sukhlal Ice & Cold Storage Co. (supra),** is also irrelevant to the issue before us. Therefore, the reasoning offered by the assessing authority purportedly to rectify the order dated 22.02.2014 is wholly unacceptable and contrary to law. Consequently, that order has not been shown to suffer from any mistake apparent from the face of record. No other reason has been stated in the order dated 28.07.2017 or canvassed in the Counter Affidavit, to justify the recall of the orders dated 22.02.2014, 18.07.2014 and 03.10.2015.

47. The fact that in the instant case the assessment proceedings for A.Y. 2008-09 (U.P., Central and, Entry Tax) became time barred on 30.09.2016 or that no assessment order came to be passed in the case of the petitioner and therefore taxable transactions performed by the petitioner may have remained from being assessed, is of no concern to this Court, in the facts of the present case. In a proverbial cat-and-mouse game enacted by the revenue and the taxpayer, the Writ Court sits an umpire. It may be guided strictly by the law alone. Equity has less or no role to play. Therefore, it is not for us to judge if the "mouse' deserved to be caught by the "cat'. If the "cat' has been lazy or mistaken, so be it. The "mouse' lives. We may only ensure strict adherence to the rule of law. That done, the fact that revenue has suffered a loss due to an error on its part, falls outside the domain of this Court, in these proceedings. Remedial action lies elsewhere.

48. Accordingly, the impugned order dated 21.06.2017 passed under Section 31 of the Act, for the A.Y. 2008-09 (U.P., Central and, Entry Tax), is hereby quashed. The writ petition succeeds and is accordingly ***allowed***. No order as to costs.

(2021)12ILR A775
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2021

BEFORE

THE HON'BLE NAVEEN SRIVASTAVA, J.

Criminal Appeal No. 3203 of 2016

Sheetal ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sunita Chauhan, Sri Vishwanath Vishwakarma

Counsel for the Respondent:
Dr. S.B. Maurya, Sri Ansuman Singh, A.G.A.

Criminal Law – Indian Penal Code, 1860 – Sections 376 - Protection of Children against Sexual Offences, 2012 Section 4 -Victim is 5 years old-Accused induced her and committed rape

on her-No material contradiction in sequence of occurrence-and identity of accused-after ascertaining her competency to give statement-it was recorded by the Trial Court-statement of victim to be critically appreciated with utmost sensitivity.

Held, *It is understood when a self respected woman like the victim would come forward in a Court to make a humiliating statement against her honour such as is involved in the commission of rape on her it is beyond of imagination that parents of the victim would manufacture a false case at the cast of assassinating the character of their own daughter though victim was a minor girl but in any rate she is woman with all attributes showing modest to her.* **(para 30)**

Appeal dismissed. (E-9)

List of Cases cited:

1. Himachal Pradesh Vs Sanjay Kumar @ Sunny (2017) 2 SCC 1: (AIR 2017 SC 463)

2. Parminder @ Ladka Pola Vs St. of Delhi (2014) 2 Supreme Court Cases 592

3. Wahid Khan Vs St. of M.P. (2010) 2 SCC 9

4. Narendra Singh Vs St. of M.P. (2004) 10 SCC 699

5. Doodh Nath Pandey Vs St. of U.P., AIR 1981, SC 911

(Delivered by Hon'ble Naveen Srivastava, J.)

1. The present criminal appeal under Section 374 (2) of Cr.P.C. has been filed against the judgement and order dated 04.05.2016 passed by Special Judge (POCSO)/Additional Sessions Judge, Etawah in Sessions Trial/Special Case No. 26 of 2014 (State Vs. Sheetal) convicting the appellant Sheetal to ten year rigorous imprisonment under Section 376 (2) (Jha) I.P.C. with fine of Rs. 10,000/- Further, accused-appellant Sheetal has been convicted under Section 506 I.P.C and sentenced to two years imprisonment. Accused-appellant also convicted under Section 4 POCSO Act and sentenced to seven years imprisonment with fine of Rs. 5,000/-.

2. In brief the prosecution case is as follows:-

On 25.06.2021, the victim/prosecutrix aged about 5 years, was playing outside of her house, at about 09:30 am accused induced her and committed rape on her in the field of Kushal Pal. The victim has reported the incident to one Man Singh. Man Singh and Robbin brought the victim to her house, where she narrated everything to her parents. Blood was also found on the underwear of the victim.

3. The matter was reported to the police and on the basis of written complaint of the informant Baburam (PW2), F.I.R. on 25.06.2014 at about 10:30 am was registered.

4. PW5 Chandraprakash Bhatt, Investigating officer took up the investigation, victim was sent for medical examination. On conclusion of the investigation, Police submitted the charge sheet against the accused under Sections 376 (2) (Jha), 506 I.P.C. and under Section 4 POCSO Act.

5. After framing of charge against accused under Sections 376 (2) (Jha), 506 I.P.C. & Section 4 POCSO Act, he was put for trial. Trial was concluded after recording the statements as many as seven witnesses.

6. PW1 is the victim herself.

7. PW2 is the informant and grand-father of the victim.

8. PW3 is the doctor who medically examined the victim on 25.06.2014 and furnished a report Ex. Ka2 and Ka3. PW4 is the Investigating Officer who submitted the charge sheet in this case, PW6 is the uncle of the victim and PW7 is the constable Moharrir who reduced the contents of the F.I.R. in G.D.

9. Accused-appellant in his statement recorded under Section 313 Cr.P.C. denied the occurrence and alleged false implication and in support thereof produced DW1 and DW2. They also denied the occurrence having been taken place.

10. Trial court after evaluating the evidence on record, convicted and sentenced the accused-appellant as above.

11. Heard Sri Vishwanath Vishwakarma, learned counsel for the appellant and Dr. S. B. Maurya assisted by Sri Ansuman Singh, learned A.G.A. for the State and perused the record.

12. Learned counsel for the appellant in support of appeal contended that there are contradictions in the statements of the victim, her grand-father (PW2) and PW6. It is also submitted that medical evidence on record does not corroborate the charges against the accused-appellant. He also contended that hymen of the prosecutrix was found to be intact and no live spermatozoa was found on the person of the victim, so it cannot be said that offence of rape was committed on her.

13. Learned counsel for the appellant canvassed that prosecution have failed to establish the necessary ingredients for the offence under the POCSO Act. The Special Court could not have relied on any presumption available under the provisions of POCSO Act especially ignoring the defence that accused-appellant has been falsely implicated in the present case because of certain property dispute.

14. Learned A.G.A. in support of the impugned judgement contends that it is settled law that in a case of rape/penetrative sexual assault, the consistent testimony of prosecutrix would be sufficient to bring in the guilt of the accused and courts except in rarest of rare cases should not seek corroboration of the prosecutrix testimony. He also argued that it is also settled that primacy must be given to the prosecutrix testimony over the medical evidence in the event they are at variance with each other.

15. He further submitted that in the present case the victim has made allegations against accused-appellant for committing penetrative assault on her and her clear and cogent evidence would suffice to establish the ingredients both under Sections 376 (2) (Jha) of I.P.C. and Section 4 of POCSO Act, therefore, the impugned judgement of Special Court is neither perverse nor contrary to law.

16. In light of rival submissions made on behalf of learned counsel for the appellant and learned A.G.A., the question which arises for consideration is (Whether Special Court finds that prosecution has established the accused-appellant culpability for punishment under the provisions of Sections 376 (2) (Jha) I.P.C. and Section 4 of the POCSO Act is either perverse or otherwise contrary to law).

17. In view of the grounds urged above, it would be helpful to refer the law elucidated by the Hon'ble Supreme Court as regards the appreciation of evidence of the victim as well as minor victim, in cases where the accused is charged with the offence of rape/penetrative sexual assault.

Hon'ble Apex Court in State of **Himachal Pradesh Vs. Sanjay Kumar @ Sunny (2017) 2 SCC 1: (AIR 2017 SC 463)** has held that:-

"It is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking

corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood.

As regards the appreciation of a minor victim's testimony, it has been held thus:-

"By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases. In such a situation one has to take stock of the realities of life as well."

The evidence on record will have to be appreciated in light of the above settled legal propositions.

18. The incident has occurred on 25.06.2014 in the morning at about 09:30 am, the victim narrates the incident to her grand-father, when she came to her house. The F.I.R. was lodged at around 10:30 a.m. on the same day and the victim was sent for her medical examination. These circumstances, indicate that victim parent despite being grief-stricken have acted with alacrity. In fact the PW2 the informant has stated in his statement that victim related the incident on enquiry.

19. After ascertaining that victim was aged about 6 years and competent to give her statement before the Court below, the trial court recorded her statement in which she explained how the accused-appellant taken her to the field and removed her under garments and penetrate on her, she felt pain and cried. She also stated that bleeding started but accused-appellant tried to rape her closing her mouth with her under garments. She further stated that she was also bitten by the accused-appellant.

The victim PW1 who was about five years of age at the time of incident, could not know the significance or the implication of the expressions such as a sexual intercourse or rape or such other expressions has described, what happened to her.

20. It is seen that F.I.R. had been lodged with the jurisdictional police station in the most natural circumstances and victim has been consistent in her statement right from the time she related the incident to informant PW2, she not only consistent in her statement recorded under Section 161 Cr.P.C. before the Investigating Officer but deposed in similar lines before the court below, thus her statement about the incident is consistent and cogent and cannot be termed unbelievable.

21. PW3 Dr. Jaya Srivastava, who examined the victim has stated that hymen was ruptured and fresh bleeding was present. As per pathological report the dead or alive sperm was not found but examination of the internal part of the victim shows some sexual act has been done. According to PW3 at the time of internal examination of the victim, fresh bleeding @ clots present.

22. I have carefully examined the report of the F.S.L. where the vaginal Swab of the victim and accused were scientifically examined. As per F.S.L. report the blood stains were found on the wearing apparels of the victim and underwear of the accused spermatozoa and semen was found present. Ex. Ka2 F.S.L. report suggest that seminal stains were found on the underwear.

23. PW4 Dr. Rajeev Kumar Gupta who medically examined the victim has stated before the Court that at the time of her medical examination-

(I) An abrasion 1.0 cm. X 1.5 cm. present on base of tongue and floor of mouth red.

(II) No other visible mark of injury (external) is present.

(III) Profuse bleeding per vaginum present.

The medical report which was furnished by the Dr. PW3 suggest that child has undergone some sexual assault.

24. No suggestion was put to the victim at the time of her cross-examination that immediately before the incident, she had occasioned to play and and sustained injury by falling down in course of her play in agriculture field without which such vaginal injury could not be sustained by the victim because it was the definite statement of the victim that she forcefully sexually assaulted by the accused-appellant.

25. It is grossly contended by learned counsel for the appellant that since hymen of the prosecutrix was found to be intact and no spermatozoa was found on her private part, no offence of rape is made out.

26. It would be relevant here to refer the explanation, for our present purpose, appended to Section 375 I.P.C. The explanation reads as follows:-

"Explanation-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

The consistent view of the Apex Court in this regard is that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration would be inconsequential.

27. In the present case the victim has given the statement that accused-appellant dis-robed her waist below and tried to penetrate which she described as *(Ganda Kam)*, causing her pain and she started bleeding from her private part.

28. The Hon'ble Supreme Court in **Parminder @ Ladka Pola Vs. State of Delhi (2014) 2 Supreme Court Cases 592** in a case arising from a similar incident in the year 2001, referring to its earlier decision in **Wahid Khan Vs. State of Madhya Pradesh (2010) 2 SCC 9** has referred to an extract from Modi on Medical Jurisprudence and Toxicology (Twenty First Edition) and held as follows:-

"Thus, to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genital or leaving any seminal stains." Section 375, IPC, defines the offence of "rape' and the Explanation to Section 375, IPC, states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. This Court has accordingly held in ***Wahid Khan v. State of Madhya Pradesh [(2010) 2 SCC 9]*** *that even the*

slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. In the aforesaid case, this Court has relied on the very same passage from Modi in Medical Jurisprudence and Toxicology.

This enunciation as regards what amounts to penetration to constitute an offence of Rape would continue to apply even after the Amendment Act of 2013 by which the provisions of Section 375 of I.P.C. are substituted. The provisions of Section 375 of I.P.C. are substituted. The provisions of section 375 of I.P.C., prior to amendment stipulated that a person is said to have committed Rape, subject to exceptions provided therein, when such person has intercourse with a woman under the circumstances described therein. The 1 Explanation to this unamended Section 375 of I.P.C. stipulated that penetration, without defining the expression penetration, would be sufficient to constitute the sexual intercourse necessary for an offence of Rape. After amendment by the Amendment Act of 2013, section 375 of I.P.C. stipulates that a man is said to commit Rape under four circumstances mentioned in sub-clauses (a), (b), (c) and (d) thereof, and sub-clause (a) reads, "penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes are to do so with him or any other person. The expression penetrates his penis, to any extent, into the vagina ..... ., in the light of the victim's consistent and cogent evidence that the appellant-accused inserted his male organ in the victim's pudendum and pushed himself to penetrate would constitute Rape as contemplated under Section 375 of I.P.C. as well as Penetrative Sexual Assault as contemplated under Section 3 of the provisions of the POCSO Act."

29. PW2 the informant who is grand-father of the victim in his statement stated that victim reported the incident and the F.I.R. was lodged on the very same day after a written report Ex. Ka1 was escribed by Rajeev Yadav. During his entire cross-examination, PW2 could not be dented as regards the incident.

I do not find any material contradiction as regards the sequence of the occurrence as also the identity of accused-appellant.

30. The settled proposition of law is that even statement of victim in a case of rape has to be critically appreciated with utmost sensitivity keeping in view the broader probability of the incident. It is understood when a self respected woman like the victim would come forward in a Court to make a humiliating statement against her honour such as is involved in the commission of rape on her it is beyond of imagination that parents of the victim would manufacture a false case at the cast of assassinating the character of their own daughter though victim was a minor girl but in any rate she is woman with all attributes showing modest to her.

31. So far as the plea of alibi is concerned, it is argued on behalf of appellant that on the date of occurrence he was on duty in another village and in support of his contention DW1 and DW2 have also been examined as defence witness, they deposed that accused-appellant was present at that time in Village Pathakpura.

32. The plea of alibi reflected under Section 11 of the Evidence Act. It has been held in number of citations such as **Narendra Singh Vs. State of M.P. (2004) 10 SCC 699** that- "Strict proof is required to prove the alibi and burden is upon the accused." It has further been held that- "accused must provide the strict proof of impossibility of the presence of the accused at the place of occurrence at the time of incident."

In **Doodh Nath Pandey Vs. State of U.P., AIR 1981, SC 911,** the Apex Court has laid-down-

"The plea of alibi succeeded only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed. Distance thus would be material factor in the matter of acceptability of plea of alibi."

33. In the present case the accused-appellant was present in the adjoining village and it was not such a great distance that it would be impossible for the accused-appellant to be absent at the place of occurrence when the incident took place. In these circumstances, the testimonies of DW1 and DW2 do not inspire confidence as the testimony of PW1 the victim has undoubtedly established the incident which also finds corroboration from the medical evidence as well as testimony of PW2.

In the statement recorded under Section 313 Cr.P.C, accused-appellant had taken plea that to grab his land, one Rajeev Yadav, Corporator in collusion with the informant has falsely implicated him in the present case but the details of such property had not been given by the accused-appellant. So in the absence of any proof of hostility between the parties, it would be very difficult to believe that accused-appellant has been falsely implicated in the present case.

34. In view of the above discussions, I am impressed to hold that victim was violated by the accused-appellant in the field which she not only narrated to her parents but also disclosed the same before the Court below. The evidence tendered by the victim that she was sexually assaulted by the accused has been corroborated by the evidence tendered by the doctor. I have, therefore, no doubt that the prosecution has proved its case beyond all reasonable doubts. The trial Court has considered all the probable aspects of the case after critically evaluating the evidence adduced in this case. I find sufficient reason to uphold the conviction of the appellant.

35. The appeal lacks merit and is accordingly dismissed.

36. The impugned judgement/order dated 04.05.2016 of the trial court is hereby confirmed.

37. Let a certified copy of the judgement/ order along with lower court record be sent to the court concerned for necessary compliance.

(2021)12ILR A781
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 3691 of 2018

Sunil Chaudhary ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri J.P. Pandey, Sri Harshit Pandey, Sri Munna Pandey, Sri Rakesh Chandra Upadhyay, Sri Aishwarya Pratap Singh

Counsel for the Respondent:
A.G.A.

Appellant was Lekhpal-demanded bribe-complaint made in office of Anti Corruption-pre trap exercise was conducted-caught red handed-Demand of illegal gratification is sine qua non to constitute the offence under the Act-voluntarily acceptance to be proved beyond doubt-proved.

Appeal dismissed. (E-9)

List of Cases cited:

1. B.Jayaraj Vs St. of A.P. [2014 SC (supp.) 1837]

2. C.M.Girish Babu Vs CBI Cochin, 2009 (3) SCC 779

3. Surajmal Vs State (Delhi Administration) 1979 (4) SCC 725

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred against the impugned judgment and order dated 3.7.2018, passed by Special Judge, Anti-Corruption/Additional Sessions Judge, Meerut, in Criminal Case No.08 of 2013 *(State vs. Sunil Chaudhary)* arising out of Case Crime No.1146 of 2013, under Section 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (herein after referred to as 'the Act, 1988'), Police Station-Loni, District-Ghaziabad, by which the appellant was convicted and sentenced for a period of four years and fine of Rs.15,000/- under Section 7 of the Act, 1988 and for a period of five years and Rs.15,000/- fine under Section 13(2) of the Act, 1988 with imprisonment in default of fine. All the sentences were directed to run concurrently.

2. Brief facts of this case are that on 6.6.2013, a case was registered against the appellant-Sunil Chaudhary on the basis of first information report (Ex.ka10), according to which, the appellant was *lekhpal* and posted in Tehsil-Loni, District-Ghaziabad as a public servant. One Sonepal had applied through an application for measurement of his land and the said application was given to concerned Sub Divisional Magistrate. On 4.6.2013, complainant-Pramod Sharma submitted an application in the office of Anti-corruption, Meerut, stating that his cousin-Sonepal had moved an application to SDM for measuring his land. That application was sent to *lekhpal*-Sunil Chaudhary. On 3.5.2013, he met with *lekhpal*, but he demanded Rs.50,000/- as bribe for measurement of the land. Again on 1.6.2013, he met with *lekhpal*, but he told that he will not make the measurement unless he has given Rs.50,000/-. After bargaining, *lekhpal* was ready to take Rs.30,000/- as bribe and said that he should talk to him on 6.6.2013. It is said in first information report that complainant did not want to give the bribe, but wanted that *lekhpal* should be caught red-handed. After recording the statement of complainant, Inspector G.S.Chauhan was directed to conduct pre-trap exercise. Shri Chauhan submitted report that general reputation of *lekhpal* is of a corrupt public servant. Team for trap was organized and District Magistrate, Ghaziabad, was contacted to make two independent witnesses available. District Magistrate nominated Shri Raj Singh Yadav, DIOS Ghaziabad, and directed that he should take one of his subordinates with him as witness. Shri Raj Singh Yadav took Shri Tasleen with him from the office of DIOS. Trap-team led by Deputy S.P.-Ravindra Pal Singh Tomar, went to the place of occurrence where complainant met with the team. Complainant handed over Rs.30,000/-, consisting of 60 notes of Rs.500/- to D.S.P., who noted the numbers of currency notes. Constable Anand Swaroop applied chemical powder on the notes. After that above notes were handed over to the complainant with the direction that these notes will be given to the *lekhpal* on his demand. Hands of constable Anand Swaroop and the complainant were made to wash separately in the liquid of *sodium-carbonate* and the colour of water turned pink, which was filled in separate bottles and sealed.

3. It was told by the complainant that *lekhpal* has called him at about 01:00 p.m. in front of *Abhinandan Vatika*, trap-teem took the position near *Abhinandan Vatika*. At about 1:15 p.m., he came there in Swift Car bearing No.UP14BR1105. Complainant reached to the *lekhpal* and asked him to conduct the measurement of his land. *Lekhpal* demanded Rs.30,000/- as bribe as decided earlier. Complainant handed over the notes, which were treated with the chemical. Trap-team surrounded *lekhpal* at once. *Lekhpal* tried to flee away, but he was caught 15 steps away from the car at about 1:30 p.m. and treated 60 notes of Rs.500/-

were recovered from his right hand. On the basis of above report, Case Crime No.1146 of 2013 was registered against the appellant.

4. Report was received from Forensic Science Laboratory, Agra, according to which in the sample liquid contained in bottles, sent for chemical examination, *sodium-carbonate* and phenolphthalein was found. This report is Ex.ka16 on record. After investigation, Investigating Officer submitted charge-sheet against the appellant-*lekhpal* under Section 7/13 (1) d and 13 (2) Prevention of Corruption Act, 1988.

5. Learned trial court framed charges against the appellant under Section 7 of the Prevention of Corruption Act, 1988 and Section 13(1) d and 13(2) of the Prevention of Corruption Act, 1988. Learned trial court, after conclusion of trial, convicted the appellant for the aforesaid charges and sentenced as stated earlier. Hence, this appeal.

6. Heard Shri Aishwarya Pratap Singh, learned Advocate, assisted by Shri Munna Pandey, learned counsel for the appellant, Shri S.S.Sachan, learned AGA appearing on behalf of State and perused the record.

7. Learned counsel for the appellant submitted that appellant has been falsely implicated in this case by the complainant due to annoyance. The work of measuring the land was not in the work-domain of the appellant. He has revealed this fact in writing to his superior officers. He further argued that the work of measurement of land was to be conducted by a three-member committee and not by *lekhpal* alone. Therefore, when the work of measurement was not in work-domain of the appellant, there was no question for demanding any bribe. He further submitted that prosecution has failed to prove that any demand of bribe was made by the appellant. It is also submitted that prosecution witnesses have given contradictory statements regarding the dates of demand. It is next argued by counsel for the appellant that story of trapping was narrated by prosecution witnesses, but it is also contrary to the statements of each other. Manner of arrest on the spot is also told differently by prosecution witnesses. Learned counsel contended that in fact, appellant refused for measurement of land because it was not within his work-domain and due to that reason, complainant misunderstood that appellant is in connivance with the other party. Hence, complainant falsely implicated the appellant.

8. *Per contra*, learned AGA submitted that all the witnesses of fact have supported the prosecution case. Minor discrepancies in the statements of witnesses are bound to occur when statements were recorded after a lapse of time, but overall story is the same. It is also submitted that recovery of Rs.30,000/- treated notes was made from the possession of the appellant, which is not a small amount. It is next submitted that Mahaveer Prasad (PW6), Revenue Inspector at the time of occurrence, has proved that the application of complainant's brother, namely, Sonepal was sent to appellant-*lekhpal* in writing. Therefore, it is proved that work had to be conducted by the appellant only. Therefore, there was no question of false implication. Moreover, laboratory report has also supported the prosecution case. As far as demand is concerned, it is a matter between two persons. Learned trial court has rightly convicted and sentenced the appellant. Hence, the appeal is liable to be dismissed.

9. First of all, learned counsel for the appellant has raised the argument with regard to the demand of bribe. It is stated by learned counsel for the appellant that it was a matter of measurement of land of complainant's brother, but this work was not in the domain of appellant. A three-members committee does this work and

complainant's land was also measured by forming a three-members committee. PW1 has categorically stated that SDM formed the committee consisting of Ayub Khan (*Lekhpal*), Rakesh Sharma (*Lekhpal*) and Mahaveer *(Kanoongo)*, which recorded their statements also. Therefore, it is very much natural when the work of measurement was not to be conducted by the appellant, there was no question of demand of bribe.

10. It is also submitted by learned counsel for the appellant that prosecution witnesses have failed to establish the date of aforesaid demand. In this regard, PW1-complainant Pramod Sharma has stated in his statement that he met with appellant in connection with measurement of land for the very first time in May, 2013, but he could not tell that before or after how many days of date 15th of the month, he met with the appellant. In his examination-in-chief, the complainant-Pramod Sharma (PW1) has said that he met with appellant on 1.6.2013 while in cross-examination, he said that he met with him in the month of May, 2013. Learned counsel also submitted that complainant has also said in his statement that he did not meet with any person of anti-corruption department between 1.6.2013 and 6.6.2013 while Ravindra Pal Singh Tomar (PW2), the then Deputy S.P. of Anti-Corruption Department has said that complainant met him on 4.6.2013. In this way, prosecution has measurably failed to establish and prove the factum of demand of bribe by the appellant and when demand is not there, prosecution case does not stand anywhere.

11. Learned counsel submitted a legal argument that demand is *sine qua non* to constitute the offence under the provisions of Prevention of Corruption Act. Learned counsel referred the case law of ***B.Jayaraj vs. State of A.P.*** [2014 SC (supp.) 1837] and submitted that it is held by Hon'ble Apex Court that insofar as the offence under Section 7 is concerned, it is settled position of law that demand of illegal gratification is *sine qua non* to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 of the Act unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe.

12. Learned counsel argued that since demand is *sine qua non* to constitute the offence, in the absence of demand, no case is made out against the appellant and learned trial court convicted and sentenced the appellant without sufficient evidence and without the ingredients of the offence.

13. Learned counsel for the appellant argued that from the prosecution evidence at the worst case, it can be said that currency-notes were recovered from the appellant, but this alone does not constitute the offence. To bring home the charges levelled against the appellant, the prosecution is required to prove beyond reasonable doubt that the accused/appellant had demanded the illegal gratification and accepted the same voluntarily. This argument of learned counsel for the appellant is legally correct. Kerala High Court in ***C.M.Girish Babu vs. CBI Cochin***, 2009 (3) SCC 779 has also upheld this view. In ***Surajmal vs. State (Delhi Administration)*** 1979 (4) SCC 725, Hon'ble Apex Court held that mere recovery of tainted money divorced from the circumstances under which it is paid not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe.

14. In this regard, the statement of PW6 is very important. PW6 was posted as Revenue Inspector, Tehsil-Loni, District-Ghaziabad, in the

month of May, 2013, who has stated in his statement that the Paper No.8ka/2, the application of Sonepal, which was received by him from Hanuman Prasad Maurya *(Tehsildar)* in connection with measurement of the land. He has also stated that he had sent this application to the appellant-Sunil Chaudhary on 8.5.2013 through *dak-bahi* and *lekhpal*-Sunil Chaudhari put his signature by receiving this application in *dak-bahi* at serial No.486. Although, it is in the evidence of SDM (PW8) that he formed a committee of three-members subsequently for measurement of the land yet the statement of PW6 cannot be overlooked for the purpose of application moved for measurement was handed over to appellant to get the work done, therefore, occasion arose for appellant to raise the demand of greasing the palm. Thus, the contention of counsel for the appellant that particular work for which the bribe was demanded, was not in work-domain of the appellant does not exist. As far as, the argument regarding the discrepancies in the dates of demand is concerned, these minor discrepancies do not make the issue of demanding the bribe unbelievable because it is a general phenomenon of human memory that one cannot repeat the things in mechanical manner. It does not make any difference if the PW1 could not ascertain the exact date of demand of bribe whether it was in the month of May, 2013 or on the date of 1st June, 2013 because the crux of the matter is that complainant (PW1) categorically stated that demand was raised by the appellant and in his cross-examination also nothing is extracted which proves fatal regarding the issue of demand. Evidence of a witness should be seen and considered in its entirety and not in piecemeal. In my considered opinion, the evidence of PW6 corroborates the evidence of complainant-PW1, who is public servant and it is established that appellant had reason to make the demand, which is positively stated by PW1 that it was raised.

15. It is also argued by counsel for the appellant that application moved for measurement of land was given by Sonepal, who is cousin of complainant, but entire exercise of trapping was carried out at the behest of complainant and Sonepal was not even produced in evidence while he was the prime witness. In this regard, it is in the evidence of PW1 that he had purchased some land from Sonepal so he had interest in measurment of the land because the erstwhile purchaser of the portion of land from Sonepal had encroached the land due to which application for measurement was given to the concerned SDM.

16. It is next argued on behalf of appellant that prosecution witnesses have failed to corroborate each-other's statement regarding the scene of crime and arrest of the appellant. In this regard, it is submitted that PW1 does not say in his statement that he sat inside the car of the appellant at the time of transaction of money, but PW2 says that the complainant sat inside the car. Moreover, PW1 has categorically stated that at that time A.C. of the car was on, but PW2 has said that at that time, glasses (windows) of car were open. If it was so then this statement of PW1 falsifies that A.C. of the car was on. These contradictory statements show that nothing had happened there. There are two versions of the same story. It is also submitted that Raj Singh Yadav (PW4), who is said to be an independent witness, has specifically stated in his statement that he could not hear the conversation between the complainant and the appellant. Hence, it is clear from the aforesaid statement of PW4 that no person was in a position to hear the conversation between them and in this situation, it cannot be said by prosecution that the appellant made any demand from the complainant and complainant gave any money to the appellant.

17. Learned counsel for the appellant also submitted that as per site-plan and even on the basis of statements of witnesses, place of occurrence is almost in front of Police Station-Loni. Hence, it is not possible for any person to fix the place for taking the bribe in front of any police station. Moreover, the place of occurrence

is not established by prosecution because if it was in front of police station then no police personnel came on the spot and no police personnel of that police station was produced in evidence as it is not in evidence that any police personnel came out from police station when such type of trapping was led by the team. If it was the place of occurrence, it is very busy place, but no public witness is there.

18. These arguments regarding place of occurrence do not convince this Court as it is in evidence of witnesses that police station was 150-200 steps away from the place of occurrence and moreover, when trap-team set the trap, it was not necessary for police personnel to come on the spot because it is not the prosecution case that team contacted or informed the said police station prior to setting the trap.

19. Now, it comes the question of voluntary acceptance of bribe by the appellant. In this regard, perusal of first information report (Ex.ka10) itself shows that it is mentioned in this report that when trap-team caught the appellant then treated 60 notes of Rs.500/- were recovered from his right-hand. Ravindra Pal Singh Tomar (PW2), the then DSP, has also stated in his statement that from his right-hand, Rs.30,000/- were recovered and these were the same notes, which were treated before laying the trap. Hence, when treated-notes were recovered from the hand of the appellant and that too 15-20 steps away from his car then it is itself proved that he accepted the money voluntarily.

20. Recovery of Rs.30,000/- from the possession of appellant at the place of occurrence is not at all doubted. There is ample evidence on record that at the time of apprehending the appellant, the amount of Rs.30,000/- was recovered from his right-hand and these were the same currency-notes, which were treated before giving to him as a bribe. Report received from Forensic Science Laboratory, Agra (Ex.ka.16) states that in the sample of liquid sent for chemical examination, *sodium-carbonate* was found. This liquid was result of washing the hands of appellant and due to application of powder on currency-notes, which were to be given as bribe. Demand of illegal gratification is *sine qua non* to constitute the offence under the Act. Mere recovery of currency-notes also itself does not constitute the offence under the Act, 1988, unless it is proved beyond all reasonable doubt that the accused-appellant voluntarily accepted the money, knowing it to be bribe. But, in the facts of the present case, I am of the opinion that both the above ingredients of offence under Sections 7 and 13 (1) (d) (ii) of the Act, 1988, are completely satisfied and proved as discussed above.

21. With the above discussion, this Court comes to the conclusion that in this case demand of illegal gratification on the part of the appellant is proved and it is also proved that he accepted it, voluntarily. It is also proved that at the time of apprehending him, the same treated-notes worth Rs.30,000/- were recovered from his right hand.

22. Hence, the learned trial court has rightly appreciated the evidence on record. There is no infirmity or illegality in the impugned judgment. The appeal is devoid of merit and is liable to be dismissed.

23. The appeal is dismissed, accordingly.

(2021)12ILR A786
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.11.2021

BEFORE

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

Criminal Appeal No. 7187 of 2017

Sunil Kumar Divakar ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Amar Singh Kashyap, Sri Ashwani Prakash Tripathi.

Counsel for the Respondent:
A.G.A.

Criminal Law – Indian Penal Code, 1860 – Sections 1 & 4 -Deceased was wife of accused-deceased caught fire while burning the fire crakers-while saving her accused also sustained burn injuries in hand-both admitted –wife died-trial court finding is that incident happened out of quarrel and death happened due to septicemia-death caused not premediated-no intention-fall under exception 1 and 4 to section 300 IPC-offence is not under section 302 IPC but is culpable homicide-**Appeal partly allowed.** (E-9)

List of Cases cited:

1. Khokan@ Khokhan Vishwas Vs St. of Chattisgarh, 2021 LawSuit (SC) 80,

2. Banarsi Dass & ors. Vs St. of Har., Bhadragiri Venkata Ravi Vs Public Prosecutor High Court of A.P., Hyderabad, (2013) 0 Supreme (SC) 511,

3. Surinder Kumar Vs St. of Har., 2011 LawSuit (SC) 1149,

4. Arvind Singh Vs St. of Bihar, 2001 (3) Supreme 570,

5. Kashmira Devi Vs St. of Uttarakhand & ors., (2020) 11 SCC 343,

6. Smt. Rama Devi Vs St. of U.P., (2018) 102 ACrC 105,

7. Misri Lal Vs St. of U.P., (2017) 7 ADJ 14,

8. Sanjay & ors. Vs St. of U.P. (2016) 3 SCC 62

9. Manoj Kumar Vs St. of U.P., (2019) 1 ADJ 221

10. Tukaram & ors. Vs St. of Mah., reported in (2011) 4 SCC 250

11. B.N. Kavatakar & anr. Vs St. of Karnataka, reported in 1994 SUPP (1) SCC 304

12. Veeran & ors. Vs St. of M.P. Decided, (2011) 5 SCR 300

13. Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs St. of Gujarat) decided on 11.9.2013

14. Anversinh Vs St. of Guj., (2021) 3 SCC 12

15. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529 & Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

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

1. This appeal challenges the judgment and order dated 13.4.2016 passed by Additional Sessions Judge, Court No.1, Kannauj in Sessions Trial No.144 of 2009 convicting accused-appellant under Sections 498 & 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced him to undergo imprisonment for life with fine of Rs.25,000/- under Section 302 of I.P.C. and under Section 498A, sentenced him to undergo 2 years and 6 months rigorous imprisonment with fine of Rs.5,000/- and in case of default of payment of fine, further to undergo six months imprisonment.

2. Factual scenario as culled out from the record and the judgment of the Court below is that the complainant lodged a complaint that his daughter was married with accused-appellant namely Sunil Kumar Diwaker on 28.4.2008. After she went to matrimonial home, she was being harassed for dowry. On the fateful day, she was sent back to matrimonial home on 28.10.2008, again accused demanded money and gold chain. She was set ablaze by pouring kerosene on her despite the fact that she was pregnant. She was subjected to all kinds of mental harassment. The child in the womb was also declared dead and, therefore, the parents of the deceased decided to see that the accused are brought to trial. The complainant lodged the complaint.

3. Investigation was moved into motion. After recording statements of various persons, the investigating officer submitted the charge-sheet against accused under 498A & 304 B of I.P.C. and Section 3/4 of Dowry Prohibition Act, 1961 (in short 'D.P. Act'). The learned Chief Judicial Magistrate before whom charge sheet was laid put the same before the learned Sessions Judge. The learned Sessions Judge, on hearing the learned Government Advocate and learned counsel for the accused, framed charges under Section 498A, 304B, 302/34 of I.P.C. & Section 4 of D.P. Act.

4. On being summoned, the accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined 9 witnesses who are as follows:

1	Ramsaran	PW1
2	Rajrani	PW2
3	Jitendra	PW3
4	Surendra Kumar Sharma	PW4
5	Dr. Anil Nigam	PW5
6	Sameer Verma	PW6
7	Dr. G.N. Dwivedi	PW7
8	Indrajeet Singh	PW8
9	Ram Swaroop	PW9

5. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.8
2	Written Report	Ex.Ka.1
3	Panchayatnama	Ex.Ka.2
4	Postmortem Report	Ex.Ka.6
5	Site-plan	Ex.Ka.10
6	Charge-sheet	Ex.Ka.11

6. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellants as mentioned aforesaid.

7. Heard Sri Amar Singh Kashyap and Sri Ashwani Prakash Tripathi, learned counsel for accused-appellant, learned A.G.A. for the State and perused the record.

8. It is submitted by learned counsel for accused-appellant that the accused is in jail since 2008, more particularly from 19.12.2008. The deceased was the wife of the accused-appellant. It is submitted that the deceased caught fire while burning the fire crackers and in saving her, the accused also sustained burn injuries in his hand; that both the deceased and accused sustained burn injuries and admitted to Hallet Hospital Kanpur where after giving her statement before the Magistrate, the Smt. Renu died.

9. Learned counsel for the appellant has vehemently submitted that dying declaration is not worth believing and it is an admitted position of fact that she died out of septicemia.

10. It is further submitted by learned counsel for the appellant that most of the witnesses have turned hostile despite that, learned Sessions Judge has convicted him under Section 302 of I.P.C. As far as conviction under Section 498A of IPC is concerned, he has completed the period of incarceration. It is submitted that there is no evidence of demand of dowry in the dying declaration which was the sole base of the case and that neither any specific charge was framed against the appellant under Section 302 of I.P.C. nor any evidence was led to that effect by any of the witnesses and, therefore, conviction under Section 302, could not have been recorded.

11. In support of the his submission, learned counsel for the appellant has relied on **Khokan@ Khokhan Vishwas v. State of Chattisgarh, 2021 LawSuit (SC) 80, Banarsi**

Dass and Others v. State of Haryana, Bhadragiri Venkata Ravi v. Public Prosecutor High Court of A.P., Hyderabad, (2013) 0 Supreme (SC) 511, Surinder Kumar v. State of Haryana, 2011 LawSuit (SC) 1149, Arvind Singh v. State of Bihar, 2001 (3) Supreme 570, Kashmira Devi v. State of Uttarakhand and others, (2020) 11 SCC 343, Smt. Rama Devi v. State of U.P., (2018) 102 ACrC 105, Misri Lal v. State of Uttar Pradesh, (2017) 7 ADJ 14, Sanjay and others v. State of Uttar Pradesh, (2016) 3 SCC 62, Manoj Kumar v. State of U.P., (2019) 1 ADJ 221. In alternative, it is submitted that at the most punishment can be under Section 304 II or Section 304 I of I.P.C. If the Court feels, as the accused have been in jail for more than 17 years without remission, they may be granted fixed term punishment of incarceration.

12. Learned A.G.A. for the state has vehemently submitted that facts of this case will not permit the Court to convert the sentence to that under Section 304 Part I of I.P.C. as none of the judgments relied by the accused-appellant will apply to the facts of this case.

13. Learned Judge has categorically relied on the testimony of Dr. Anil Nigam and has opined that she died out of septicemia. There were formation of pus pocket on her body. She died on 3.11.2008. The postmortem was conducted on 4.11.2008. She was a young lady of 22 years. P.W.1 has testified against all the accused. The accused used to beat the deceased after consuming alcohol and all the accused persons used to take part in the same. There was dying declaration of the deceased where also she had categorically mentioned that the accused had tried to set her ablaze. The genesis of setting her ablaze was non fulfillment of dowry. The learned Sessions Judge has relied on the testimony of P.W.1 & P.W.2 and, therefore, we have also no doubt in our mind that offence under Section 498A & 304B of IPC has been committed for which the punishment cannot be said to be exaggerated. For section 498A of IPC, the learned Sessions Judge has sentenced the accused to undergo two & half years of incarceration with fine of Rs.5000/- & under Section 302, the accused has been sentenced to undergo imprisonment for life with fine of Rs. 25,000/-. As far as offence under Section 304 B is concerned, learned Sessions Judge has coupled it with Section 302 of I.P.C. The death was not due to demand of dowry but it was due to the accused-husband having bad eye on other girls for which the deceased-wife has cautioned him. We are unable to fathom on why the learned Sessions Judge then had convicted the accused under Section 498A. But, as the period of incarceration Section 498A of I.P.C. is over, we are not delving into the same. As far as Section 302 of IPC is concerned, as per the finding of the learned Sessions Judge, incident happened out of quarrel and death has happened due to septicemia on which heavy reliance has been placed by learned Sessions Judge.

14. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants.

15. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

*"**299. Culpable homicide:** Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause*

death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

16. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
	INTENTION
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

17. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra,** reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304,** we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

18. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

19. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of ***Krishan vs. State of Haryana reported in (2013) 3 SCC 280,*** *the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying*

declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of ***Maniben (supra),*** *the Apex Court has observed as under:*

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal

Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

20. In latest decision in **Khokan@ Khokhan (Supra)** where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

21. All others judgments which were pressed into service by the learned counsel for the appellant are not discussed as that would be repetition of what we have decided.

22. We come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellant would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but is culpable homicide and, therefore, sentence of the accused appellant is reduced to the period he has already undergone. The fine is reduced to Rs.10,000/- to be paid to the original complainant.

23. Appeal is partly allowed. Record and proceedings be sent back to the Court below forthwith. If the accused-appellant fails to pay the fine, the default sentence will start after 13 years of incarceration.

24. This Court is thankful to learned Advocates for ably assisting the Court.

(2021)12ILR A792
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 5977 of 2019

Ishaque **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Sri S.K. Agrawal, Sri Pushpendra Singh, Sri Mandeep Singh

Counsel for the Respondent:
D.G.A.

Criminal Law –Code Of Criminal Procedure, 1973 - Section313 - Appellant is a citizen of Bangladesh-all papers signed by h im in Bengali-examination of Appellant u/s 313 Cr.P.C. was not in respect of the circumstances against him in prosecution evidence-he was merely apprised as to who have testified against him and documents produced-and not as to what has been testified or what the documents contained-circumstances not put to the accused in the manner required by law-improper examination of accused u/s 313 Cr.P.C. – serious prejudice to accused-miscarriage of justice.

Held, *in the prosecution evidence had been put to the accused in a manner he could have understood, he might have given an explanation that seeing his wife sleeping next to the deceased, he lost his bearings and self control and, in a fit of sudden rage, committed the act. Such an explanation perhaps could have fit in with the prosecution evidence and absolved him of the charge of an offence punishable under section 302 IPC and might have served as a mitigating factor to convert the charge of murder to one of an offence punishable under section 304 IPC. Likewise, he could have offered explanation as to why he was seen running, may be by telling that because he was terrified seeing his wife, or somebody else, commit the murder. Importantly, the appellant was not seen by PW1 running with a knife though, according to PW2 he ran away with the knife whereas, the knife was recovered, found hidden, wrapped in a cloth, beneath a stack of bricks, from a Kothri near the scene of crime. Had all these circumstances been put in the form required by law and in the language understood by the accused, result might have been different.***(para 31)**

Appeal allowed. (E-9)

List of Cases cited:

1. Nar Singh Vs St. of Har.: (2015) 1 SCC 496

2. Tara Singh Vs State : AIR 1951 SC 441

3. Ajay Singh Vs St. of Mah. : 2007 (12) SCC 341

4. Naval Kishore Vs St. of Bihar : (2004) 7 SCC 502

5. Maheshwar Tigga Vs St. of Jharkhand : (2020) 10 SCC 108

6. Jai Dev & ors. Vs St. of Pun. : AIR 1963 SC 612

7. Shivaji Sahabrao Bobade & anr. : St. of Mah. : (1973) 2 SCC 793

8. Asraf Ali Vs St. of Assam : (2008) 16 SCC 328

9. Alister Anthony Pareira Vs St. of Mah. : (2012) 2 SCC 648

10. Satyavir Singh Rathi ACP Vs State, (2011) 6 SCC1

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

1. This appeal is against a composite judgment and order dated 12.06.1996 passed by Ninth Additional District & Sessions Judge, Ghaziabad in two connected Sessions Trial Nos. 147 of 1991 and 149 of 1991 whereby, the appellant - Ishaque has been convicted under Sections 302 I.P.C. and section 4/25 Arms Act, respectively; and has been punished as follows: (i) under Section 302 I.P.C., life imprisonment with fine of Rs. 2,000/- and a default sentence of six months R.I. and (ii) under Section 25/4 Arms Act, two years R.I. with fine of Rs. 500/- and a default sentence of one month R.I. Both sentences to run concurrently.

INTRODUCTORY FACTS

2. (i) At 6.10 hours on 29.01.1991, Rajendra Kumar (PW-2) gave a written report (Ex. Ka-1), which was lodged as first information report (FIR) (Ex. Ka-4) at P.S. Shahibabad, District Ghaziabad, alleging therein that two days before, in the evening, at about 7.00 pm, Arun Jeev @ Bhaloo Sham (the deceased), a rickshaw puller, on his rickshaw, came with a lady, a man and a child. Claiming that the lady is his sister (Ayesha), the man is his brother-in-law (Ishaque Matwar - the appellant), Arun Jeev asked for a room from the informant (PW-2) to stay for two days on the pretext that

their own abode (hutment) at Nai Seemapuri would be ready in two days. It is alleged that on that request, PW2 gave them a room to stay. It is alleged in the FIR that in the morning of 29.01.1991, at about 5 am, PW2 and his wife Ruparani (not examined) heard noise. When they came out of their room, they saw the rickshaw puller (Arun Jeev) lying dead in a pool of blood, with his throat/neck slit, and his brother-in-law (Ishaque - appellant) having a big blood-stained knife in his hand. Soon thereafter, the appellant ran away with the knife, leaving his wife Ayesha behind.

(ii) Inquest was conducted at about 8 am at the place of the incident. Inquest report (Ex. Ka-8) was witnessed by Sameeruddin (PW-3); Ali Hasan; Afsar Ali (PW-5); Jameel Ahmad; and Raj Kumar.

(iii) S.I. Govind Krishna Dwivedi (PW-8) reached the spot, prepared site plan (Ex. Ka-7), collected blood in a small tobacco box and blood-stained piece of carpet. Recovery memo (Ex. Ka-2) was witnessed by Sameerudin (PW-3) and Afsar Ali (PW-5). Autopsy was conducted on the same day at about 5 pm. The autopsy report (Ex. Ka-3) prepared by PW-6 noticed: an incised wound 12 cm x 5.0 cm x bone deep on the front of neck 4.0 cm below to chin; 6.0 cm above Supra Sternal notch; 5.0 cm below to right ear; and 6.0 cm below to left ear, margin clear cut; larynx, trachea and oesophagus cut, through and through; and heart empty. Semi-digested food was found in the stomach. Small intestine and large intestine were half filled. Opinion was that death was due to shock and haemorrhage as a result of ante-mortem injury. Estimated time of death was three-fourth of a day before.

(iv) On 30.01.1991, at about 1.20 pm, in the presence of witness Raj Kumar and Ibrahim (PW-4), on the pointing out of the accused, allegedly, a blood-stained knife, wrapped in a cloth, was recovered from a stack of bricks near the wall of premises No. 161 A, Shalimar Park, Pradeep Trading Comp. A memo (Ex. Ka-3) of that recovery and site plan (Ex. Ka-15) of that recovery was prepared by PW-8.

(v) Investigation was completed by Jitendra Pal Singh (not examined as a witness because he had died in an encounter) and a charge-sheet (Ex. Ka-6) was submitted, which was proved by H.C. Brijlal Singh (PW-7).

(vi) S.S. Guha (PW-9) recorded the statement of Ayesha under Section 164 of the Code of Criminal Procedure, 1973 (for short Cr.P.C. or the Code). P.W.9 stated that Ayesha could only speak in Bangla language therefore, her statement was recorded with the help of a translator/ interpreter. On PW-9's statement, statement of Ayesha was marked Ex Ka-7.

(vii) On recovery of the knife, a separate case under Section 25 Arms Act was registered. Investigation of which was assigned to S.I. Mahendra Singh Tyagi (not examined). After investigation, charge-sheet (Ex. Ka-16) was submitted, which was proved by PW-8. On the two charge-sheets, cognizance was taken and cases were committed to the Court of Session giving rise to two sessions trial, namely, S.T. No. 147 of 1991, under Section 302 I.P.C.; and S.T. No. 149 of 1991, under Section 25/4 Arms Act. Both the trials were connected with each other and a single set of evidence was led.

EVIDENCE OF THE PROSECUTION

3. (i) Upon committal, after the charges were denied by the accused-appellant, in the trial, the prosecution examined nine witnesses, namely, PW.-1 Alam; PW-2 Rajendra Kumar (informant); PW-3 Sameeruddin; PW-4 Ibrahim; PW-5 Afsar Ali; PW-6 Dr. Jai Prakash; PW-7-Brij Pal Singh; PW-8 Govind Krishna Dwivedi; and PW-9 Sri S.S. Guha.

(ii) PW-3 Sameeruddin and PW-5 Afsar Ali are witnesses of recovery of blood-stained carpet from the spot; PW-4 Ibrahim is one of the witnesses of recovery of knife; PW-6

- the doctor who conducted the post-mortem - proved the post-mortem report; .PW-7 Brij Pal Singh - Head Moharir at the police station Shahibabad - proved the registration of the FIR on 29.01.1991 at 6.10 am and handing over copy /chik FIR to Sri G.K. Dwivedi (P.W.8) for investigation.

(iii) PW-8, S.I. Govind Krishna Dwivedi, is the investigating officer. He stated that on registration of the FIR, he reached the spot and on the directions of the informant prepared site plan, lifted blood and blood soaked carpet. He stated that a day after registration of the FIR, the investigation was transferred to Prabhari Nirikshak - Jitendra Pal Singh, who, later, died in an encounter in the district of Pilibhit. He stated that Jitendra Pal Singh had arrested the accused and effected recovery of the knife on the pointing out of the accused. He proved the signature of Jitendra Pal Singh on the recovery memo as also on the charge-sheet prepared by Jitendra Pal Singh. He also stated that he got the statement of Ayesha recorded under Section 164 Cr.P.C. He stated that investigation of the offence under Section 25 Arms Act was assigned to S.I. Mahendra Singh Tyagi who submitted charge-sheet. He recognised the signature of Mahendra Singh Tyagi on the charge-sheet.

In his cross-examination, PW-8 stated that the FIR was not written in his presence; that he reached the spot after about one hour i.e. on or about 7 am; that he does not remember that there was light at the scene of the crime; that he does not remember as to how many doors were there in the room where the body was found though he can tell the same after looking at the site plan; that the house where the crime occurred had boundary wall about chest high; that the house had a common gate; and that adjoining the house there was a Kothari and inside the room, where the body was found, there was a cot. The body was 2-3 paces away from the cot, lying in a supine position with left hand on stomach and right hand on the floor. He saw accused's wife on spot. He had taken her statement but her clothes were not collected as she had no other clothes to wear. He also took photographs of the body. He, thereafter, got the body sealed after carrying out inquest. He stated that he had searched for the accused that day though he could not remember where he had searched for him. He also stated that he met Alam -the Chowkidar (PW1) - on that day. P.W.1 was Chowkidar of a different block. He stated that P.W.1 had not disclosed that Ishaque (appellant) had a knife in his hand. PW1 also did not disclose whether Ishaque's (appellant's) clothes were blood-stained.

(iv) PW-9, A.C.J.M., Sri S.S. Gupta. He proved the recording of statement of Ayesha under Section 164 Cr.P.C. with the help of a translator.

In his cross-examination, he stated that he used the service of a translator to translate Bangla into Hindi. He stated that he did not himself understand Bangla and that he did not understand what Ayesha stated in Bengali but he wrote whatever the translator told him. He disclosed the name of translator as Sikandar (not examined).

(v) PW-4-Ibrahim is the witness of recovery of knife. He stated that about two years ago while he was returning after collecting fodder for his buffalo, he saw 5-6 police personnel and one Master Raj Kumar (not examined) sitting and enquiring from accused Ishaque (appellant). Ishaque told them that he could recover the weapon of assault. Ishaque moved ahead near the Kothi where the murder took place and just behind that, from a dilapidated kothari and stack of bricks, he took out a knife wrapped in a cloth, which was taken by the police. He stated that the police thereafter prepared a memo and got his signatures. He proved his signature on the memo.

In his cross-examination, he stated that the place from where the recovery was made is half a kilometer away from his house; that Ishaque had stated that he had killed Arun Jeev

as he was seen lying close to his wife; he stated that there were 60-70 people standing there at that time; that at the time when the memo was prepared there were only 5-6 police personnel and Raj Kumar; he denied the suggestion that he is telling lie under pressure of police; he also stated that at the time when the confessional statement was made, the accused was in the custody of the police.

(vi) PW-2 is the informant. He proved the lodging of the FIR. In his statement- in-chief he reiterated what was narrated by him in the FIR. He identified the deceased from his photographs as Arun Jeev @ Bhalu Sham, the rickshaw puller.

In his cross-examination, he stated that he has a house at Shalimar Garden which has four rooms and a kitchen. Out of those four rooms, he uses two rooms for himself and two rooms lie vacant. All four rooms are in front of each other. The deceased Arun Jeev used to take his children to the school on a rickshaw therefore, he knew him from before. He saw Ishaque (the appellant) for the first time and came to know about him through the deceased. He denied the suggestion that he lodged the FIR on the information provided by Ayesha. He stated that the police neither arrested the accused nor recovered anything from him in his presence. In paragraph 10 of his cross-examination though he denied the suggestion that he lodged a false FIR on the statement of Ayesha but stated that Ayesha had told him that her husband ran away after killing the deceased and on her statement, he lodged the report. He stated that he did not have a fondness for the rickshaw puller (the deceased) but as he used to take his children to school, he was allowed a room to sleep.

(vii) PW-1 Alam Chowkidar. He stated that about a year and 9 -10 months before, between quarter past 5 and 5.30 am, while he was performing his duties as a Chowkidar at D Block at New Seemapuri Colony, he saw the accused (present in Court) running; thinking him to be a thief, he caught hold of him. On being caught, he told him that he is not a thief and that he has to go to his maternal uncle Jabbar. He, thereafter, took him to his uncle Jabbar. When Jabbar told him that the accused is his nephew, he released him. At that point of time he was not aware that the accused was running after committing murder.

In his cross-examination, he admitted that from the statement of the lawyers present in Court he could guess that the accused before him is Ishaque. He stated that New Seemapuri and Old Seemapuri colonies are at a distance of half a kilometer and at the time when he saw the accused running he saw him running from half a mile away. At that time, the accused was wearing just a Tehmat (Lungi) with no upper garment on his body.

4. After the prosecution evidence was closed, the statement of the appellant was recorded under Section 313 Cr.P.C. The record of the statement of the appellant including the questions put to him, under Section 313 Cr.P.C. is extracted below:-

''एस0टी0 नं0 147/91
सरकार बनाम ईशहाक
अ0 धा0 302 आई0पी0सी0
थाना साहिबाबाद।
नाम– ईशहाक, मातवर पिता का नाम– मंसूर मातवर उम्र– पेशा– निवासी– बहरतला,
थाना– शिवसर, जिला फरीदपुर बंगलादेश– हाल झुग्गी सीमापुरी दिल्ली।
ब्यान अन्तर्गत धारा 313 सी0आर0पी0सी0
– – – – – – – – – – – – – – – – – –
प्रश्न 1– यह कि अभियोजन पक्ष का कथन है कि दिनांक 29.1.91 को सुबह करीब 5. 00 बजे राजेन्द्र कुमार के मकान नं0 ए 184 शालीमार गार्डन साहिबाबाद में आपने आरूनजीव उर्फ भालू की चाकू से गर्दन काटकर हत्या कर दी जिसकी रिपोर्ट राजेन्द्र कुमार ने थाना साहिबाबाद पर लिखाई जो प्रदर्शक–1 है इस इस बारे में आपको क्या कहना है।
उत्तर– गलत है।

प्रश्न 2– अभियोजन पक्ष की ओर से आपके खिलाफ गवाहान राजेन्द्र कुमार, समीर, इब्राहीम, अफसर अली, आलम, डा0 जयप्रकाश हैड कान्स्टेबिल ब्रिजपाल सिंहविवेचनाधिकारी गोविन्द कृष्ण द्विवेदी, ए0सी0 जैन श्री एस0एस0 गुप्ता ने गवाही दी है इस बारे में आपको क्या कहना है।

उत्तर– गलत रंजिश से बयान देते है।

प्रश्न 3– यह कि अभियोजन पक्ष की ओर से आपके खिलाफ एफ0आई0आर0 तहरीर रिपोर्ट फर्द खून आलदा दरी, नक्शा नजरी फर्द बरामदगी चाकू आरोप पत्र आदि करामात साबित किये जो प्रदर्शक–2 ता प्रदर्श क–16 है इस बारे में आपको क्या कहना है:–

उत्तर– पता नही।

प्रश्न 4– क्या आपको कुछ कहना है।

उत्तर– जी नही।

प्रश्न 5– आपके खिलाफ मुकदमा क्यो चला।

उत्तरः– रंजिश से।

प्रश्न 6– क्या आप सफाई देगे।

उत्तर– ''।''

TRIAL COURT FINDINGS

5. The trial court by placing reliance on the evidence led, held that the following circumstances were proved: (a) that PW2 gave a room to the deceased, the appellant, his wife and child to sleep; that, in the morning, PW2 heard shrieks; upon coming to the spot, he saw the appellant with a blood soaked knife in his hand and the deceased lying dead in a pool of blood; that, soon thereafter, the appellant escaped; that, the wife of the appellant in her statement under section 164 CrPC disclosed that the appellant committed murder because he discovered the deceased lying next to her in the night; and that, the knife (weapon of assault) was recovered at the pointing out of the appellant. Upon finding the chain of circumstances complete to prove the guilt of the appellant and rule out all other hypothesis inconsistent with it, found the charge of murder proved and punished the appellant accordingly.

6. We have heard Sri Mandeep Singh, holding brief of Sri Pushpendra Singh, for the appellant; Sri J.K. Upadhyay, learned A.G.A. for the State; and have perused the record.

SUBMISSIONS

7. The contentions of the learned counsel for the appellant are as follows:-

(a) The incriminating circumstances emanating from the prosecution evidence were not put to the accused-appellant as is required by law for recording statement of the accused under Section 313 Cr.P.C. which vitiates the trial and the order of conviction. It was urged that, admittedly, the appellant is a citizen of Bangladesh, he signed all papers in Bangla therefore, even if the evidence was recorded in his presence, unless the incriminating circumstances appearing in the prosecution evidence were put and explained to him, he could not have offered a plausible explanation. This caused serious prejudice to appellant's defence thereby vitiating the trial and the order of conviction.

(b) The key eye-witness of the incident, Ayesha, though listed as a witness in the charge sheet, was not examined. The prosecution is therefore guilty of withholding their best evidence. Otherwise, her statement under Section 164 Cr.P.C. is not admissible. The statement of P.W.9 as to what Ayesha said is not admissible, being hearsay. In addition to that, Ayesha, admittedly, was not conversant with Hindi language and, therefore, her statement recorded with the help of a translator, cannot be narrated by PW-9 as PW9 admitted that he could not understand what Ayesha stated in Bangla. Thus, the testimony of PW 9 as to what Ayesha told him is irrelevant and cannot be read in evidence.

(c) In so far as the statement of PW-2 is concerned, from his statement during cross-examination, it appears that he lodged the first information report on the basis of information received from Ayesha and not on his own

personal knowledge. PW2's statement in cross-examination that he lodged the FIR on the basis of information provided by Ayesha that her husband has killed the deceased and has run away with the knife reflects that he arrived at the spot after the accused had left therefore, his rendition of the incident that he saw the deceased standing with a knife appears doubtful. Further, PW-1, the Chowkidar, who claims to have caught hold the appellant between 5.15 and 5.30 am, on the date of the incident, as he was seen running from quite a distance, did not state that the appellant was having a knife in his hand. Thus, PW2's statement that the accused-appellant ran away with the knife is extremely doubtful because, in that scenario he would have no time to hide the weapon beneath a stack of bricks, as alleged by the prosecution, and that too, in close proximity to the scene of crime.

(d) The evidence of recovery of knife at the pointing out of the appellant is completely cooked up because hiding the knife in close proximity to the scene of crime does not seem to fit in with the prosecution evidence inasmuch as according to PW2 the appellant ran away with the knife whereas, from the statement of PW4, recovery of the knife, wrapped in a cloth, was made from beneath a stack of bricks near the scene of crime. Even otherwise, the Investigating Officer, who effected recovery, was not examined as he is stated to have died in an encounter.

(e) In the alternative, it was contended that from the prosecution case it appears to be a case where the deceased was seen lying near appellant's wife therefore, in a fit of rage, the incident occurred. Thus, conviction could be under Section 304 I.P.C. and not Section 302 I.P.C. Under the circumstances, as up to 03.06.2021, the appellant has already suffered incarceration of 30 years 04 months and 03 days, and with remission 38 years, 8 months, he is liable to be released on sentence undergone.

8. **Per contra,** the learned A.G.A. submitted that this is a case where there is a prompt first information report; that the witnesses are not inimical; that the accused was seen with a blood-stained knife at a place where the body was lying in a pool of blood and that the injury on the body was referable to that knife therefore, in absence of any explanation on the part of the accused, the prosecution by proving the chain of incriminating circumstances was successful in proving the guilt. On the question of sentence, the learned A.G.A. submitted that since the statement recorded under Section 164 Cr.P.C. is not a substantive piece of evidence, as Ayesha was not examined in court, and no explanation came from the accused to demonstrate existence of mitigating circumstances, the conviction of the appellant for the offence punishable under Section 302 I.P.C. is justified and therefore no case for interference is made out. In respect of the contention that the incriminating circumstances appearing in the evidence were not put to the accused, the learned A.G.A. submitted that even if all the incriminating circumstances have not been put to the accused while recording the statement under Section 313 Cr.P.C., but, as the entire evidence was laid by the prosecution in the presence of the accused, unless prejudice is shown, the accused gets no benefit. In support of the above submission, the learned A.G.A. cited Apex Court's decision in **Nar Singh v. State of Haryana : (2015) 1 SCC 496.**

ANALYSIS

9. Having noticed the rival submissions and the entire prosecution evidence, before we proceed to weigh the respective submissions, it would be apposite to observe that from the record it is established that the appellant is a citizen of Bangladesh and all papers including charge memorandum and statement under section 313 CrPC has been signed by him in Bengali. Further, from the own case of the prosecution, as would be apparent from the statement of PW9, the wife of the appellant did

not understand Hindi and therefore, her statement was recorded with the help of a translator. No doubt, it has not come on record that any application was moved by the appellant that he needed the help of a translator or that he was not conversant with Hindi language but what cannot be ignored is that here was a trial of a citizen of Bangladesh who was signing in Bangla and his wife's statement was recorded with the help of a translator as she did not know Hindi. In these circumstances, what were the precautions that the trial judge was required to take, and whether by not taking those precautions, the trial and the order of conviction stood vitiated needs to be examined. In that context we shall also examine whether there was due compliance of the provisions of section 313 CrPC, if not, whether it caused serious prejudice to the appellant thereby vitiating the order of conviction.

10. To address the issues culled out above, a brief glimpse at the relevant statutory provisions in the Code would be useful. Under section 272 CrPC the language of each court within the State other than the High Court is as may be determined by the State Government for the purposes of the Code. Subject to its proviso, section 273 CrPC provides that evidence taken in the course of the trial shall be taken in the presence of the accused, or, when his personal presence is dispensed with, in the presence of his pleader. Section 277 CrPC provides for the language of record of evidence. Section 279 CrPC provides as follows:

"279. Interpretation of evidence to accused or his pleader.- *(1) Whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him.*

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as necessary."

11. Section 281 CrPC provides for the record of examination of accused. Sub-section (3) of section 281 provides that the record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court. Sub section (4) of section 281 further provides that the record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

12. Section 313 Cr.P.C. reads as under:

"313. Power to examine the accused.- *(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-*

(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2). No oath shall be administered to the accused when he is examined under sub-section (1).

(3). The accused shall not render himself liable to punishment by refusing to

answer such questions, or by giving false answers to them.

(4). The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(5). The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."

13. There is nothing in the Code which may indicate that the provisions of sub-sections (3) and (4) of section 281 of the Code would not apply when there is an examination of the accused under section 313 of the Code. In fact, a combined reading of these provisions would indicate that they have been crafted in the Code to ensure a fair trial so that the accused is in know of the circumstances appearing against him in the evidence and is able to set up his explanation or defence accordingly.

14. The importance of the provisions of section 342 of the Code of Criminal Procedure, 1898, which is *pari materia* with section 313 of the Code, 1973, was highlighted in a Constitution Bench decision of the Apex Court in **Tara Singh v. State : AIR 1951 SC 441.** In paragraph 32, His Lordship Vivian Bose, J. observed as follows:

"32. I cannot stress too strongly the importance of observing faithfully and fairly the provisions of section 342 of the Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the committal court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. ***He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.*** *I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of section 342, Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice."*

(Emphasis Supplied)

15. Developing the law further, in **Ajay Singh v. State of Maharastra : 2007 (12) SCC 341**, interpreting the word 'generally' appearing in sub-section 1(b) of section 313 of the Code, it was observed by the Apex Court as follows:-

"14. ***The word 'generally' in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a***

general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. *The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.*"

(Emphasis Supplied)

16. In **Naval Kishore v. State of Bihar : (2004) 7 SCC 502,** it was observed by the Apex Court as under:-

"5. .....Under Section 313 Cr.P.C. the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of question and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case. ***We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation.*** *The trial judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality.* ***It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in slipshop manner, it may result in imperfect appreciation of evidence."***

(Emphasis Supplied)

17. In **Nar Singh v. State of Haryana : (2015) 1 SCC 496** with regard to the object of section 313(1)(b) Cr.P.C. it was observed by the Apex Court as follows:-

"11. The object of Section 313 (1)(b) Cr.P.C. is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. ***The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him.*** *The examination of accused under Section 313 (1)(b) Cr.P.C. is not a mere formality. Section 313 Cr.P.C. prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused.* ***The real importance of Section 313 Cr.P.C. lies in that, it imposes a duty on the Court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point."*** *(Emphasis Supplied)*

18. The above observations have been cited in a recent three-judge Bench decision of

the Apex Court in **Maheshwar Tigga v. State of Jharkhand : (2020) 10 SCC 108**, wherein, in paragraph 8, it was observed as follows:-

"8. ***It stands well settled that circumstances not put to an accused under Section 313 Cr.P.C. cannot be used against him, and must be excluded from consideration.*** *In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt."*

(Emphasis Supplied)

19. Having examined the relevant provisions of the Code and the decisions noticed above, the legal principle deducible is that the circumstances appearing against the accused in the evidence led during the course of trial must be put to the accused in a form that the accused could understand as to what circumstances appearing against him in the evidence, he has to explain. The language and the manner in which those circumstances are put to the accused assumes importance as that enables a person to have a clear picture of the circumstances which he has to explain. An incriminating circumstance appearing in the evidence not put to the accused to have his explanation is ordinarily to be eschewed from consideration.

20. Now, we shall examine as to what is the test to determine whether the accused has been fairly examined and whether a lapse in putting the incriminating circumstance to the accused in the manner required by law, vitiates the trial. And if there is any such lapse by

21. In **Jai Dev and others v. State of Punjab : AIR 1963 SC 612,** a three- judge Bench of the Apex Court, with reference to section 342 of 1898 Code (*pari materia* with section 313 of the 1973 Code), in paragraph 21 of its judgment, observed as follows:-

"21. .....The examination of the accused person under a. 342 is undoubtedly intended to give him an opportunity to explain any circumstances appearing in the evidence against him. In exercising its powers under Section 342, the Court must take care to put all relevant circumstances appearing in the evidence to the accused person. ***It would not be enough to put a few general and broad questions to the accused, for by adopting such a course the accused may not get opportunity of explaining all the relevant circumstances. On the other hand, it would not be fair or right that the Court should put to the accused person detailed questions which may amount to his cross examination. The ultimate test in determining whether or not the accused has been fairly examined under s. 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity. It is obvious that no general rule can be laid down in regard to the manner in which the accused person should be examined under Section 342. Broadly stated. however, the true position appears to be that passion for brevity which may be content ' with asking a few omnibus general questions is as much inconsistent with the requirements of Section 342 as anxiety for thoroughness which may dictate an unduly detailed and large number of questions which may amount to the cross-examination of the accused person....."***

(Emphasis Supplied)

22. Further, in **Shivaji Sahabrao Bobade and another : State of Maharastra : (1973) 2**

SCC 793, a three-judge Bench of the Apex Court, in paragraph 16 of its judgment, observed as follows:-

".....It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction."

23. In **Asraf Ali v. State of Assam : (2008) 16 SCC 328,** in paragraph 21, 22 and 24 of the judgment, the Apex Court had observed as under:-

"21. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that ***each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.***

22. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. ***Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice.*** *This Court also expressed similar view in S. Harnam Singh v. The State, while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non- indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise.*

24. ***In certain cases when there is perfunctory examination under Section 313 of the Code, the matter is remanded to the trial Court, with a direction to re-try from the stage at which the prosecution was closed."***

(Emphasis Supplied)

24. Upon a conspectus of its earlier decisions, in **Alister Anthony Pareira v. State of Maharastra : (2012) 2 SCC 648**, the Apex Court, in paragraph 61 of its judgment, observed as follows:-

"From the above, the legal position appears to be this: the accused must be apprised of incriminating evidence and materials brought in by the prosecution against him to enable him to explain and respond to such evidence and material. ***Failure in not drawing the attention***

of the accused to the incriminating evidence and inculpatory materials brought in by prosecution specifically, distinctly and separately may not by itself render the trial against the accused void and bad in law; firstly, if having regard to all the questions put to him, he was afforded an opportunity to explain what he wanted to say in respect of prosecution case against him and secondly, such omission has not caused prejudice to him resulting in failure of justice. The burden is on the accused to establish that by not apprising him of the incriminating evidence and the inculpatory materials that had come in the prosecution evidence against him, a prejudice has been caused resulting in miscarriage of justice."

(Emphasis Supplied)

25. In **Nar Singh v. State of Haryana (supra)**, after considering various earlier decisions, the Apex Court, in paragraph 30 of the judgment, held as under:-

"30.1.Whenever a plea of non-compliance with Section 313 Cr.P.C. is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer.

30.2. In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.

30.3. If the appellate court is of the opinion that non-compliance with the provisions of Section 313 Cr.P.C. has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh.

30.4. The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused."

(Emphasis supplied)

26. Having noticed the various decisions, in our view, the legal principles deducible therefrom, with regard to - (a) the test whether the accused has been fairly examined under section 313 of the Code; (b) whether the lapse, if any, in putting the incriminating circumstance to the accused has vitiated the trial; and (c) the courses available to the appellate court, if there is a lapse on the part of the trial court while examining the accused under section 313 CrPC, are summarised below:-

(a) All incriminating circumstances must be put to an accused as to enable him to explain those circumstances. But there is no prescribed form in which those circumstances are to be put to the accused. Ordinarily, the incriminating circumstances must be specifically and distinctly put. The practice of putting all the incriminating circumstances in one large question has been deprecated as it is likely to confuse the accused and may thereby hamper an articulate and a proper explanation. But that would not mean that the questions are put on every minute details or be so thorough that the examination becomes a cross-examination of the accused. In fact, the questions are to be framed in a way as to enable the accused to know what

are the circumstances against him that he has to explain, and for which an explanation is needed. The whole object of the section (i.e. S. 313 CrPC) is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him therefore, the questions must be couched in a form which even an ignorant or illiterate person will be able to appreciate and understand. The ultimate test therefore, in determining whether or not the accused has been fairly examined under section 313 CrPC, would be to enquire whether, having regard to all the questions put to him, did the accused get an opportunity to say what he wanted to say in respect of prosecution case against him.

(b) An omission on the part of the Court to question the accused on any incriminating circumstance would not ipso facto vitiate the trial, unless it is shown that some prejudice is caused to the accused resulting in miscarriage of justice.

(c) Ordinarily, where any incriminating circumstance has not been put to the accused, the Court must eschew such circumstance appearing in the evidence from consideration and decide the matter on the basis of the remaining evidence.

(d) If the incriminating circumstances appearing in the prosecution evidence are not put to the accused by the trial court and the accused demonstrates before the appellate court, or it is apparent from the record, that prejudice has been caused to him, following courses are available to the appellate court:-

(i) The appellate court may examine or further examine the convict (appellant) or the counsel appearing for him and take into consideration the answers for deciding the matter;

(ii) The appellate court may direct re-trial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh;

(iii) The appellate court may decline to remit the matter to the trial court for re-trial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.

27. Having noticed the legal principles above, now, we shall proceed to examine whether in the instant case the examination of the accused-appellant under Section 313 Cr.P.C. was in the manner mandated by law. If not, whether any prejudice was caused to him. If so, its legal consequence.

28. In the instant case, the incriminating circumstances appearing in the evidence against the appellant were as follows:-

(i) The deceased, the appellant, appellant's wife Ayesha and their child, were provided a room by the informant (PW-2) two days before the date of the incident to stay as their hutment at Nai Seemapuri was being redone;

(ii) In the morning of 29.01.1991, at about 5 am, on hearing noise, PW-2 arrived at the spot (i.e. the room provided above) to notice the deceased lying in a pool of blood, with his throat slit, and the appellant holding a blood stained knife in his hand;

(iii) Seeing P.W.2, the appellant ran away with the knife and while he was running away, at some distance from the spot, he was apprehended by PW-1 but, upon intervention of appellant's Mama (Jabbar) was let off;

(iv) Later, when the appellant was arrested, at his pointing out, on 30.01.1991, knife, wrapped in a cloth, was recovered from a stack of bricks lying in a kothari.

29. The circumstances that have been culled out above have not been put to the accused while recording his statement under Section 313 Cr.P.C. The questions put to the appellant to evoke his explanation are detailed below:

(i) The first is with regard to the allegation made in the FIR (Ex. Ka1). This question is couched in a form as to what the appellant has to say in respect of the accusation made in the FIR (Ex. Ka1) that he had killed the deceased by slitting his throat with a knife in the morning of 29.01.1991 at about 5.00 am.

The first question narrates the charge of murder but not the circumstances appearing in the evidence against the appellant. The circumstances, as we have noticed, were that the informant gave a room to the deceased, appellant, his wife and child to stay; and that, in the morning of 29.1.1991, the deceased was lying dead with his throat slit and the appellant was seen standing there, with a knife in his hand, and, upon seeing the informant, he ran away with the knife. Importantly, in the prosecution evidence, no witness stated that the appellant killed the deceased by slitting his throat at 5.00 am on 29.01.1991. Such an allegation appeared only in the statement of Ayesha, under section 164 CrPC, which is not admissible in evidence as she was not examined in the trial. The charge of murder was based on circumstantial evidence but, unfortunately, the circumstances that appeared in the prosecution evidence were not put to the accused.

(ii) The second question too, does not at all narrate the incriminating circumstances that appeared in the deposition of the witnesses. Rather, the question just enumerates the witnesses who had deposed against the appellant. As to what they deposed is not put to the appellant.

(iii) The third question recites the documents exhibited without disclosing their contents and as to what they relate to.

(iv) The fourth question is general as to what the accused has to say.

(v) The fifth question does not seek explanation but seeks answer from the accused as to why he has been prosecuted.

(vi) The sixth question just asks the accused as to whether he would like to give his defence.

30. From a close examination of the questions put, as noticed above, it is clear that the examination of the appellant under Section 313 Cr.P.C. was not in respect of the circumstances that appear against him in the prosecution evidence. Rather, the appellant was merely apprised as to who have testified against him and what documents were produced by the prosecution. As to what their testimony had been and what the documents contained and related to, were not put to the appellant. We are therefore of the considered view that the circumstances appearing in the prosecution evidence against the accused-appellant were not put to the accused in the manner required by law.

31. Now, we shall examine whether by not putting those circumstances any prejudice has been caused to the appellant resulting in miscarriage of justice. Whether prejudice has been caused or not to the accused has to be seen from the stand point of the accused. At this stage, we may observe that from the order sheet of the trial court it appears that on 20.01.1993 a prayer was made on behalf of the appellant to the Court that the *amicus curiae* representing the appellant thus far be discharged because he has engaged a counsel. The entire order sheet of the trial court reflects that the appellant had been signing in Bangla script. These circumstances as also the fact that the appellant has suffered continuous incarceration since the year 1991 reflects that the appellant is not a person with means or support to fight for his freedom. In that back drop, in our view, the trial court ought to

have put itself on guard, while examining the accused under section 313 CrPC, to ensure that the accused (i.e. appellant herein) had understood what he had to explain. The Code also, by inserting sub-sections (3) and (4) to section 281, mandates that the record of the examination of accused shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court; and the record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers. In the instant case, nothing of the sort appears on the record of the trial court. No doubt, where, the accused is a literate person, well versed with the nuances of law, and is represented by a battery of competent lawyers who undertake gruelling cross examination of the witnesses on behalf of the accused, in the presence of the accused, the accused may have to demonstrate that omission during examination under section 313 CrPC has caused serious prejudice to the accused and, in absence of such demonstration, failure to raise the issue during trial may prove detrimental to the plea of prejudice set up for the first time in the appellate court as was held by the Apex Court in the case of **Satyavir Singh Rathi ACP V. State, (2011) 6 SCC1.** But where the accused is a foreign national who signs in a language which is not the language of the court, absence of a proper examination in the true spirit of the provisions of section 313 CrPC read with sub-sections (3) and (4) of section 281 CrPC would certainly cause prejudice to him resulting in miscarriage of justice. To illustrate it further, in the context of the instant case, say the circumstances appearing in the prosecution evidence had been put to the accused in a manner he could have understood, he might have given an explanation that seeing his wife sleeping next to the deceased, he lost his bearings and self control and, in a fit of sudden rage, committed the act. Such an explanation perhaps could have fit in with the prosecution evidence and absolved him of the charge of an offence punishable under section 302 IPC and might have served as a mitigating factor to convert the charge of murder to one of an offence punishable under section 304 IPC. Likewise, he could have offered explanation as to why he was seen running, may be by telling that because he was terrified seeing his wife, or somebody else, commit the murder. Importantly, the appellant was not seen by PW1 running with a knife though, according to PW2 he ran away with the knife whereas, the knife was recovered, found hidden, wrapped in a cloth, beneath a stack of bricks, from a Kothri near the scene of crime. Had all these circumstances been put in the form required by law and in the language understood by the accused, result might have been different. We are therefore of the considered view that the improper examination of the accused under section 313 CrPC has caused serious prejudice to the accused (appellant) and has resulted in miscarriage of justice.

32. At this stage, we may again put on record that in all the papers of the trial court as well as the police papers wherever the signature of the appellant appears, it is in Bangla script. Noticeably, from the statement of PW-9, who recorded the statement of appellant's wife, namely, Ayesha, under Section 164 Cr.P.C., stated that she did not understand Hindi and therefore a translator was used. We also find from the record that due to long incarceration of the appellant pending decision in this appeal, he had filed a ***Writ Petition (Criminal) No. 291 of 2021*** in the Apex Court. The said writ petition was disposed off by order dated 26.07.2021, which is there on the record of this appeal. The said order is extracted below:-

"Heard learned counsel for the parties.

From the bare facts, it may appear that it is a hard case of unduly long incarceration of the petitioner. But, after considering the submissions of the learned counsel for the State, we find no reason to entertain the relief as claimed in the fact situation of the present case. The order sheet produced by the petitioner along with the petition, itself, makes it amply clear that the High Court was inclined to hear the criminal appeals filed by the petitioners expeditiously. However, for reasons best known to the petitioners, the conditional order lastly passed on 23.10.2019 by the High Court, had not been complied with.

Our attention is also invited to the fact that petitioner no.1 is a foreign national and as per the policy of the State Government, premature release of such convict is not permissible.

It is also pointed out that during the pendency of the proceedings in respect of which the petitioners have been convicted, the petitioner no.2 indulged in another offence under Section 307 of Indian Penal Code, which trial is still pending.

Taking overall view of the matter, therefore, we direct the State Government to file paper book in the pending criminal appeals within two weeks from today, as per the High Court Rules, if the petitioners have already not done so; so that Criminal Appeal Nos. 1944 of 2007 and 5977 of 2019 may proceed for hearing before the High Court.

Besides, the respondent-State take necessary steps to ensure that the pending trial against the petitioner No.2 is taken to its logical end expeditiously.

We request the High Court to make an endeavor to dispose of the criminal appeals within four months from the date of filing of additional paper book by the State.

The Writ Petition is disposed of accordingly.

Pending applications, if any, stand disposed of."

From the order of the Apex Court, it becomes clear that appellant is a foreign national. Further, the certificate provided by the Senior Superintendent, Central Jail, Agra also indicates that the appellant is a Bangladesh national. Therefore, if his wife, as per the statement of PW-9, did not understand Hindi language, keeping in mind that the appellant had been signing in Bangla, though we cannot say with certainty that the appellant did not know Hindi, we hold with certitude that these circumstances were sufficient to put the trial judge on guard to ensure that the incriminating circumstances appearing in the prosecution evidence were meticulously put and explained to the accused to evoke his explanation under Section 313 of the Code. This having not been done, we are of the firm view that it has seriously prejudiced the accused-appellant and it vitiates the order of conviction.

33. Once we come to the above conclusion, the circumstances that were not put to the accused would have to be eschewed from consideration which leaves us with virtually nothing to analyse. Hence an analysis of the evidence to find out whether it would lead to conviction of the appellant or not would be an exercise in futility. Further, at this stage, an exercise to record fresh statement of accused-appellant, or his counsel, under Section 313 Cr.P.C., or remit the matter back to the trial court, to cure the defect, would not be justified as, according to the certificate of the Senior Superintendent, Central Jail, Agra, the appellant has already served 30 years, 04 months and 03 days, up to 03.06.2021, in prison. Any fresh exercise to cure the defect, after such a long gap, would be travesty of justice.

34. In view of the foregoing discussion, once we eschew the circumstances not put to the accused in the manner required by law, nothing much remains to sustain the order of conviction rendered by the trial court. We thus have no

option but to allow the appeal and set aside the conviction and sentence recorded by the court below. The appeal is accordingly **allowed**. The judgment and order of the trial court (i.e. court below) in both the trials is set aside. The appellant is acquitted of the charges for which he has been tried. He shall be set at liberty forthwith, unless wanted in any other case, subject to compliance of the provisions of Section 437 A Cr.P.C. to the satisfaction of the court below

35. Let a copy of this order along with the lower court record be transmitted to the trial court for compliance.

(2021)12ILR A809
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.12.2021

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Crl. Appl No. 820 of 2007
Connected with
Crl. Appl. Nos. 831 of 2007, 1355 of 2007, 1356 of 2007 & 188 of 2007

Rajesh alias Bachchan Yadav ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Lav Srivastava, Sri Rajiv Gupta, Sri Ranjay Kumar, Sri Shivam Yadav, Sri V.P. Srivastava, Sri Dilip Kumar

Counsel for the Respondents:
A.G.A., Sri Subhash Yadav

Criminal Law – Indian Penal Code, 1860 – Sections 147,323, 436 & 506 - Eye witnesses to be not expected to give thread bare description of each and every happening-minor contradiction – natural-testimony of injured witnesses are consistent and corroborated by the medical evidence-pre planned murder with common object proved-charges framed u/s 302 & 307 IPC are without the aid of section 149 IPC-conviction u/s 302 IPC will not sustain-no specific evidence which implicates accused for charges u/s 307 IPC-conviction us 307 IPC will also not sustain-conviction –conviction u/s 147,323, 436 and 506 IPC upheld.

Conviction u/s 302 & 307 IPC set aside. (E-9)

List of Cases cited:

1. Maqsoodan Vs St. of U.P., (1983) 1 SCC 218

2. Bhagwan Jagannath Markad & St. of Har. Vs Krishnan

3. Rudal Singh & ors. Vs State, 2016 (3)ACR 2823

4. St.of U.P. Vs Kallu Lal & ors., 1985 Law Suit (All) 475

5. Sri Kishan & ors. Vs St. of U.P., 1972 (2) SCC 537

6. Ram Krishna AIR 1997 SC 3997

7. Bhogilal Vs St. of U.P., 1984(3)crimes 37

8. Yogendra Nath Jha Vs Polai Lal, AIR 1951 SC 316

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri V.P. Srivastava, and Sri Dilip Kumar, learned Senior Counsels assisted by Sri Ranjay Kumar, learned counsel appearing for the appellants and learned A.G.A. for the State respondent in criminal appeals and Sri Kamlesh Kumar Tiwari, learned counsel for the Revisionist and Sri Ranjay Kumar, learned counsel for opposite party and learned AGA for the State-respondent.

2. All the aforesaid criminal appeals and Revision have been filed against the judgment and order dated 22.12.2006 passed by the Additional Sessions Judge, court no.7 Ballia in S.T. No. 167 of 2006 *(State vs. Basdeo &others*) in case crime no.1 of 2006 under Sections 147, 148, 302, 307, 436, 435, 336, 342, 353, 323, 504, 506, 427 IPC and Section 7 of Criminal Law Amendment Act, P.S. Pakari, District-Ballia.

By the impugned judgment and order dated 22.12.2006, the learned trial court has convicted the accused-appellants namely- Brahmdeo Chauhan, Ravindra Chauhan, Rajesh alias Babban Yadav, Arvind Gaur, Kamla Rajbhar, Guddu Rajbhar, Rambhawan Rajbhar, Gama Rajbhar, Jawahir Chauhan, Harish Chand Rajbhar, Ramashankar Rajbhar, Basudeo Rajbhar under Section 147 IPC and sentenced each of them to undergo one year rigorous imprisonment, under Section 436 IPC to undergo life imprisonment and fine of Rs. 1,000/- each, under Section 323 IPC to undergo six months rigorous imprisonment, under Section 307 IPC to undergo seven years rigorous imprisonment and fine of Rs.2000/- each, under Section 302 IPC to undergo life imprisonment and fine of Rs.5000/- each and under Section 506 IPC to undergo five years rigorous imprisonment. In default of payment of fine, each accused will have to serve eight months imprisonment. All the sentences to run concurrently. All the four criminal appeals have been filed by the accused/ appellants against the aforesaid judgment and order of conviction and sentences.

By the impugned judgment and order the learned trial court has also acquitted accused namely Suman Rajbhar, Santosh Yadav, Hansnath Gaur, Ranjit Gaur, Sunil Rajbhar, Devendra Rajbhar, Harendra Rajbhar, Bechu Rajhbhar and Mohan Rajbhar from all the charges. Aggrieved by this complainant Rajnikant Yadav has filed the Criminal Revision against the judgment and order of acquittal.

3. During the pendency of the criminal appeal, appellant-accused Kamla Rajbhar has died, consequently, appeal stands abated for him.

4. In brief the prosecution case is that complainant- Rajnikant Yadav gave an application dated 01.01.2006 written by Uma Shankar Yadav at P.S. Pakari District Ballia. In the application, *it was alleged that "Applicant-Rajnikant Yadav is original resident of Hathauj, P.S. Khejuri, District Ballia. At present his father after constructing a house in village Ussa P.S.- Pakari, District- Ballia is living there with his family since last 30 years. One Brahm Dev Chauhan resident of Ussa tries to take illegal possession of the house property alleging it the land of Gram-Sabha. Because of this enmity, previously he has made several attempts to dispossess the complainant by inciting the villagers. Due to this reason today on 01.01.2006 at about 6:30 pm, Basudeo Rajbhar, Kamla Rajbhar, Guddu Rajbhar, Panch Ratan Rajbhar, Raj Kapoor Gond, Ram Bhawan Rajbhar, Harish Chand Rajbhar, Gama Rajbhar, Kavindra Nath, Ravindra Nath, Shravan Kumar, Ajay Chauhan, Rajesh alias Babban, Santosh, Arbind Gaur, Raju, Rajesh, Jawahir Chauhan, Brahmdev Chauhan and Ramashankar Rajbhar and others of the same village, and several other persons holding lathi-danda, Ballam and bricks/ stones in their hands with common object suddenly came at my house abusing and threatening with death. Seeing them I and my uncle Rajesh Yadav ran to save our lives, then they chased and assaulted us. My father Chandra Dev Yadav and younger brothers ran inside the house, then accused-persons shut the door from outside and put straw (puwal) etc. at the door and set it on fire and sat outside holding lathi-danda and spear in their hands. But anyhow my father came outside the room, then the accused-persons chased him and assaulted him severely. He fell down and became unconscious. On our cries and seeing the flames of fire, Hansnath Yadav, Adalat Yadav, Lalbachan Yadav and other villagers/ neighbourers and passers by came there and exhorted the accused-persons then they came on the road abusing and threatening with death. With the help of those persons we pulled out both from flames and saved their lives. The condition of my father, uncle and two brothers*

are serious and they have been taken to the Sadar Hospital to save their lives. The accused-persons also set on fire my kutcha house situated at some distance. Meanwhile a police vehicle came there then accused pelted bricks/ stones on police vehicle."

On the aforesaid written application, case crime no.1 of 2006 under Sections 147, 148, 149, 307, 308, 336, 342, 353, 436, 324, 323, 504 & 506 IPC and Section 7 of Criminal Law Amendment Act was registered on 01.01.2006 at 20:30 p.m. at P.S. Pakari. The investigation was taken over by S.O. Pakari, C.P. Yadav. The Investigating Officer recorded the statements of some witnesses and also arrested some of the accused and, thereafter, visited the place of occurrence and prepared the site plan. He also collected ashes from the two burnt houses, one pucca house and one kutcha house and pieces of bricks sealed it and prepared a memo.

Injured-**Chandra Dev Yadav** was admitted in the hospital for treatment. He died on 08.01.2006 at 5:35 am, in S.S.L Hospital, B.H.U, Varanasi. On his death Section 302 IPC was added. On 11.01.2006, Investigating Officer took into possession the blood stained clothes of injured/ deceased Chandra Dev Yadav, sealed it and prepared a memo. He recorded the statements of other witnesses. On 20.01.2006, during police custody remand of accused Brahm Dev Chauhan at his instance recovered a blood stained lathi and a plastic container of kerosene oil from the thatched room (Madai) in front of the house of the accused, and prepared its memo. The lathi was sent for forensic examination. During investigation, on the basis of evidence the role of Jainendra Rajbhar, Hansanth Gaur, Ranjit Gaur, Sunil Rajbhar, Devendra Rajbhar, Harendra Rajbhar, Bechu Rajbhar, Mohan Rajbhar and Suman Rajbhar also came in the light and they were also roped as accused. After completion of the investigation, charge-sheet was submitted.

5. The trial court framed charges against 23 accused namely-Basdev Rajbar, Kamla Rajbhar, Guddu Rajbhar, Ram Bhawan Rajbhar, Harish Chand Rajbhar, Gama Rajbhar, Suman Rajbhar, Santosh Yadav, Jawhir Chauhan, Ramashankar Rajbhar, Ravinder Chauhan, Shrawan Kumar Chauhan, Jainendra Rajbhar, Brhamdev Chauhan, Arvind Gond, Rajesh@ Babban Yadav, Hans Nath Gond, Ranjeet Gond, Sunil Gond, Devendra Rajbhar, Harendra Rajbhar, Bechu Rajbhar and Mohan Rajbhar under Sections 147, 436, 504, 323, 342, 307, 302, 336, 506, 435 and 308 IPC.

The prosecution produced 14 witnesses who have proved 30 prosecution papers marked as Ex.Ka-1 to Ex.Ka-30. The statements of accused were recorded under Section 313 Cr.P.C. in which they have denied the prosecution case and stated that they are innocent and have been falsely implicated. No evidence in defence was produced.

The learned trial court by the impugned judgment/ order has convicted the accused-appellants as described above while acquitted them from charges under Section 504, 342, 336, 435, 308 IPC and acquitted accused Suman Rajbhar, Hansnath Gaur, Ranjit Gaur, Mohan Rajbhar, Devendra Rajbhar, Sunil, Harendra Rajbhar, Santosh Yadav and Bechu Rajbhar from all the charges.

Accused- Panchratan Rajbhar, Kavindra Rajbhar, Ajay Chauhan, Rajesh Yadav, Shrawan, Raj Kapoor Gond and Jainendra Rajbhar were declared juvenile.

6(i) Injured-**Chandra Dev Yad**av was medically examined on 01.01.2006 at District Hospital Ballia by Dr. H.P. Rai, Senior Surgeon at 8:20 p.m., following injuries were found on his body at the time of examination:-

1. Lacerated wound 6.5cm x 1cm x bone deep at right forehead, 2.5 cm above the right orbit, full of soft clots, bleeding on touch.

2. Superficial burn in the whole of right palm, epidermis was peeled off at places.

3. Superficial burn on left palm, epidermis was peeled off at places, red in colour.

4. Lacerated wound 3cm x 1cm x bone deep at the right skull, 8 cm above the injury no.1. Soft clots, bleeding on touch.

5. Lacerated wound 3.5cm x 0.5cm x bone deep at the right skull 3cm above the right pinna, full of soft clot, bleeding on touch.

6. Contused swelling 17cm x 9.5cm at left scapular region, red in colour.

7. Contusion 10cm x 2.5cm on right scapular region.

The doctor has opined that injury nos.1, 4 and 5 were kept under observation and advised X-Ray, rest of the injuries were simple. All injuries caused by hard and blunt object, injury no.3 and 4 caused by heat. All injuries are fresh.

(ii) Injured-**Rajesh** was medically examined on the same day at 8:40 pm and the following injuries were found on his body:-

1. Lacerated wound 7cmx 1cm x bone deep at right skull, 7 cm above right pinna full of soft clot. Bleeding on touch.

2. Lacerated wound 6.5cm x 1cm x bone deep at the left skull, 6cm above the left pinna full of soft clot, bleeding on touch.

3. Lacerated wound 4cm x 1cm x bone deep at the left forehead, 4.5cm above left pinna, full of soft clots.

4. Lacerated wound 3 cm x 0.25 cm x scalp deep at the upper part of the head bleeding on touch.

5. Lacerated wound 2.5cm x 3/10 cm x scalp deep just right to injury no.4.

6. Lacerated wound 1.5cm x 3/10 x muscle deep at the right first toe.

7. Contusion 6cm x 2cm on the right lower back, red in colour.

Injury no.1 to 5 were kept under observation and advised X-Ray. Rest of the injuries were simple, all the injuries caused by hard and blunt object and fresh.

(iii) Injured-**Ghanshyam** was also medically examined on the same day at 9:00 pm and according to injury report, following injuries were present on his body:-

1. Superficial burn and redness at the nostrils and nasal Mucosa.

2. The whole oral mucosa was congested and swollen and saliva discharge from the mouth.

The child was taking laboured breathing.

In the opinion of the doctor, the patient seems to have fume poisoning, restless and kept under observation. The nasal burn was due to heated fumes.

(iv) On the same day at 9:20 p.m. the injured- **Ashutosh** was medically examined and following injury was found on his body:

1. Breathing of the injured was abnormal, saliva was discharging from the mouth, and oral mucosa was congested and swollen, patient was admitted and kept under observation.

In the opinion of the doctor, cause was fume poisoning.

Dr. H.P. Rai has been examined as P.W.-9 and he has proved all the aforesaid four medical examination reports as Ex.Ka-16 to Ex.Ka-19. The doctor has further stated that injures of all the injured persons may be caused on 01.01.2006 at 6:00 pm, the injuries no.1, 4, 5 and 7 of Chandra Dev Yadav may come from

lathi-danda while injury no.6 may come by pressing with wooden plank, injuries no.2 and 3 may come from fire burn. All the injuries of Rajesh may come from lathi-danda while injuries of Ghanshyam and Ashutosh may come from fire and its fume.

(v) Injured **Km. Nisha** was medically examined on 04.01.2006 at 2:50 p.m. by Dr. Ashwani Kumar Singh at PHC- Sukhpura, District-Ballia, following injuries were found on her body.

1. Contused abrasion 5cm x 1.5cm on anterior part of right elbow joint, bluish in colour.

2. Contusion 8 cm x 2cm on anterior part of right thigh 8cm above left knee joint, bluish in colour.

Complaint of pain on skull, no visible injury.

Complaint of pain at back side, no visible injury.

In the opinion of doctor all injuries were caused by hard and blunt object and were simple in nature, duration about three days.

(vi) Injured **Rajvanshi Devi** was medically examined on the same day at 3:00 pm and following injuries were found on her body.

1. Contusion 8cm x 3cm on lateral side of right elbow joint, bluish in colour.

2. Contusion 10cm x 3.5cm on an anterior part of left thigh, 7cm above left knee joint, bluish in colour.

3. Contusion 7cm x 3cm on anterior aspect of left leg, 8cm below left knee joint, bluish in colour.

4. Contusion 10 cm x 3cm on posterior aspect of left knee joint, bluish in colour.

5. Contusion 5cm x 3.5cm on anterior aspect of right knee joint, bluish in colour.

6. Contusion 8cm x 3.5cm on posterior aspect of right thigh, 8cm above right knee joint, bluish in colour,

7. Contusion 5cm x 3cm on left hip, bluish in colour.

complaint of pain on right leg. No visible injuiry.

In the opinion of doctor, all injuries were caused by hard and blunt object, simple in nature, duration about 3 days.

(vii) Injured- **Geeta Devi** was also medically examined on the same day at 3:30 pm and following injuries were found on her body.

1. Contused abrasion 5cm x 2cm on posterior aspect of left arm, 7cm above left elbow joint, bluish in colour.

In the opinion of the doctor, injury was cause by hard, blunt and rough object and was simple in nature, duration was about three days.

Dr. Ashwani Kumar Singh has appeared as P.W.-7 and had proved all above three injuries reports as Ex.Ka-13 to Ex.Ka-15.

(viii) The medical examination of three injured persons have been conducted by Mr. R.P. Gupta on 01.01.2006 in District Hospital, Ballia. Dr. R.P. Gupta (P.W.-12) in his statement has said that on 01.01.2006 at 9.30 pm, as Emergency Medical Officer, he has conducted the medical examination of **Hansnath Yadav** and following injuries was found on his body:

1. Lacerated wound 1cm x 0.5 cm x scalp deep over anterior head 10cm above bridge of nose, X-Ray of Skull, Bleeding present.

2. Complaint of pain on right shoulder.

Doctor has opined that injury was caused by some hard and blunt object and duration was fresh.

(ix) The witnesses has further stated that on the same day at 9:35 pm, he conducted medical examination of **Chandrakala Devi** and found following injuries on her body:

1. Abrasion 1cm x 0.5cm on lateral aspect of left knee joint, oozing present.

2. Abrasion 0.5cm x 0.4cm on right medial malleolus.

3. Complaint of pain right thigh.

4. Complaint of pain right arm.

5. Complaint of pain over skull.

Doctor has opined that injury no.1 & 2 was simple and caused by friction, duration was fresh.

(x) The witness has further stated that on the same day on 9:55 pm, he examined **Adalat** and found following injuries on his person:

1. Abrasion 1cm x 0.5cm over right medial knee joint, oozing present

2. Abrasion 1cm x 0.5cm on right leg, 12cm below right knee, medially.

3. Lacerated wound 1cm x 0.5cm over right leg medially aspect 6cm above medial malleolus, bleeding present.

4. Complaint of pain right forearm

5. Complaint of pain right hand.

In the opinion of the doctor injury no.1 and 2 are simple and was caused by friction while injury no.3 was simple and caused by some hard and blunt object, duration was fresh.

(xi) Doctor has further stated that on 02.01.2006 at 12:25 am, he medically examined **Rajni Kant Yadav** and found following injuries on his person:

1. Lacerated wound 2.5cm x 0.5cm on right side face, 1.5cm below right eye.

2. Abrasion 1cm x 0.5cm right side of forehead, 4cm above right mid eyebrow.

3. Abrasion 1cm x 0.5cm on right shoulder anteriorly.

In the opinion of the doctor injury no.1 was caused by some hard and blunt object and X-Ray advised, injury no.2 and 3 was simple and caused by friction, duration was fresh.

(7) The postmortem of the deceased **Chandra Dev Yadav** was conducted on 08.01.2006 at 4:30 pm by Dr. Puneet Kumar Singh who has appeared as P.W.-13 and has proved the postmortem report as Ex.Ka-29. According to the postmortem report, the age of the deceased was about 45 years, average built body, rigor mortis present all over the body, eyes closed, mouth partially open. Following ante-mortem injuries were found:

1. Stitch wound 4cm on right side of forehead above 3cm on mid-line & 2cm below right eyebrow on opening scalp, full thickening contusion found in scalp 6cm x 3 cm.

2. Stitch wound 3cm above mid-line of forehead on opening scalp found contused in 3cm x 8cm Andro- posterior in full thickness.

3. Contusion 12cm x 10 cm right on upper arm, 11cm from right front arm, 11cm below tip of shoulder.

4. Abraded contusion 13cm x 9cm right tip of shoulder.

5. Contused swelling 21cm x 20cm on front of both chest.

6. Multiple abraded contusion 6cm x 3cm on left ear.

7. Abraded contusion 1cm x 0.5cm on front of left and right side of thigh above 13cm knee joint scorb on cut contusion found in fat and muscles 8cm x 3cm.

8. Dormet epidermal burn all over both hands, wrist & adjacent forearm.

In the internal examination, membranes were congested, extradural, subdural & subarchmid Haemorrhage. Brain was congested,

odematous due to effect of injury no.1 & 2. Pleura, both lungs, Pericardium were congested, chambers of the heart were half-full, clotted blood was present. 100 ml watery fluid was in stomach. In small intestine- mucus and gases and in large intestine faecal matter and gases were present. Gall bladder was full, liver, pancreas, spleen and kidneys were congested. Urinary bladder was empty.

In the opinion of the doctor, cause of death was coma, as a result of head injury and intracranial haemorrhage due to blunt trauma effect. Evidence of blunt trauma over various parts of body, also burn effect over both hands. The deceased has died in SSL, Hospital BHU, Varanasi on 08.01.2006 at 5:35 am.

8 (a) In all 14 witnesses have been examined by the prosecution out of which 3 witnesses are public witnesses of facts. Rajnikant Yadav (P.W.-1) is the complainant and also an eye witness. In his examination in chief, the witness has narrated the allegations made in the written information and has proved it as Ex.Ka-1. The witness has further said that he was sent with constable Arjun Singh to the District Hospital, Ballia where he was medically examined and admitted in the hospital. He remained in the hospital for three days. After discharge from the hospital he went to BHU where his father Chandra Dev Yadav was admitted and under treatment. His father died on 08.01.2007 at BHU Hospital.

(b) Rajesh Kumar Yadav (P.W.-2) is also an eye witness. In his examination in chief, he has said that the village- Hathauj is his ancestral village. Chandra Dev Yadav was his brother. His brother Chandra Dev Yadav lived in village-Ussa, after purchasing land and constructing a house. Brahmdev Chauhan of Mohalla-Theka, village-Ussa claims the land on which the house of his brother was constructed to be Gram-Samaj Land and wanted to grab it. He had also made an attempt to dispossess Chandra Dev Yadav with the aid of other villagers. Due to aforesaid enmity on 01.01.2006 at 6-6:30 pm when he, his nephew- Rajnikant, his brother Chandra Dev Yadav (deceased) and other nephew Ashutosh and Ghyanshyam were sitting in front of Pakka house on chairs accused persons (all named) holding lathi-danda, spear, puwal, bricks, container of kerosene oil and match stick with common object came in front of his house and started to abuse, and threatened with death. Seeing them, we tried to flee then Ajay, Ravindra, Sravan, Brahmdev and Arvind beat him with lathi-danda. Ravindra and Shrawan inflicted lathi blows on the legs of his brother Chandra Dev Yadav. His brother Chandra Dev Yadav with nephew Ashutosh and Ghanshyam ran inside the room. Hansnath and Brahmdev shut the door of the room from outside and Basdeo, Kamla, Guddu and Panchratan put the straw (puwal) in front of the room and Hansnath & Brahmdev poured kerosene oil on it and lit the fire with match stick. The remaining accused set on fire three thatched roof room (madhai) with puwal. His brother Chandra Dev Yadav pushing the door, came outside the room then Ajay Chauhan, Arvind Gaur, Brahmdev Chauhan, Hansnath Gaur and Rajesh Yadav alias Babban Yadav started to beat him with lathi. His brother fell down. Hansnath Gaur pressed his chest by a wooden plank. On the noise and the sound of firing, Hansnath Yadav and Adalat Yadav holding torch and Lal Chand, Satyadev, Geeta Devi, Nisha Devi, Ram Banshi Devi, Babban Chaudhary, Chandrama Yadav, Hridaya Narayan Yadav, Veer Bahadur Yadav and Ram Asray Yadav begged for mercy but the accused severely beaten Hansnath Yadav, Adalat Yadav, Rajvanshi Devi, Chandrakala Devi and Geeta Devi with lathi. The incident was seen in the light of torch, flames of fire and the headlights of the vehicles passing through the road. Meanwhile, vehicle of police station- Khejuri reached there. Then accused started to throw bricks on it. Then extra police force reached

there. Before arrival of the extra police force, accused Mohan, Suman, Harendra, Santosh and others set on fire his old house with Khaprail roof pouring kerosene oil and with puwal. The household articles, straw, cot, beddings etc. burnt in the fire. This house was used to tether cattle. The accused persons ran away when extra force was called. Ashutosh and Ghyanshyam were taken out from the burning room with the help of witnesses. They were also beaten with lathi-danda and they also received burn injuries. Their face and hands were burnt. Thereafter he his brother Chandradev, Ashutosh, Ghanshyam, Adalat, Hansnath and Chandrakala came to district hospital Ballia where their medical examination was conducted and were admitted for treatment. He was hospitalized in District Hospital, Ballia for five to six days. Chandra Dev Yadav was referred to BHU, Hospital, Varanasi where he died during treatment due to injuries suffered.

(C) Hansnath Yadav (P.W.-4) has also given the eye witness account and has said in his examination in chief that the incident is of 01.01.2006. He and his uncle Adalat Yadav, after getting the torch repaired came to the room of Chandra Dev Yadav at 06:20 p.m. Chandra Dev Yadav, Ramesh Yadav, Rajnikant, Ashutosh, Ghanshyam and Chandrakali were talking there, sitting on the chairs. At 06:30 pm, accused persons (all named) forming an unlawful assembly and holding lathi, puwal, bricks, spear, kerosene oil, and match sticks came there and started to abuse Chandra Dev Yadav, Rajni Kant and their family members. Ravindra Chauhan, Shrawan Chauhan, Ajay Chauhan, Arvind Gaur and Brahmdev Chauhan assaulted Rajnikant and Rajesh Yadav with lathi. Chandra Dev Yadav was assaulted in legs with lathi by Ravindra Nath and Shrawan Chauhan. Chandradeo Yadav with Ashutosh and Ghanshyam entered into the pucca house and shut the door from inside. Accused asked them to open the door, otherwise they will burn the house and kill all of them. Then Brahmdev and Hansnath Gaur taking puwal set on fire the madai. They also set on fire the two other thatched rooms by pouring kerosene on it. This incident was seen by Rajwanshi Devi, Nisha Devi, Geeta Devi, Ram Dev Yadav, Lal Bachan Yadav, Chandrama Yadav, Hridaynarayan, Veer Bahadur and Ram Asray. We were begging for our lives then the accused assaulted us with lathi-danda causing injuries to Adalat Yadav, Rajvanshi Devi, Geeta Devi, Nisha and the witness himself. When door was partly burnt, Chandra Dev Yadav pushing the door came outside. Then Ajay Chauhan, Rajesh alias Babban Yadav, Arvind Gaur, Brahmdev Chauhan and Hansnath Gaur assaulted him with lathi. Chandra Dev Yadav fell down then Hansnath Gaur pressed his chest by putting a wooden plank. Meanwhile, police force of thana- Khejuri came there. Accused persons threw stones on it and also set on fire the old house of Chandradev with kerosene oil. We took out, Ashustosh and Ghanshyam in unconscious condition. Thereafter we took the injured persons to the hospital on a vehicle where their medical examinations were conducted and they were admitted in the hospital for treatment. Chandra Dev Yadav was referred to Varanasi-Hospital where he died on 08.01.2006. We saw the incident in the light of torch, flames of fire and head lights of the vehicles passing through. The straw, cot, beddings, motorcycle, engine and other household articles were burnt in the fire. The witness has further said that he has shown his torch to the Investigating Officer in presence of Susheel Yadav and Sadanand. The witness has produced the torch before the court. The witness has further said that in all there are 29 accused. He forget the name of accused-Raju.

(d) S.I. Chedi Prasad Yadav (P.W.-6) the then S.O. of P.S.- Pakari is the Investigating Officer. The witness has said that the aforesaid case crime no.01 of 2006 was registered in his

absence on 01.01.2006. Constable Vinay Prakash, Constable Arjun Singh, Constable Braghu Nath and Constable Indra Dev Singh reached the place of occurrence with the relevant papers and handed over to him at the house of the complainant. He started the investigation and recorded the statements of witness- Babban Chaudhary and Tarkeshwar Tiwari. On 02.01.2006 arrested accused namely Basdev Rajbhar, Kamala Rajbhar, Guddu Rajbhar, Panchratan Rajbhar, Rajkapoor Gaur, Ram Bhawan, Harish Chand Rajbhar, Gama Rajbhar, Kavindra Rajbhar, Ravindra Nath Chauhan and Shrawan Chauhan and recorded their statements. He also recorded the statement of Satya Dev Yadav and visited the place of occurrence and prepared the site plan at his instance. He also collected the burnt ashes from both the houses kuttcha and pucca and pieces of bricks in front of pucca house, sealed it and prepared its memo. The witness has proved, site plan as Ex.Ka-5 and memo as Ex.Ka-6. The witness has further said that he recorded the statements of other witnesses and then reached the district hospital Ballia collected the injury reports. On subsequent dates, he arrested the other accused persons and recorded the statements of remaining injured and also took in possession the blood stained cloths of Chandra Dev Yadav (deceased) and torch and prepared its memo. The witness has proved it as Ex.Ka-7. On receiving the postmortem report and panchayatnama of the deceased, Section 302 was added. On 20.01.2006 at 20:10 O'clock during the police custody remand of accused-Brahmdev Chauhan at his instance, recovered blood stained lathi/ bamboo, one plastic container of the kerosene oil used in the incident, from his thatched room, sealed it and prepared its memo. The witness has proved the recovery memo Ex.Ka-8. Witness has further said that he also prepared the site plan of place of recovery as Ex.Ka-9. He also collected other relevant papers like X-Ray report, X-Ray plate, medical reports and recorded the statements of other witnesses and sent the materials for forensic examination and after completing the investigation, submitted the charge-sheet Ex.Ka-10. The witness has also proved the GD No.2 of 02.01.2006 at 2:30 am regarding the entry of arrested accused at Police Station and also GD No.7 on 03.01.2006 at 6:30 am regarding the entry of three accused persons and two containers of burnt ashes as Ex.Ka-11 & Ex.Ka-12.

(e) The constable Gopal Rai (P.W.-8) in his examination in chief has said that on 01.01.2006 he was posted as constable at P.S. Khejuri. S.O. Rajnikant Verma received the information from control room to reach village-Ussa to maintain peace. He with S.O. and constable Akhilesh and constable driver Ataul Haque by Govt. Jeep No.UP60/ 9140 were going to village Ussa and reached in front of Katra Veer Bahadur Singh (small market) then 29 to 30 persons holding lathi-danda, bricks/ stones, threw it on their vehicle damaging its head lights, indicator and wire of wireless. Brahmdev Chauhan exhorted the others to attack the police personnels. We moved back the jeep. When more police force came there we reached the place of occurrence. It was 07:00 pm. Witness has identified accused-Brahmdev Chauhan in the court room.

(f) S.I.- Rajesh Kumar Verma (P.W.-14) in his statement has said that on 01.01.2006 he was posted as S.O., P.S. Khejuri and on that day at about 6:30 p.m. he received information from the control room through R.T. Set that some incident is happening in village Ussa. On the aforesaid information he with constable Gopal Rai, constable Akhilesh Kumar and Constable driver- Ataul Haque by Govt. Jeep No.UP60/ 9140 reached village Ussa. When his jeep reached near the Katra Veer Bahadur Singh then 29 to 30 persons including Brahmdev Chauhan holding bricks/ stones and lathi-danda in their hands came in front of his jeep and stopped it. Brahmdev Chauhan exhorted them to beat the

policemen and they damaged the jeep with bricks/ stones and danda. The head lights, indicator and the wire of wireless of the vehicle got damaged. This incident happened at 19:20 pm. He identified the accused in the light of jeep and torch.

(g) Remaining witnesses are formal in nature. Constable Mahaveer (P.W.-3) is the chik writer who has said that on 01.01.2006 on the written information of complainant Rajnikant, he registered the case crime no.01/2006 and has proved chik FIR as Ex.Ka-2. Constable Amar Nath Tiwari (P.W.-5) is the GD writer and has proved G.D entry of FIR dated 01.01.2006 as Ex.Ka-3. The witness has also proved the entry of GD no.22 at 15.25 pm of 11.01.2006 by which Section 302 IPC was added as Ex.Ka-4.

(h) Arun Prakash Chaubey (P.W.-10) has said that on 12.01.2006 he was posted as Traffic Inspector, ARTO, Ballia and on request of Traffic Inspector, Police Line inspected the vehicle Jeep No.UP 60/9140 of Police Station-Khejuri and submitted a report dated 13.01.2006. The left head light, left indicator and the antenna of wireless machine of the jeep was damaged. The witness has proved the inspection report as Ex.Ka-20.

(i) S.I. Buddhi Ram Sharma has conducted the inquest proceedings of deceased Chandra Dev Yadav and has proved the inquest report and related papers as Ex.Ka21 to Ex.Ka-24.

9. All the three eye witnesses produced by the prosecution namely Rajnikant Yadav (P.W.-1), Rajesh (P.W.-2) and P.W.-4 Hansnath Yadav have corroborated the prosecution case that Chandra Dev Yadav (deceased) original resident of village Hathauj was living in village Ussa where accused Brahmdeo Chauhan wanted to grab his land alleging it as the land of Gram Sabha. On 01.01.2006 at 6:00 pm all accused persons holding with lathi-danda, bricks/ stones, spears and kerosene container and straw in their hands with common object came at the house of Chandra Dev Yadav and started to abuse Chandradeo Yadav and his family members. They also threatened them with death. Accused Ravindra, Shrawan, Ajay, Brahmdev started to beat Rajnikant, Rajesh and Chandradeo Yadav. Chandradeo Yadav with Ashutosh and Ghanshyam ran inside the room then Brahmdeo Chauhan and Hansnath Gaur shut the door from outside and putting straw, pouring kerosene, lit the match-stick and set it on fire. When Chandradeo Yadav came outside then Ravindra, Shrawan, Ajay, Brahmdeo beat him with lathi. Hansnath pressed his chest by a wooden plank. Rajesh alias Babban Yadav beat Chandradev with lathi. Ashutosh and Ghanshyam received burn injuries. They also set on fire the other kutchha house. The police force of police station- Khejuri came there then accused pelted stones/ bricks on their vehicle and damaged it.

The aforesaid eye witneseses are also the injured. They have received injuries in the incident. Rajesh Yadav (P.W.-2) and Hansnath Yadav (P.W.-4) both have been medically examined just after the incident on 01.01.2006 at 8:40 pm and 9:30 pm respectively. According to medical evidence seven visible injuries including six lacerated wounds and one contusion were found on the body of injured-Rajesh. Five of them were on the head, one on the right thumb and one on the back. Hansnath Yadav P.W.-4 has received one injury- lacerated wound on the head. Rajnikant Yadav (P.W.-1) was medically examined in the night on 01.01.2006 at 12:25 O'Clock at the District Hospital Ballia. According to medical evidence, three visible injuries were found on his body, one lacerated wound at the face, two abrasions, one at face and other on the right shoulder. Dr. H.P. Rai and Dr. R.P. Gupta have also corroborated the prosecution case that the injuries of the injured, eye witnesses may come at the time of occurrence with lathi-danda.

Chandra Dev Yadav has also received seven visible injuries, three lacerated wound on head/ skull, two contusions on scapular region and two burn injuries on both palms/ hands. The doctor has corroborated the prosecution case that these injuries may come at the time of occurrence by hard and blunt object and fumes of fire. Chandra Dev Yadav was admitted in the district hospital from where he was referred to BHU. He was admitted there for treatment but could not survive and succumbed to his injuries during treatment on 08.01.2006 at 5:35 am. His postmortem report (Ex.ka-29) further proves that injured has died due to ante-mortem injuries. Kumari Nisha, Smt. Rajwanshi Devi, Geeta Devi, Ghanshyam, Ashutosh, Chandra Kala Devi and Adalat have also received visible injuries in this incident, their injury reports have also been duly proved by the concerned doctors who have also corroborated the prosecution case and have opined that these injuries may come at the time of occurrence with lathi-danda. Doctor has also opined that injuries of Ghanshyam and Ashutosh may come from smokes/ fumes of fire. So Ocular testimony of the witnesses stands fully corroborated with medical evidence on record.

10. During site inspection, Investigating Officer has collected burnt ashes and pieces of bricks. The witness Chedi Prasad Yadav (P.W.-6) has proved the memo and the material exhibits. This evidence also corroborates the ocular testimony. Motive of the incident as alleged in the FIR also got corroboration from the oral statement of the witnesses.

11. Rajesh Kumar Verma P.W.-14 then SO Khejuri and constable Gopal Rai have said that on 1-01-2006 they were posted at PS Khejuri. On receiving information from control room that some incident is happening in village Ussa they proceeded for village Ussa. When their jeep reached near the market of Veer Bhadur Singh 29-30 persons came in front of the jeep and stopped it. They were holding bricks/stones and danda. They attacked the vehicle and damaged its headlight; indicator and wire of wireless. SI Rajesh Kumar Verma has also named Brhamdev Chauhan, Rajesh Yadav alias Babban and Manoj Gond in his statement and has also said that he received the information at 6:30 p.m. and the incident with him has occurred at 7:20 p.m. Constable Gopal Rai PW8 has named only Brhamdev Chauhan and has also identified him in the court. Arun Prakash Chaubey assistant regional transport inspector has said that on 13-01-06 he make inspection of jeep no. UP60/9140. Its left headlight, left indicator and antennae of wireless were damaged. The witness has proved the technical examination report ext.ka 20. From statement of SI Chedi Prasad Yadav it is established that when he reached village Ussa the police force of PS Khejuri was there. So the above prosecution evidence further corroborates the allegations of the F.I.R. and oral testimony of the eye witnesses.

12. The prosecution has also produced the evidence of recovery of lathi and kerosene container used in the alleged incident at the instance of accused Brahmdev Chauhan. S.I.-Chedi Prasad Yadav (P.W.-6), the Investigating Officer has proved the recovery memo and material exhibits connected with.

13. Learned counsel for the appellants contended that the witnesses have said that Chandra Dev Yadav was beaten on legs by lathi-danda but no injury was found on his legs so oral testimony is not corroborated with medical evidence.

Learned AGA contended that the oral evidence fully corroborates the medical evidence, there is no major discrepancy or contradiction. Some minor contradiction are natural.

Considering the nature of the occurrence, it is not expected that the eye witnesses should

give thread bare description of each and every happening, some minor contradiction are natural. The testimony of injured witnesses are consistent and it stands corroborated by the medical evidence. The contradiction or discrepancy pointed out by the learned counsel for the appellants is not of such a nature which affects the reliability of the witnesses. Their presence on the spot is duly proved as they themselves had received injuries in the incident. The Hon'ble Supreme Court in the case of ***Maqsoodan vs. State of U.P., (1983) 1 SCC 218,*** has held that minor inconsistencies in the statement of witnesses and FIR regarding the number of blows inflicted and regarding the fact who assaulted whom, would not, by itself, make the testimony of such witnesses unreliable. On the contrary, it would show that the witnesses were not tutored.

It is established law that the testimony of an injured witness is more reliable because his presence on the place of occurrence stands established and it is proved that he suffered injuries in the course of the incident and due weightage should be given to the testimony of an injured witness because the injured witness is a person who has received injuries during the course of incident which is in-built guarantee of his presence on the spot.

In ***Bhagwan Jagannath Markad and State of Haryana vs. Krishnan***, it has been laid down that the testimony of an injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies. The reason for attaching such reliability for evidence of an injured witness is that his presence on the scene stands established and it is proved that in the said incident he got injured.

14. The learned counsel for the appellants further contended that the motive has been attributed to Brahmdev Chauhan and it is alleged that he was trying to forcibly occupy the land of Chandradeo Yadav alleging it as Gram-Sabha land. There is no motive for remaining accused. It is further contended that the accused Brahmdeo Chauhan in defence has produced the documents related to litigation between him and the deceased. So accused Brahmdeo Chauhan was taking legal recourse and there was no occasion to indulge in the criminal act. Learned counsel also contended that informant Rajnikant (complainant) Chandra Dev Yadav (deceased) and some of his family members have previously committed maar-peet with Brahmdeo Chauhan and a criminal case was registered against them which was pending at the time of the incident. Accused-appellant Rajesh alias Babban was also an accused in that case which shows that he was on the side of informant and so it is improbable that he will involve himself with his rivals and will take the sides of Brahmdeo Chauhan. On the aforesaid grounds, the learned counsel contended that motive as alleged is not proved.

The aforesaid arguments of the learned counsel are not appealing. All the three eye witnesses have consistently said that Chandra Dev Yadav has settled in Village- Ussa after acquiring some land and making construction there. Accused-appellant Brahmdeo Chauhan who is the resident of Village-Ussa did not like this and he wanted to forcibly dispossess Chandra Dev Yadav alleging that the land belongs to Gram-Sabha. He has also instigated the other co-villagers against Chandra Dev Yadav which culminated in the present incident. The circumstances may change, so it is not improbable that accused-appellant Rajesh alias Babban who was previously with Chandra Dev Yadav has turned against him and has joined the opposite party. There is nothing improbable in it and this cannot be a ground to disbelieve either the motive alleged by the prosecution or the

involvement of accused-appellant Rajesh alias Babbhan in the incident which is established from consistent evidence on record.

15. Learned counsel also contended that the incident is alleged to be of 6:30 pm on first January, in District Ballia the eastern district where in the month of January, sunset occurs at 5:00 pm and it becomes totally dark after 6:00 pm. Regarding the source of light there are different and contradictory statements. Some of the witnesses have said that lantern and torch was the source of light while the others have said that torch and head lights of vehicles was the source of light. So the source of light is also not established. Incident being of darkness, the identity of the accused could not be established.

It is undisputed that the incident is of 6:30 pm of the first of January, so it is established that at the time of occurrence, it was darkness. From the site plan it is also established that the place of occurrence is inside the village and there are other houses near the place of occurrence. The site plan also shows public way in the south. It is also proved from the evidence that two house, one pucca house and one kuttcha house of the complainant was set on fire and when police party reached at the place of occurrence, the fire was flaring up. There is specific statement of P.W.-4 Hansnath Yadav that he came at the house of Chandradeo Yadav after getting his torch repaired. The torch has been taken into possession by the Investigating Officer and has been produced in the court. So the statements of witnesses that they have seen the incident in the head light of the vehicles passing through the road and the flames of fire, torch and lantern are natural and probable. Further, in the circumstances of the present case, the source of light in insignificant. It is proved from the oral evidence that accused persons holding lathi-danda, bricks, stones came at the house of Chandra Dev Yadav, beat them with weapons in their hands, set on fire the pucca house and one kutchha house. In the incident 11 persons including three eye witnesses have received visible injureies. The incident has occurred over a considerable duration. It was not momentary. According to statement of Rajnikant Yadav (P.W.-1), the incident has occurred for nearly 45 minutes. The incident was of such a magnitude that police control room conveyed a message to nearby police stations and police team of three police stations, P.S.- Khejuri, P.S.- Pakari and P.S.-Sikandarpur reached there to restore peace and maintain order. So the manner in which the incident has occurred there was ample time and opportunity to look and identify the accused persons. There is no occasion to doubt that witnesses were not in a position to identify the culprits.

16. Learned counsel for the appellants also contended that it is a case of mob violence and all the eye witnesses in their statements have admitted that woman were also part of the mob which attacked the house of victim. They have also said that police had also resorted to lathi charge to control the situation, so there is probability that injured persons may have received injuries in the lathi-charge. It has also been contended that there is also contradiction between the statement of Rajanikant (P.W.1) and Rajesh (P.W.-2) regarding the role of women in the incident while Rajnikant has said that women were holding bricks/ stones and they pelted stones but Rajesh has said that women have not pelted stones.

These arguments also have no force. In the FIR 20 accused persons have been named and it is also alleged that some other unknown persons are also involved in the incident and during investigation some of the accused not named in the FIR were also found to have taken part in the incident and have been arrayed as an accused and charge-sheet have been submitted against them. As stated above, the incident has occurred for a long duration, so the presence of women at

the place of occurrence cannot be improbable. Every person present at the place of occurrence cannot be made accused. The person who have actually participated and have prominent roles are to be implicated. Considering the nature and magnitude of the incident, the presence of public at large at place of occurrence is natural. To maintain order and restore peace, the police may have used mild force. The witnesses being rustic villagers have termed it as lathi charge. So on this ground, the prosecution version cannot be disbelieved or testimony of the witnesses cannot be discarded.

17. Learned counsel for the appellants also contended that name with parentage of accused are mentioned in the FIR but the informant Rajnikant (P.W.-1) in his statement has said that he does not know the parentage of the accused persons. It shows that the report has been written with consultation and deliberation. Learned counsel further contended that FIR is ante-timed. The Investigating Officer has not recorded the statements of injured in the night while in his statement he has said that in the night, he reached the hospital. Constable Mahaveer Prasad (P.W.-3) in his cross examination has said that he has prepared Chitthi Majroobi of informant Rajnikant and sent him for medical examination, he has also said that he has not mentioned crime number and sections in the Chitthi Majroobi while Constable Amarnath Tiwari (P.W.-5) in his cross-examination has said that he has prepared Majroobi Chitthi of informant Rajnikant Yadav and has mentioned crime number on it. It is also contended that there is over writing on the number of GD and number 2 has been made 1 by over writing. Learned counsel also contended that the witness has admitted that there was no prior entry of any other crime in the GD of concerned date. All these discrepancies reflects that FIR has been lodged later on, mentioning time of 8:30 pm.

Learned AGA on the other hand contended that the FIR has been lodged on the application of Rajnikant Yadav and from the evidence on record it is proved that after sending his father Chandra Dev Yadav and other injured to the district hospital, the informant went to the police station and on his written application the FIR was lodged. At that time the Investigating Officer was not present on the police station. He got the papers at the place of occurrence itself sent by the head Moharrir through constables. After lodging of the FIR, Rajnikant was sent to the District hospital for medical examination and he was examined in the night at 12:30 pm. So there is no circumstance which indicates that the FIR is ante timed.

From the evidence on record, it is proved that in the incident, Chandra Dev Yadav, father of the informant has received serious injuries and other members of his family were also injured. The witness has said that he sent his father and other injured in a Jeep to the district hospital and then he proceeded to police station to lodge the report. He got the report written by Uma Shankar. It is also proved from the evidence that informant Rajnikant Yadav was medically examined at district hospital at 12:25 pm in the night of the incident. The original injury report of the injured Rajnikant Yadav is not on record. The photo-copy of the report has been proved by producing medico legal register, so it cannot be judged whether crime number and sections were mentioned in it or not. It is true that there is contradiction between the statement of Constable- Mahaveer (P.W.-3) and Constable Amarnath Tiwari (P.W.-5), on the fact of preparation majroobi chitti of informant Rajnikant Yadav. They are formal witnesses and have given the statement, on the basis of their memory. It is pertinent to mention that three of the injured namely Kumari Nisha, Smt. Rajwanshi Devi and Geeta Devi have been medically examined on 04.01.2006 on a Majroobi Chitthi but the crime number and sections are missing in their chitthi majroobi also which have been prepared on 04.01.2006

after three days of lodging of the FIR, so mere omission of crime number or sections in the chitthi majroobi does not indicate that the FIR was not in existence at that time. The fact that no other crime was registered prior to this one also does not establish that the FIR is ante-timed. The witness Rajnikant (P.W.-1) has explained in his statement that he has written the parentage of the accused after enquiring from other persons. So there is no material on record on the basis of which in can be presumed that FIR is ante-timed or written information is a result of consultation or deliberation.

18. Learned counsel for the accused-appellant also contended that prosecution has failed to produce any GD entry of Investigating Officer proceeding to the hospital. It is also contended that in the entire case diary no time of commencement of the investigation, and the time of its conclusion has been mentioned. The statement of injured witnesses have been recorded with much delay after several days of the incident.

Learned AGA contended that the Investigating Officer received the papers at the place of occurrence and commenced the investigation. He recorded the statement of some of the witnesses and then ensured the arrest of some of the accused-persons. Thereafter he came back at police station and then went to the hospital from where he collected medical examination report of the injured. Considering the nature of the incident, there was a panic situation and to restore law and order, it was necessary to ensure the arrest of the accused persons, so he gave priority to it and due to this the statement of injured could not be recorded in the night. Under the circumstances of the case, the act of the I.O. cannot be said to be improper.

From the evidence on record it is clear that the Investigating Officer who was the the S.O. of Police Station- Pakari reached the village Ussa before registration of FIR, on receiving the information from the control room. The police party of the other police stations also reached there. Firstly police Jeep of Khejuri police station reached the village, the culprits pelted stones on it and did not allow it to reach near the place of occurrence and at that time the flames were flaring up. S.O. Pakari reached at place of occurrence, thereafter. The police force firstly tried to maintain order and restore peace and put off the fire with the aid of villagers. The Investigating Officer has said that he reached the place of occurrence between 7:00 to 7:15 pm, meanwhile, FIR was lodged at the police station and papers were sent to him at the place of occurrence. On receiving the papers and after maintaining peace and order he commenced the investigation. At that time the injured had gone to the district hospital, so he recorded the statements of other witnesses available on the spot and prepared the site plan and thereafter he engaged himself to ensure the arrest of the accused persons. He arrested some of the accused persons and thereafter came at the police station and then he proceeded to the hospital. It is true that statements of injured witnesses have been recorded with some delay but it is well settled principle of law that latches on part of the Investigating Officer, cannot benefit the accused. There may be some latches on part of the Investigating Officer but it does not adversely affect the prosecution.

19. Learned counsel for the appellants contended that there is no independent witness of recovery of lathi and kerosene container at the instance of Brahmdeo Yadav, the alleged recovery is planted and fabricated. Accused-Brahmdeo Chauhan was taken on police remand and he was tortured and his signature was obtained on a blank paper and he made a complaint in this regard to the concerned Magistrate who summoned the Police Officer in the court and S.I. Chedi Prasad (P.W.-6) in his cross examination has admitted these facts.

Learned AGA contended that recovery has been proved by S.I. Chedi Prasad Yadav (P.W.-6) who is also the Investigating Officer and lathi and kerosene container has been produced in the court and proved as material exhibits. The testimony of S.I. Chedi Prasad Yadav cannot be discarded merely because there is no other independent witness of alleged recovery.

From the statement of S.I. Chedi Prasad Yadav, it is proved that Investigating Officer after taking Bhramdeo Chauhan on police remand, at his instance, recovered one lathi and one plastic container of kerosene from thatched room near the house of the accused. The witness has also proved the recovery memo as Ex.Ka-8 and lathi and plastic container of kerosene oil as material exhibits Ka.1 and Ka.2. S.I.- Chedi Prasad Yadav in his cross examination has denied the suggestion of the defence that during police custody remand, accused Brahmdeo Chauhan was beaten after disrobing him and his signature was obtained on a blank paper. The witness has only admitted that accused Brahmdeo Chauhan has made a complaint in the court of CJM on which he was summoned by the court. It is true that no other witness has been produced by the prosecution to corroborate the statement of P.W.-6 of this recovery but only on this ground it will not be proper to disbelieve it. Even if this evidence is ignored, there is still sufficient evidence in form of ocular testimony which proves the prosecution version about the involvement of accused-appellants in the incident.

20. From the appreciation of evidence it is clear that the ocular testimony of injured witnesses are consistent. It also stands corroborated from medical evidence and other supporting evidence. There is no major contradiction or discrepancy which create any suspicion or doubt. The prosecution evidence is wholly reliable and there is no ground to disbelieve it. From the evidence of record it stands proved that the accused persons at the behest of Brhamdev Chauhan in a pre- planned manner and with a common object holding lathi, danda, bricks/stones and kerosene container came at the house of Chandra Dev Yadav (deceased) abused and beaten Chandra Dev Yadav and other members of his family. Chandra Dev Yadav with Ashutosh and Ghanshyam went inside the room. The accused shut the door and set it on fire. They also beat them when they came out to save their lives. Accused person also set on fire, the other kutcha house (thatched roof rooms). They attacked the police vehicle and damaged it. They also threatened with death Chandra Dev Yadav and his family members. In this incident 11 persons suffered visible injuries and Chandra Dev Yadav who was seriously injured and was admitted in the hospital, succumbed to his injuries one week after the incident.

21. Learned counsels for the appellants vehemently contended that neither any charge under Section 149 IPC has been framed against the appellants-accused nor their conviction have been recorded with the aid of Section 149 IPC. It is not proved as to which of the accused has caused the fatal injury to the deceased. So none of the appellants could be convicted for charge under Section 302 IPC. Learned counsel further contended that all of the appellants-accused also cannot be convicted for simplicitor charges under Section 307, and 436 IPC. Individual role of each accused will have to be judged. It is also contended that according to prosecution evidence Ravindra, Shrawan, Ajay, Brahmdeo Chauhan and Arvind assaulted Rajesh with lathi-danda and further Ravindra and Shrawan assaulted Chandra Dev Yadav with lathi. The role of setting on fire the room in which Chandra Dev Yadav, Ashutosh and Ghanshyam had taken refuge is assigned to Brahmdeo Chauhan and Hansnath Gaur (since acquitted). Rajesh alias Babban has been assigned the role of assaulting Chandra Dev Yadav with lathi. Chandra Dev

Yadav has suffered 13 injuries and it is not clear that which of the accused caused which of the injury. Learned counsel for the appellants has relied on following citations:

(i) Rudal Singh & ors vs. State, 2016 (3)ACR 2823

(ii) State of U.P. vs. Kallu Lal and ors, 1985 Law Suit (All) 475

(iii) Sri Kishan and ors vs. State of U.P., 1972 (2) SCC 537.

The learned AGA conceded that as trial court has not framed charge of section 149 IPC the individual role of the each accused will be scrutinised. He submitted that accused-appellants could not be convicted for charge under section302 IPC but the may be convicted for charges under section 307 and 436 IPC according to their roles explicit from the evidence.

From the perusal of the charges framed by the trial court, it is clear that unfortunately the trial court has framed charges without aid of Section 149 IPC and has framed simplicitor charges under Section 302, 307, 308 and 436 IPC. It is settled principle of law on the point that mere omission to mention Section 149 IPC may be considered an irregularity but failure to mention the nature of the offence committed by the accused-persons cannot said to be a mere irregularity. The charges framed under Section 302 & 307 IPC are without the aid of Section 149 IPC and further there are no words in these charges which give any indication of existence of the ingredients of Section 149 IPC. So the conviction of the accused-appellants for charge under Section 302 IPC will not sustain. From the evidence on record it is also clear that there is no specific evidence which implicates the accused-appellants punishable for charges under Section 307 IPC and conviction for the aforesaid charge will also not sustain.

The trial court has also framed charge under Section 436 IPC simplicitor without the aid of Section 149 IPC but the trial court has used the words "आप अभ्युक्त द्वारा एक राय होकर"which denotes the common object of the accused.

In ***Ram Krishna AIR 1997 SC 3997*** the Honourable Apex Court has observed "where the complicity of the accused in the crime has established and no specific charge indicating the applicability of section 149 was framed but all the ingredients of section 149 were clearly indicated in the charge framed against the appellants, the court held that the omission to mention Section 149 specifically in the charge is only an irregularity and since no prejudice was shown to have been caused to the appellants by that omission it was not to effect their conviction."

Although section 149 IPC is not specifically mentioned in the charge framed under Section 436 IPC but the language of the charge clearly indicates the common object of the accused which is the essential ingredient of Section149 IPC. Applying the aforesaid principle of law as laid down by the Hon'ble Apex Court it is clear that the accused-appellants cannot get benefit of omission of Section 149 IPC in the charge of Section 436 IPC. They could not be acquitted on this ground from the aforesaid charge as the charge indicates that the act was done in furtherance of the common object and omission of Section 149 IPC is a mere irregularity. From the evidence it is proved that accused-appellants, forming an unlawful assembly with common object, set on fire the two houses of the complainant, so their conviction under Section 436 IPC is just and legal.

22. It also stands proved from the evidence that all accused persons holding lathi-danda, bricks/stones and kerosene container forming an unlawful assembly came at the door of Chandra Dev Yadav and threatened Chandra Dev Yadav

and his family members will death and beat them with lathi-danda. So charges under Section 147, 323 & 506 IPC also stand proved.

23. By the impuned judgement, the trial court has acquitted accused Suman Rajbhar, Santosh Yadav, Hansnath Gaur , Ranjit Gond, Sunil Rajbhar, Devendra Rajbhar , Harendra Rajbhar, Bechu Rajhbhar and Mohan Rajbhar from all the charges. Complainant/injured has filed criminal revision no. 188 of 2007 against the said order of acquittal. The learned counsel of revisionist contended that prosecution has produced three eye witnesses who are also injured and by there testimony prosecution case is fully established and their testimony cannot be disbelieved. From the deposition of witnesses it is established that all the accused including the acquitted accused have actively participated in the crime. The learned counsel further contended that the trial court on the same evidence has convicted some of the accused but acquitted the nine accused (opposite party) without any cogent reasoning . When the trial court has believed the testimony of eye witnesses there was no reason to disbelieve it for acquitted accused. It is further contended that leaned trial court has acquitted other accused persons without considering the totality of the circumstances and material available on record which is not sustainable in the eyes of law. On the aforesaid grounds learned counsel prayed that criminal revision filed on behalf of the informant against the acquittal of those accused persons is liable to be allowed.

The learned counsel for the accused opposite party submitted that all the nine accused acquitted by the trial court except Santosh Yadav were not named in the FIR and there names have been added during the investigation without any just cause. They have not been put to identification. The learned trial court on appreciation of the evidence found that their involvement in the incident is doubtful. The learned trial court giving benefit of doubt have acquitted them. The findings of the learned trial court do not suffer from any illegality or infirmity and there is no sufficient ground to set aside the order of acquittal .

Section 401 of CrPC deals with power of High Court in Revision. Sub -section 1 and 3 the relevant provisions are as follows:-

"1. In the case of any proceeding the record of which has been called for by itself or Which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

3. Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction."

In a catena of decisions it has been held that the High Court cannot in revision convert finding of acquittal into one of conviction. In ***Bhogilal v. State of UP, 1984(3)crimes*** 37 this court has held even if there is an error on the point of law or in appreciation of evidence the higher court should not interfere in the finding of acquittal. The order of acquittal may be set aside if it is based on conjecture and surmises and there is mis-carriage of justice. In ***Yogendra Nath Jha Vs. Polai Lal, AIR 1951 SC 316*** it has been held that by merely characterising the judgment of the trial court as perverse and lacking in perspective, the High Court cannot reverse pure findings of fact based on the trial courts appreciation of evidence . The power of the High Court is very limited and as a general rule the High Court will not interfere in revision against the order of acquittal unless there is a gross error of law.

In respect of the aforesaid acquitted accused the learned trial court has observed that

except Santosh Yadav the seven other accused are not named in the FIR and their name have been added during investigation but it is not clear from the prosecution evidence that on what basis their names have been added. If they were not named in the FIR whether any identification parade was conducted. It has been further observed that this statement that as and when there names came into knowledge they were added. is not sufficient and satisfactory explanation. In respect of accused Hansnath Gaur it has been alleged that he pressed the chest of Chandra Dev Yadav with a wooden plank causing injury to him but omission of the name of the accused in the FIR attributed with such a prominent role and narrating it for the first time in the court creates doubt. The learned trial court on the aforesaid appreciation has held that the accused whose names have been added after the FIR, creates doubt about their participation in the incident and on the aforesaid grounds have given benefit of doubt to them. In respect of accused Santosh Yadav the learned trial court has observed that he is resident of village Sahaspura PS- Rasda while in the FIR it is alleged that all the accused are residents of village Ussa and there is no explanation about the fact that how he has been alleged to be resident of village Ussa in the FIR. The learned trial court has also observed that it has come in the evidence that many people were assembled at the place of occurrence and passers by were also there. Hence in such a circumstance, the presence of any outsider at the place of occurrence was possible and on its basis his name may have been mentioned in the FIR. On the aforesaid reasoning, the learned trial court has extended benefit of doubt to the accused Santosh Yadav, also. The findings of the learned trial court are based on appreciation of evidence and cannot be said to be perverse or purely conjecture and surmises. The view taken by the learned trial court cannot be said to be improbable also. It may be a possible view. Applying the proposition of law as discussed above it is clear that there is no sufficient ground to interfere in the aforesaid findings of the trial court and set aside the order of acquittal. The powers of revisional court being limited, the revisional court cannot re-appreciate the evidence in its own way to interfere in the finding of acquittal unless the said finding is either perverse or based on inadmissible evidence or admissible evidence has been ignored by the court. There is no such circumstance in this case. So there is no merit in the revision which is liable to be dismissed.

24. From the above discussion, it is clear that convictions of accused-appellants under Sections 302 & 307 IPC are not sustainable in the eye of law, the same is liable to be set aside and all the accused-appellants are liable to be acquitted of the charges under Sections 302 and 307 IPC.

Conviction of the accused-appellants for charges under Section 147, 323, 436 and 506 IPC are liable to be upheld. The sentences awarded by the trial court in respect of the aforesaid charges are also just and proper and need no interference.

25. All the aforesaid four criminal appeals are ***partly allowed*** and conviction and sentence of the appellants-accused under Section 302 and 307 IPC are hereby set aside. Appellants accused are acquitted of the charges under Section 302 & 307 IPC. The conviction and sentence of the appellants accused for charges under Sections 147, 323, 436 & 506 IPC are hereby upheld. Appellants- accused Ravindra Chauhan, Brahmdeo Chauhan, Arvind Gaur and Rajesh alias Babban are in jail. They will serve their remaining sentences. Remaining appellants accused Basdeo Rajbhar, Guddu Rajbhar, Ram Bhawan Rajbhar, Harish Chand Rajbhar, Gama Rajbhar, Jawahir Chauhan, Ram Shankar Rajbhar are on bail. Their bail bonds and suriety bonds are cancelled. They shall surrender before

the trial court within 15 days and be taken into custody to serve their sentences, failing which the trial court shall proceed according to law.

26. Criminal Revision has no merits and is hereby ***dismissed.***

27. Copy of this judgment along with lower court record be transmitted to the learned trial court immediately.

(2021)12ILR A828
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.12.2021

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE MANISH KUMAR, J.

Criminal Appeal No. 3023 of 2009

Brijesh Kaushal & Anr. ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Nagendra Mohan, Maneesh Kumar Singh, Navita Sharma

Counsel for the Respondent:
Govt. Advocate, Brijesh Kumar Yadav, Indra Pratap Singh

Marriage solemnized 5 years ago-earlier case was filed-same was compromised-deceased living in her matrimonial house since long-conviction made on the basis of dying declaration-dying declaration is suspicious-prosecution could not prove its case-impugned conviction order set-aside.

Appeal allowed. (E-9)

List of Cases cited:

1. Darshana Devi Vs St. of Pun. [(1996) SCC (Cri) 38]

2. P. Mani Vs St. of T.N. [(2006) 2 SCC (Cri) 36]

3. St. of Raj. Vs Prithvi Raj [(1995) SCC (Cri) 934]

4. Meera Vs St. of Raj. [(2004) SCC (Cri) Supp. 16]

5. Ajay & ors. Vs St. of U.P. [(2020) 2 JIC 537 (All.)]

6. Nagabhushan Vs St. of Karn. [2021 2 SCC (Cri) 539]: [(2021) 5 SCC 222]

7. P. Mani Vs St. of T.N.[(2006) 2 SCC (Cri) 36]

8. Ram Das Vs St.of Mah. [(1977) SCC (Cri) 254]

9. St. of Raj. Vs Prithvi Raj [(1995) SCC (Cri) 934]

10. Prem Pal Singh Vs State [2017 (1) JIC Reports 104 (All)]

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

1. This Criminal appeal has been filed by the appellants against the judgment and order dated 27.11.2009 passed by Additional Sessions Judge, FTC-Vth, court no. 14, Sultanpur in S.T. No. 332 of 2007 arising out of Crime No. 372 of 2007 under Sections 302/34, 498 A IPC and 3/4 of the Dowry Prohibition Act, 1961 registered at Police Station-Musafirkhana, District-Sultanpur convicting the appellant Brijesh Kaushal and Smt. Nirmala and sentencing them for life imprisonment along with fine of Rs. 5000/ each, in default thereof to undergo simple imprisonment for a period of three months.

2. Heard Shri Maneesh Kumar Singh, learned counsel for the appellants and Shri Umesh Verma, learned Additional Government Advocate for the State and perused the judgment and order passed by learned trial court as also the lower court record.

3. As per the prosecution case, on 22.05.2007, a First Information Report was lodged at 9.30 A.M. against four persons namely, Brijesh Kaushal (husband of the deceased), Smt. Nirmala (mother in law of the deceased), Ghanshayam Kaushal (father-in-law

of the deceased) and Rajesh Kaushal (devar/brother-in-law of the deceased) under Sections 302/34, 498 A IPC and 3/4 of the Dowry Prohibition Act, 1961 stating therein that the marriage of the daughter of the complainant namely Manju *(hereinafter referred to as 'the deceased')* was solemnized with Hindu customs and rituals five years ago with Brjesh Kaushal (appellant no. 1). At the time of marriage, as per the capacity, the dowry was given. After the marriage, the husband and in-laws of the deceased used to harass mentally and physically both for dowry demand, and the same was told by the deceased repeatedly. On the fateful day i.e. 22.05.2007 at 08.00 A.M. some unknown persons called the complainant and informed him that his daughter was set ablaze by pouring kerosene oil and when he reached the Community Health Centre, Musafirkhana, District Sultanpur, he saw his daughter lying on the bed in the emergency ward and on asking, she told that today morning at 8.00 A.M. she was set to fire by her husband and mother in law by pouring kerosene oil for dowry demand of Rs. 20,000/-. The daughter has been referred to Medical College at Lucknow. It has also been disclosed that earlier also, case for dowry demand was filed which was subsequently compromised and his daughter returned to her matrimonial house.

4. After investigation, charge-sheet was filed against all four accused persons under Sections 302/34, 498-A IPC and under Section 3/4 of the Dowry Prohibition Act, 1961.

5. The trial Court framed the charges against the accused appellants under Sections 302/34, 498-A IPC and 3/4 of Dowry Prohibition Act, 1961 and the same was denied by the accused persons and asked for trial.

6. The prosecution, in order to bring home the accusation against the appellants has produced two witnesses of fact, namely Ram Chandar (the complainant)/father of the deceased as PW-1, Kumari Sanju Kaushal (younger sister of the deceased) as PW-2. The prosecution has further produced as many as six formal witnesses viz Suresh Kumar Dubey as PW-3, Dr. Rajendra Prasad as PW-4, Nagendra Singh, the Sub-Inspector as PW-5, Sheetla Prasad Pandey as PW-6, Rajeev Kumar Shukla as PW-7 and Dr. Suresh Chandra as PW-8 and Shri Madan Mohan Verma has also produced as CW-1.

7. As documentary evidence, the prosecution has proved the Nakal Tehrir as Ext. ka-1, Chik FIR as Ext. ka 2, Kayami G.D. as Ext. ka-3, Dying Declaration as Ext. ka- 4, Chargesheet as Ext. ka-5, Site plan as Ext. ka- 6, Fard as Ext. ka- 7, Panchanama as Ext. ka- 8, C.M.O Report as Ext. ka-9, Photonash as Ext. ka- 10, Form- 13 as Ext. ka- 11, Dead Memo as Ext. ka- 12, Photo G.D. as Ext. ka- 13, Post Mortem Report as Ext. ka- 14.

8. On the other hand, the appellants in their defence examined Shiv Shankar Agrahari as DW-1, Ram Nath *alias* Natthu as DW-2, Surendra Pratap Tripathi as DW-3.

9. The statement of the accused persons were recorded under Section 313 of Code of Criminal Procedure *(hereinafter referred to as, 'the Cr.P.C.')*, wherein, they had denied the commission of crime stating therein that the first information report was ante timed and they took her to the hospital for treatment. The charge-sheet has wrongly been filed and the appellant no. 1 has further stated that he was at his shop, downstairs and the mother was not at home and had gone to the temple and after hearing hue and cry, he ran immediately and saw that the clothes of deceased caught fire from the stove and she was burning. After receiving the burn injuries, the deceased had never said anything.

10. The trial court has not accepted the case of the prosecution on two aspects. Firstly, the marriage was solemnized five years ago. As

per the evidence before the trial court, a clear finding has been given that marriage was solemnized more than seven years ago. Hence, no offence is made out against the accused persons/appellants under Section 498-A r/w Section 304 IPC and Section 3/4 of the Dowry Prohibition Act, 1961 and secondly, the statement that previously also, a case was filed but the same was compromised. On that the trial court had given a specific finding that it was an old matter and after the compromise the deceased was living in her matrimonial house since long. The father-in-law and the Dewar were acquitted, whereas the husband i.e. appellant no. 1 and the mother-in-law were convicted under Section 302 r/w Section 34 IPC and sentenced, as above on the basis the dying declaration of the deceased before the Naib Tehsildar, wherein she had said that her husband/appellant no. 1 put her on fire on the instigation or instructions of his mother and at the time of the incident, the husband and mother-in-law were present.

11. Learned counsel for the appellants has submitted that the second dying declaration, which has been relied upon by the trial court without looking to the alleged first non-judicial dying declaration made by the deceased-Manju before her father/complainant (P.W.1), there is variance in the first dying declaration given by the deceased-Manju when compared to the deposition during cross-examination of her father and it contradicts with the dying declaration given to the Naib Tehsildar. In the case of non-judicial dying declaration, there should be no variance in the statements of the witness and the exact words allegedly used by the deceased. In the present case, as according to the narration in the first information report lodged by PW.1, the deceased told him that due to non-fulfillment of dowry demand of Rs. 20,000/-, my husband and mother-in-law put me on fire by pouring kerosene oil at 08.00 AM, whereas in the examination in chief, PW.1 has stated that his daughter-Manju told him that due to the demand of Rs. 20,000/-, as dowry, my husband, my mother-in-law, father-in-law and Dewar poured kerosene oil and put me on fire at around 07.30 AM. So, this variance in the statements of PW.1 with regard to the exact words allegedly used by the deceased had become suspicious. 12. In the first dying declaration, there is a mention as stated by the P.W. 1 in his statement that the deceased has told as under:-

"अस्पताल वहां पर एमरजेन्सी के बेड पर मेरी लडकी जली अवस्था में मौजूद कराह रही थी जिससे पूछने पर उसने बताया कि मुझसे दहेज के 20,000/– रुपया कम देने के कारण मेरे पति व सास ने मिटटी का तेल डालकर करीब सुबह 8 बजे जला दिया।"

13. Further, in the cross-examination, PW.1 has stated as under:-

"दिनांक 22 मई को सबेरे 8 बजे अज्ञात आदमी ने मुझे टेलीफोन किया व बताया कि मंजू के सास, ससुर व देवर व पति मंजू के ऊपर मिट्टी का तेल डालकर जला दिये। मैं मुसाफिरखाना अस्पताल आया तो देखा कि लड़की जीवित थी और कराह रही थी। मैं मंजू से पूछा कि कैसे हुआ? तो मंजू ने बताया कि 20 हजार रुपये दहेज में न देने के कारण मेरे पति, मेरी सास, ससुर व देवर ने मेरे ऊपर मिट्टी का तेल डालकर मुझे जला दिया। सुबह 7–1/2 बजे मुझे जला दिया।"

14. The Apex Court in the case of ***Darshana Devi vs. State of Punjab [(1996) SCC (Cri) 38],*** has held as under:-

"There is variance in the statements of the two witnesses with regard to the exact words allegedly used by the deceased. According to PW 2, the deceased had stated that the appellant had sprinkled kerosene on him when he was lying asleep and had burnt him, while Lachhmi Devi, PW 1 did not attribute any such statement to the deceased. PW 1 reiterated in her cross-examination "all that Madan Lal told me was

that he had been burnt by Darshana Devi by sprinkling koresene" Even though an oral dying declaration can form basis of conviction in a given case, but such a dying declaration has to be trustworthy and free from every blemish and inspire confidence. The reproduction of the exact words of the oral declaration in such cases is very important. The difference in the exact words of the declaration in this case detract materially from the value of the oral dying declaration." (emphasis laid by us)"

15. As per the above law settled by the Apex Court in the case of oral dying declaration, the words should be exact, used allegedly by the deceased, but such a dying declaration must be free from every blemish and inspire confidence, whereas in the present case, due to the variance about the time, which can be ignored but involvement of accused persons is major. On the contrary, learned trial court has not made any observation in its judgment impugned in the present criminal appeal on this aspect of the matter, regarding the alleged oral dying declaration made by the deceased to her father-PW.1.

16. The deceased, in her second dying declaration before the Naib Tehsildar has stated, as under:-

"*प्रश्न– कैसे आग लगी?*

उत्तर– मेरे पति ने मेरे ऊपर मिटटी का तेल डालकर माचिस से आग लगा दी। मेरे पति नशा करते है मर्फिया पीते है मॉ के कहने पर जलाये। मैं दहेज एक्ट का पहले मुकदमा लड़ चुकी हूँ। मैं मुकदमे में समझौता कर ली थी, इसके बाद पति के साथ रहने लगी थी। मेरे जलने के समय मेरे पति व सास थी। एक आदमी ने मुझे बचाया मैं उसको पहचानती नहीं।"

17. In the above two dying declarations there is variance and hence are not reliable. In the first dying declaration, the cause of putting her ablaze was demand of Rs. 20,000/- as dowry and all the four persons were made accused in the dying declaration whereas in the second dying declaration before the Naib Tehsildar, there is no whisper of demand of dowry due to which she was put to fire and out of four, the names of only two accused persons were mentioned and in support of his submission, learned counsel for the appellants has relied upon various judgments.

18. The Apex Court in paragraph 14 in the case of ***P. Mani vs. State of Tamil Nadu*** reported in ***[(2006) 2 SCC (Cri) 36],*** has held as under:-

"14. Indisputably conviction can be recorded on the basis of the dying declaration alone but therefor the same must be wholly reliable. In a case where suspicion can be raised as regards the correctness of the dying declaration, the court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on record suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them. In this case the circumstances which have been brought on record clearly point out that what might have been stated in the dying declaration may not be correct. If the deceased had been nurturing a grudge against her husband for a long time, she while committing suicide herself may try to implicate him so as to make his life miserable. In the present case where the appellant has been charged under Section 302 of the Penal Code, the presumption in terms of Section 113-A of the Evidence Act is not available. In the absence of such a presumption, the conviction and sentence of the accused must be based on cogent and reliable

evidence brought on record by the prosecution. In this case, we find that the evidences are not such which point out only to the guilt of the accused."

19. In paragraph no. 3, the Apex Court in the case of ***State of Rajasthan vs. Prithvi Raj*** reported in ***[(1995) SCC (Cri) 934],*** has held as under:-

"3. To satisfy ourselves we have carefully gone through the evidence and also the original records. From the above resume it can be seen that the dying declarations Ex. P-7 and Ex. P-11 recorded by the Assistant Sub-Inspector and the Magistrate are of great importance in this case. It is held in a number of cases that if there are more than one dying declarations, the court has to see whether they are consistent in material particulars. In the instant case we have to examine the contents of the dying declaration particularly in the background of the plea taken by the accused. In Ex. P-7 the deceased stated that her husband used to give her threats and that he would burn her to death and that she returned from her father's house and was sitting in the kotha when her husband asked her to go out. Thereafter her husband poured kerosene on her and went out into the aangan (courtyard). He brought a matchstick and set fire. Her in-laws were sitting near the outgate and doing stitching work. In Ex P-11 she stated that she was sitting in the aangan and not in the kotha and that her husband set fire to her clothes and on making hue and cry, people gathered and her husband and her in-laws carried her to the hospital."

20. In paragraph 7, the Apex Court in the case of ***Meera vs. State of Rajasthan*** reported in ***[(2004) SCC (Cri) Supp. 16]***, has held as under:-

"7. The second dying declaration on which the prosecution relied is said to have been made by the deceased when she was taken on a 'tonga' to her parents' house at Purada. Such a statement was allegedly made by her to her mother Chhogi (PW-10) in the presence of Sadia (PW-2) and Uma (PW-3). Chhogi (PW-10), the mother of the deceased, stated that on the date of occurrence the deceased had been brought on a 'tonga' to her village in the evening. Deva was also with her. Her daughter was brought down from the 'tonga' and at that time she was saying that her mother-in-law made her drink a rat poison and this was stated in the presence of PW-2 Sadia and PW-3 Uma. Immediately the Sarpanch was contacted who gave them a letter with which they left for the hospital at Sumerpur. At the hospital her daughter was alive for about an hour."

21. In the case of ***Ajay and Ors. vs. State of U.P. reported in [(2020) 2 JIC 537*** (All.)], this Court in paragraph 28 has observed, as under:-

"28. In Heeralal V/S State of Madhya Pradesh, 2009 LawSuit (SC) 394, the Apex Court has held as hereunder :

"that being so, in view of the apparent discrepancies in the two dying declarations it would be unsafe to convict the appellant."

In Gopal V/S State of Madhya Pradesh, 2009 LawSuit (SC) 484, the Apex Court has held as hereunder :

"Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. See: Kundula Bala Subrahmanyam

vs. State of A.P. 1993 2 SCC 684. However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of various dying declaration, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances."

22. On the other hand, learned AGA has submitted that there is no variance in the two dying declarations of the deceased. The learned trial court, while acquitting the father-in-law and the brother-in-law and convicting only husband and mother in law brings end to the plea of variance raised by the appellant. Only those persons have been punished or convicted against whom the material was found in the dying declaration. It is further submitted that whatever the consistencies, the benefit of the same was given to the persons who were entitled for the same and in support of his statement, learned AGA has relied upon the judgment of the Apex Court reported in ***[2021 2 SCC (Cri) 539]: [(2021) 5 SCC 222] Nagabhushan Vs. State of Karnataka.***

23. The position which emerges out after hearing the submissions advanced by the learned counsel for the respective parties and going through the record as also the judgment of the Apex Court, the position which emerges out in the present case is that it is an admitted settled legal proposition of law that a conviction can be awarded on the basis of dying declaration alone, therefore, the same must be wholly reliable and for determining the correctness of the dying declaration, it must be looked with some corroborative evidences. In the present case, there are two dying declaration of the deceased and the variance has already been discussed above, the said variance in the two dying declaration of the deceased.

24. From the records, it is revealed that the dying declaration recorded by the Naib Tehsildar on which the time mentioned is 9.43 A.M. whereas time of lodging of the First Information Report is 9.30 A.M. so within 13 minutes, the Naib Tehsildar was there for recording the dying declaration of the deceased, which is highly improbable. Apart from that, the learned trial court on the application of the prosecution side under Section 311 Cr.P.C. has passed an order on 21.10.2009 summoning Shri Madan Mohan Verma, Naib Tehsildar as CW-1. The Naib Tehsildar CW-1 in his statement before the Court has stated that he had received the information of recording the dying declaration at Musafir Khana at 9.30 A.M. and it took 20-30 minutes to reach the office of SDM at Musafir Khana from Jagdishpur and 15-20 minutes in obtaining the orders from the SDM and thereafter he might had taken some time to reach to the hosptial for recording the dying declaration. The time, as stated by the Naib Tehsildar makes the dying declaraion suspicious that it was recorded at 9.43 AM. It is also not disclosed by CW-1 that, who had informed him at 9.30 AM at Jagdishpur asking him to reach Musafirkhana for recording the dying declaration. There might be three sources, which are as follows:-

1. The Police, who lodged the FIR.
2. The doctor, who attended, the deceased.
3. Any higher officer to whom, the special report would have been forwarded under Section 157 of the Cr.P.C.

25. Except the above, no other source is there from which the CW-1 would have received the information at the earliest whereas the Investigating Officer and the doctor in their testimony before the Court have stated that they had not informed the Naib Tehsildar.

26. There is a procedure for submitting the dying declaration report before the Court. It must be in the sealed envelope. It could only be opened by the order of the Court whereas from the record it is revealed that in the endorsement, it has been mentioned that the dying declaration is in the envelope. There is no order on the record passed by the Court for opening the same.

27. It is the requirement of the law that before recording the dying declaration there must be a certificate by a doctor that the injured is physically and mentally stable and fit to give any statement. In the present case, the dying declaration recorded by the Naib Tehsildar and at the top of the same, the doctor, who was attending the deceased, had certified that she was mentally fit to depose statement but at the time of testimony given by the doctor-PW-4 before the court had stated that the deceased was mentally very much disturbed due to her burn injuries and she was in pain meaning hereby, her mental condition was not stable and not fit for deposing any statement on the basis of which, the appellants were convicted and sentenced to life imprisonment.

28. In these circumstances, if seen all the things collectively, makes the dying declaration suspicious, whereas the dying declaration is to be trustworthy and free from every blemish and inspire confidence, which is failing in the present case, as discussed above and hence, the appellants cannot be convicted and sentenced solely relying upon the said dying declaration.

29. The learned trial court, while giving finding on the basis of the statement of CW.1 has mentioned time totally against the time mentioned by the CW.1, in his statement. The time mentioned by the CW.1 in his statement has already been mentioned above, whereas at the time of giving finding, the learned trial court has noted that the CW.1 has obtained the order from the SDM at 09.30 AM and in obtaining the order, it took 15-20 minutes and took 10-15 minutes to reach Musafirkhana from Jagdishpur, which is totally against the time mentioned by CW.1, in his statement, as has already been mentioned in para-12 of the judgment.

30. As the incident had occurred in the house of the appellants, then as per Section 106 of the Evidence Act, 1872 *(hereinafter referred to as "the Act of 1872')*, the burden shifts on the defence to prove his innocence. It is no doubt that the initial burden is upon the prosecution, but as per Section 106 of the Act of 1872, the corresponding burden also lies upon the inmates of the house. The Cr.P.C. provides not only the procedure but also provides certain protection to the accused persons by following certain procedures i.e. after registration of the case, production of the prosecuting witnesses and evidences, the opportunity is to be given to the accused persons under Section 313 Cr.P.C. either to deny or to accept the charges/allegations by examining or questioning by the trial court; thereafter the second important stage available with the accused is to produce the defence witnesses and evidences, just to prove their innocence and third most important stage is opportunity to cross-examine the prosecuting witnesses, just to bring the truth of the prosecution story/allegations/charges.

31. Learned counsel for the appellant has further submitted that the conduct is very relevant for sentencing an accused. In the present case the appellant while trying to save the life of his wife i.e. Manju also got burn injuries and thereafter they had taken her to the Community Health Centre, Musafirkhana and being then referred to the KGMU, Lucknow, brought her to the KGMU in car but before reaching the KGMU, the deceased succumbed to her injuries.

32. In support of his submissions, regarding conduct, the learned counsel for the

appellants has relied upon various judgments of the Apex Court.

33. In the case of ***P. Mani vs. State of Tamil Nadu reported in [(2006) 2 SCC (Cri) 36]*** , the Apex Court in paragraph 11 has held as under:-

"11. The High Court furthermore commented upon the conduct of the appellant in evading arrest from 4-10-1998 to 21-10-1998. The investigating officer did not say so. He did not place any material to show that the appellant had been absconding during the said period. He furthermore did not place any material on record that the appellant could not be arrested despite attempts having been made therefor. Why despite the fact, the appellant who had been shown to be an accused in the first information report recorded by himself was not arrested is a matter which was required to be explained by the investigating officer. He admittedly visited the place of occurrence and seized certain material objects. The investigating officer did not say that he made any attempt to arrest the appellant or for that matter he had been evading the same. He also failed and/or neglected to make any statement or bring on record any material to show as to what attempts had been made by him to arrest the appellant. No evidence furthermore has been brought by the prosecution to show as to since when the appellant made himself unavailable for arrest and/or was absconding."

34. In the case of ***Ram Das Vs. State of Maharashtra*** reported in ***[(1977) SCC (Cri) 254],*** the Apex Court in paragraphs 9 & 10, has held as under:-

"9. The next circumstance on which great reliance was placed by the High Court was the fact that the accused immediately took the deceased to the Civil Hospital which, according to the High Court, was meant merely to cloak his guilt. We are indeed surprised that the High Court should have taken such a perverse view of the matter. If the accused had himself administered the poison to Shantabai he would be the last person to take her to the hospital and thereby take the chance of the deceased being cured or of regaining consciousness, in which case the deceased would have implicated the appellant. The conduct of the accused in rushing her to the hospital is more consistent with his innocence rather than with his guilt. The High Court instead of taking the circumstance as proving the good faith and bona fides of the accused drew the opposite inference. Furthermore, assuming that the High Court was right and that the accused went to the hospital merely to cloak his guilt this may be one inference possible, but the other inference which is equally reasonable was that the accused having found that his wife had taken poison and attempted to commit suicide took her to the hospital immediately so that she could be given proper medical aid and her life may be saved. In this state of the evidence, the High Court violated the rule of appreciation of circumstantial evidence in accepting only that inference which went against the accused and not entertaining the inference which proved his innocence and which, in our opinion, was more probable than the other.

10. It was suggested by the High Court that the accused gave no information to the father of the deceased. In view of the short time at the disposal of the appellant, there was hardly any opportunity to inform the parents. Moreover, as the appellant made no secret of the fact that his wife had died and the body was in fact handed over to the doctor for post-mortem and then cremated, it cannot be said that the appellant maintained any secrecy in the matter."

35. The Apex Court in the case of ***State of Rajasthan Vs. Prithvi Raj*** reported in ***[(1995) SCC (Cri) 934***], has held in paragraph 5, which is quoted hereinbelow:-

"5. It is true, as contended by the learned counsel, that the manner of appreciation of the evidence in respect of the dying declaration is not altogether sound. But the High Court has rightly held that the immediate conduct of the accused and his parents in rushing the deceased to the hospital immediately by arranging a jeep is quite consistent with their being innocent. However, we find that the overall reasoning of the High Court in giving the benefit of doubt to the accused cannot be said to be wholly unsound and does not stand judicial scrutiny. This is an appeal against acquittal and that too in respect of an offence said to have been committed in the year 1978. Since this is a bride burning case and having regard to the nature of the evidence that can be available in such cases, we have gone through the entire records including the original records. However, having given a careful consideration to the whole matter we are not wholly satisfied that this is a case where interference should necessarily be called for. Accordingly the appeal is dismissed."

36. On the contrary, the conduct of the complainant/father of the deceased who after lodging the FIR, at 9.30 AM reached KGMU, Lucknow at 7.00 PM having full trust and faith that his daughter will get treatment properly under the supervision and care of her husband and in-laws.

37. On the other hand, the conduct of PW.1, since the very inception, the prosecution was trying to falsely implicate the appellants. At the time of lodging of the first information report, a false fact was disclosed that the marriage was solemnized five years ago, just to falsely implicate the whole family under Section 498-A r/w Section 304 IPC, as they knew that their daughter was not murdered or killed by the appellants and it was very difficult for the prosecution to prove the offence against the appellants under Section 302 IPC. The conduct is also very strange that even after lodging of the first information report at 09.30 AM, the father/PW.1 reached Lucknow at around 07.00 PM in the evening as admitted in the cross-examination.

38. On the other hand, learned AGA has submitted that the conduct of the appellants is suspicious and doubtful as he was sitting in his shop down stairs and the deceased was ablazed at the first floor and got 90 per cent burn injuries meaning hereby, the appellants must have awaited that she should burnt fully and in support of his submissions relied upon the judgment in the case of ***Nagabhushan (supra)***, paragraphs 9, 10,11 & 12 are quoted hereinbelow, for ready reference:-

9. Now so far as the merits of the appeal are concerned, it cannot be disputed that in the present case there are two dying declarations, (i) Ext. P-5 and (ii) Ext. D-2. The High Court in the impugned judgment and order [State of Karnataka v. Nagabhushan, 2019 SCC OnLine Kar 3093] has given cogent reasons to rely upon and believe the second dying declaration -- Ext. P-5. The High Court has also taken note of the fact that the second dying declaration is reliable and the version in the second dying declaration is supported by the circumstances, namely, the injuries sustained by the deceased; no stove was found at the place of occurrence. The High Court has also taken note of the fact that in the second dying declaration, the deceased has explained her first statement that it was a case of accident and she categorically stated in the second dying declaration that at the time when she gave first statement that it was a case of accident, she was given threats by the appellant herein -- original Accused 1 that he will kill her children also. She also stated in the second dying declaration that after her parents came, she got the courage to tell the truth. Therefore, as such, the High Court rightly believed the second dying declaration -- Ext. P-5.

10. At this stage, the decisions of this Court in Nallam Veera Stayanandam v. High Court of A.P. [Nallam Veera Stayanandam v. High Court of A.P., (2004) 10 SCC 769 : 2005 SCC (Cri) 606] , Kashmira Devi v. State of Uttarakhand [Kashmira Devi v. State of Uttarakhand, (2020) 11 SCC 343 : (2020) 4 SCC (Cri) 269] and Ashabai v. State of Maharashtra [Ashabai v. State of Maharashtra, (2013) 2 SCC 224 : (2013) 1 SCC (Cri) 943] are required to be referred to. In the aforesaid decisions, this Court had an occasion to consider the cases where there are multiple dying declarations. In the aforesaid decisions, it is held that each dying declaration has to be considered independently on its own merit as to its evidentiary value and one cannot be rejected because of the contents of the other. It is also held that the court has to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs. When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated on its own merits.

11. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, and on evaluation of both the dying declarations independently, dying declaration recorded as Ext. P-5 reflects the true state of affairs and the contents are supported by the medical evidence and the injuries sustained by the deceased. The plea put forth by the defence that it was a case of an accident and while pouring the kerosene from kerosene can to the bottle, the same had fallen on the clothes placed on the ground and when the deceased tried to remove the clothes from that place, the candle fell on the ground, as a result, her clothes caught fire and she sustained burn injuries is disbelieved by the High Court considering the circumstances noted by the High Court that the deceased sustained injuries on the face, chest and back and to the upper limbs. The main injuries are found on the upper limbs of the body. Therefore, as rightly observed by the High Court, the aforesaid injuries can be possible when the kerosene is poured on the deceased. According to the defence and as per the evidence of DW 1/A-1, while putting the kerosene into the stove, accidentally the kerosene had fallen on the ground and also on her clothes, and thereafter when the candle fell on the ground, the same had come in contact with her clothes and kerosene. If that is the case, there would have been injuries to her feet also. However, no burn injuries are found on her feet. No stove was found at the place of occurrence. Therefore, the defence came out with a false case of accidental fire, which, as such, is not supported by any other reliable evidence. On the contrary, this evidence speaks otherwise. Therefore, when A-1 came with a false defence and the dying declaration Ext. P-5 is corroborated by other surrounding circumstances and evidence and after independent evaluation of Ext. P-5 and Ext. D-2, when the High Court has found that Ext. P-5 is reliable and inspiring confidence and thereafter when the High Court has convicted the accused, it cannot be said that the High Court has committed any error.

12. Now so far as the submission on behalf of the accused that even thereafter he tried to extinguish the fire and he also sustained injuries and therefore it cannot be said that the appellant has committed an offence punishable under Section 302 IPC is concerned, at the outset, it is required to be noted that in the present case the prosecution is successful in proving that the appellant-accused herein poured kerosene on the deceased. As per dying declaration Ext. P-5, it has been proved that the deceased was set ablaze by pouring kerosene on her. The act of the accused falls in clause fourthly of Section 300 IPC. It emerges from the evidence on record that the accused poured kerosene on the deceased and not only poured kerosene but also set her ablaze by the matchstick. Merely because thereafter A-1 might have tried to extinguish the fire, that will not

bring the case out of clause fourthly of Section 300 IPC."

38. After hearing the learned counsel for the respective parties, going through the records and judgments of the Apex Court, the position which emerges out is that the conduct of the appellants is very relevant as they took the injured to the local hospital immediately and thereafter came to the KGMU, Lucknow as referred by the Community Health Centre, Musafirkhana to save her life and if they would have committed the offence, they would have not tried to save the life of the injured-Manju. If the offence was committed by the appellants they would have tried hard to cause her death and not taken her to the hospital or in the better hosptial referred by the Community Health Centre, Musafirkhana. The appellant no. 1 also got burn injuries which was examined after his arrest while he was being sent to the jail and as per the medical report, there burn injuries are of 5-7 days old i.e. corroborating with the date of incident, so the immediate action and conduct of the appellants has proved the innocence of the appellants.

39. The judgment relied upon by the learned AGA is not applicable in the present case for the reasons that the fact of this case are different as of the case relied upon by learned AGA. The fact of the case relied is while giving second dying declaration the deceased had categorically explained that her first statement was given under the threat given by the appellant to kill her children. Secondly, the dying declaration was corroborating with the other witnesses. The appellants did not take the injured to the hospital and there were other evidences adduced by the prosecution which proved the case against the appellants beyond reasonable doubt wheras in the present case, no such fact is in existence. It is nowhere stated by the deceased that she was threatened to depose certain statements by the appellants. Their conduct for trying to save the life and to make vulnerable themselves for false implication in the case if the injured be cured and except the dying declaration, nothing was on the record.

40. As per the settled law that if there is no break in chain in the prosecution story, then as per Section 106 of the Act, 1872, the burden shifts on the defence to prove his innocence. In case the occurrence of the incident inside the house, the initial burden is upon the prosecution but as per Section 106 of the Act, 1872, the corresponding burden also lies upon the inmates of the house.

41. The appellants in defence to prove their innocence while discharging the burden under Section 106 of the Act, 1872 produced three defence witnesses, two were those who are neighbours and had seen the appellant no. 1 trying to save the deceased by making efforts to douse the fire and the third witness, who is the *Pujari* of the temple had specifically made the statement that appellant no. 2 was at the temple at that time but the learned trial court had completely ignored the defence witnesses.

42. In the present case, learned trial court only referred the defence witnesses for proving the dying declaration recorded by CW.1 and precisely on the issue that the appellant no. 1, in his statement has stated that after receiving the burn injuries, the deceased had not spoken a single word till she succumbed to the injuries. The trial court has observed that DW.1 & 2, after seeing smoke coming out from the first floor of the appellant no. 1 and hearing the hue and cry, Shiv Shankar Agrahari, Ghanshyam, Hari Shankar, Ram Nath *alias* Natthu, Rajesh and others went inside the house by running and the appellant no. 1 also ran from his shop and when we all reached we saw the wife of appellant no. 1 is on fire and appellant no. 1 is trying to douse the fire and on asking, she said that while cooking the food, her saree caught

fire. Learned trial court has taken into consideration only one line of the statements of DWs. that it was told by the deceased and held that she was talking and hence the statement recorded by the Naib Tehsildar is proved. The learned trial court cannot read the evidence/statements in parts but it has to be read in totality. The trial court by placing reliance on the testimony of defence witnesses and not disbelieving it then no offence is made out against the appellants for convicting and sentencing them, as mentioned above.

43. The learned trial court has completely failed to appreciate that the defence witnesses who were cross-examined also by the prosecution and thereafter it has come out that appellant no. 1 was on his shop and after seeing the smoke and cries of the deceased, he ran away from his shop to his house and other persons including the defence witnesses ran towards the house and what they saw is appellant no. 1 was trying to save the life of the deceased. This major statement which has come out after the cross-examination of the defence witnesses has completely been ignored, which absolve the appellants from the allegations/charges of killing his wife/her daughter-in-law and except that, the defence witnessed had neither been relied or discussed or their testimony was rejected by the learned trial court. The law is well-settled by the Apex Court in paragraph 32 in the case of ***Prem Pal Singh Vs. State reported in [2017 (1) JIC Reports 104 (All)],*** which is as under:-

"32. It is evident from the perusal of the impugned judgment of trial court that the defence evidence has not been carefully considered by it. We do not understand why the statements of the D.W.-1 A. S. Rizvi, ACO (Consolidation) and D.W.-2 Malkhan Singh, father of appellant Babu Lal have been brushed aside in the manner as done by the Trial Judge. There is no reason why their evidence should not be accepted when they have asserted before the trial court on oath that appellants Babulal was present in Sultanpur on the date of incident. The courts below have held that the two witnesses produced by the defence are unreliable. But the Trial Judge has not given any satisfactory reason for the same. It is necessary to point out that as far as courts are concerned, witnesses of both sides, prosecution and defence, sail in the same boat. Both have to appraised on the touchstone of credibility and truthfulness. Courts cannot say that she will not trust some witnesses merely because they have been produced by defence. Testimony of defence witnesses has to be evaluated in same manner as that of prosecution. Same yardstick has to be applied. Testimony of D.W.-1 A.S. Rizvi is cogent and credible. There was no reason for him to lie. D.W-2 Man Singh was his subordinate. There was no pressure upon him to favour Babu Lal. We have carefully examined the testimony of D.W.-1 A. S. Rizvi. He has established the presence of appellant Babu Lal on the date of incident in District Sultanpur, situated at long distance away. We feel that there is no reason to disbelieve his evidence especially in the light of shaky, weak and untrustworthy evidence of P.W-10 Savitri Devi who alone tried to support the prosecution story, out of seven eye witnesses produced by the prosecution."

44. From the above judgment, it is settled proposition of law that the witnesses of both the sides (prosecution and the defence) sail on the same boat both have to be given same treatment at par to appraise on the touchstone of credibility and truthfulness which has not been made in the present case. If the testimony of the defence witnesses have not been disputed meaning hereby the case of the defence is accepted and the prosecution has failed to prove its case beyond reasonable doubt as no one has seen the incident or there is no eye witness of the incident. The whole case is on the basis of the circumstantial evidence.

45. In view of above facts and circumstances of the case, the attending circumstances and a careful scrutiny of the evidence on record, both oral as well as documentary, we are not satisified that the prosecution has been able to prove its case against the appellants, beyond all reasonable doubts and hence neither the recorded conviction of the appellants nor the sentence awarded to them, can be sustained in law and are liable to be set aside.

46. In view of the aforesaid, the present criminal appeal is **allowed** and consequently, the judgment and order dated 27.11.2009 passed by the Additional Sessions Judge, FTC-Vth, court no. 14, Sultanpur in S.T. No. 332 of 2007 arising out of Case Crime No. 372 of 2007 under Sections 302/34, 498-A IPC and 3/4 of the Dowry Prohibition Act, 1961 registered at Police Station-Musafirkhana, District-Sultanpur, is set aside.

47. The appellants, who are in jail, shall be released forthwith, if they are not wanted in any other case.

48. Let the lower court record along with a copy of this order be transmitted forthwith to the learned trial court concerned for necessary information and compliance.

(2021)12ILR A840
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.11.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VIVEK VARMA, J.

Criminal Appeal No. 124 of 1985

Barjor **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Brijesh Kumar Yadav

Counsel for the Respondent:
G.A.

Merely being a relative of the victim-cannot be interested witness-interested only when he derives some benefit from the result of a litigation-prosecution successful in proving its case-and the motive-prior enmity.

Appeal dismissed. (E-9)

List of Cases cited:

1. Sudhakar Vs State: (2018) 5 SCC 435

2. Gumansinh & ors. Vs The St. of Guj.: AIR 2021 SC 4174

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

(1) Four accused persons, namely, Barjor, Satti, Nawab and Vidya were tried by V Additional Sessions Judge, Unnao in Sessions Trial No. 180 of 1994 : *State Vs. Barjor and others* arising out of Case Crime No. 56 of 1983, under Section 302 read with 34 of the Indian Penal Code, Police Station Auras, District Unnao. Vide judgment and order dated 28.01.1985, the V Additional Sessions Judge, Unnao convicted the accused/ appellants under Section 302 read with Section 34 of the Indian Penal Code and sentenced them to undergo life imprisonment.

(2) Feeling aggrieved by the aforesaid judgment and order dated 28.01.1985, convict/ appellant, **Barjor**, has preferred the instant criminal appeal under Section 374 (2) Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C."), whereas other three convict/ appellants, **Satti, Nawab and Vidya,** preferred Criminal Appeal No. 129 of 1985 under Section 374 (2) of the Code of Criminal Procedure.

(3) It transpires from the record that during pendency of the aforesaid criminal appeals, co-

convict/appellants, **Satti, Nawab and Vidya,** died, hence Criminal Appeal No.129 of 1985 was dismissed as abated by Co-ordinate Bench of this Court vide order dated 6.3.2020 passed in Criminal Appeal No. 129 of 1985. In this background, this Court proceed to decide the instant appeal on behalf of present surviving appellant-Barjor.

(4) The facts as unfolded by the prosecution, in short conspectus, are as under :-

The informant/Darshan (P.W.1) son of Lalu Yadav is the resident of Village Saidapur, Police Station Auras, District Unnao. On 03.09.1983, informant/Darshan (P.W.1), his uncles, namely, Daya Shanker (deceased) and Ram Asrey (P.W.4) had gone to the market of Village Ajgaon. In the market, Radhey Shyam, who is the son of Daya Shanker (deceased), also came from Hyderabad after schooling. Subsequently, after purchasing certain items, all of them were returning to their home. On the way, Mahaveer (P.W.7) started talking with his uncle Daya Shanker (deceased) about the field which was given to him on *batai* and informant-Darshan (P.W.1), his uncle Ram Asrey (P.W.4) and Radhey Shyam were proceeding a little ahead. When Daya Shanker (deceased) had reached the southern passage of the field of Babu Pasi, which is situated at village Ajigaon, convict/appellant Barjor came from behind Daya Shanker (deceased) and started beating him with lathi, whereupon Daya Shanker (deceased) holds the lathi of convict/appellant Barjor. Thereafter, informant-Darshan (P.W.1), his uncle Ram Asrey (P.W.4) and Radhey Shyam, after raising alarm, ran. In the meantime, convict/appellant Nawab armed with gun, convict/appellant Satti armed with pistol and convict/appellant Vidya armed with lathi were started running from North-East and South corner, respectively, from the field of maize. Thereafter, convict/appellants Satti and Nawab fired on the deceased (Daya Shanker), who, after sustaining injuries, fell down there and on hearing the noise of fire, informant Darshan, P.W.4-Ram Asrey and Radhey Shyam stopped there due to afraid. Then, all the convict/appellants started beating the deceased with lathis. Thereafter, on seeing the crowd, which had assembled there, the convict/appellants ran away from the spot. The deceased was a Village Pradhan in Village Saidapur and convict/appellants were residents of the same village. There was prior animosity between them because the convict/appellants had illegally taken possession of Gaon Samaj land.

(5) The informant-Darshan got the FIR scribed by Ram Vilash (P.W.5), who after scribing it read it over to him. He, thereafter, affixed his thumb impression on it and, then, proceeded to Police Station Auras, which was situated at a distance of three miles from the place of occurrence and lodged it at 06:45 p.m. at the police station Auras.

(6) The evidence of Constable Om Prakash (P.W.6) shows that on 3.9.1983 (on the date of incident), he was posted at Police Station Auras. On the basis of written report (Ext. Ka. 1) submitted by Darshan (P.W.1), a chik report (Ext. Ka.2) was prepared by him and the case was registered as Case Crime No. 75 of 1983, under Section 302 I.P.C. at police station Auras, District Unnao, which was entered in G.D. Report No.24 (Ext. Ka. 3). In the cross-examination, he deposed that Darshan (P.W.1) did not stay at Police Station in the night and he had left Police Station even before departure of the Investigating Officer.

(7) The evidence of P.W.9-S.I. Raghuraj Singh shows that he was posted at Police Station Auras on 03.09.1983. The case was registered in his presence and thereafter, he investigated it. He took the statement of Informant P.W.1-Darshan at the police station itself. He reached at the place of occurrence at 09:00 p.m. by

motorcycle but due to lack of light in the night, he did not prepare panchayatnama, however, he interrogated Radhey Shayam and Ram Bilas (P.W.5) in the night. On 04.09.1983, at about 06:00 a.m., he prepared *pachayatnama* of the deadbody of Daya Shanker in the presence of Satyakumar, Hiralal, Bachanu, Ramadhar, Ram Singh. This panchayatnama (Ext. Ka. 5) was written by S.I. Jageshwar Singh. He also prepared challan lash (Ext. Ka.6) and photo lash (Ext. Ka.7). He, thereafter, sent the corpse of the deceased Daya Shanker in a sealed cover for post-mortem through Constable Ramesh Singh and Churamani. He also recovered *kurta* and towel of the deceased and sealed it under recovery memo (Ext. Ka. 10). He also recovered Potato and Guava placed near the deadbody of the deceased and sealed it under recovery memo (Ext. Ka.11). He also recovered *bidi*, matchbox, one rupee and fifty paise from the *kurta* and shoes of the deceased and sealed it under recovery memo (Ext. Ka. 12). He recovered umbrella placed near the dead body of the deceased and sealed it under recovery memo (Ext. Ka. 13). From the place of incident, he seized plain and bloodstained earth in separate containers under a recovery memo (Ext. Ka. 14). He also recovered two empty cartridges and sealed it under recovery memo (Ext. Ka.15). He inspected the place of occurrence and prepared site plan (Ext. Ka. 16). He, thereafter, interrogated Mohanlal, Kunwarpal and Bhikhari and their statements were marked as Ext. Ka 17 to Ext. Ka. 19. Thereafter, he searched the accused persons but he did not find them. Subsequently, after completion of investigation, he submitted the charge-sheet (Ext. Ka. 20) against the accused persons under Section 302 read with Section 34 of the Indian Penal Code before the Court concerned.

In his cross-examination, P.W.9-S.I. Raghuraj Singh has denied the suggestion that chik report, panchayatnama and other documents were prepared on the advice of the police. He deposed that S.I. Jageshwar Singh was in his police station. He searched the accused persons and prepared the recovery memo. He recognized the written and signature of S.I. Jageshwar Singh. In column no. 3 of the challan lash (Ext. Ka. 6), "X' was appended. The distance between the place of occurrence to the place of police station in the *pachayatnama* was 3 kms. and in the challan lash it was written as 6 metres. He went to the place of occurrence by motorcycle and the distance of that road is 4-6 kilometers and the direct way is 3 kms. He denied the suggestion that at the time of panchayatnama, chick report was not with him.

(8) The post-mortem on the dead body of deceased Daya Shanker was conducted on 04.09.1983, at 4.15 p.m., by Dr. S.P. Rastogi (P.W.8), who found on his person ante-mortem injuries which are enumerated hereinafter :-

"(i) Lacerated wound 2" x ½" transverse in nature, bone deep present on the right side scalp front part 1 ½ right to the midline.

(ii) Lacerated wound 1 ½ x 0.5" x bone deep present on right side scalp front part ½" back to the injure no. one, 1 ½" right to the midline.

(iii) Lacerated wound oblique in nature 2 ½ x 0.5" x brain cavity deep present 3" right to the midline, 2" above the right ear, 3 ½" area away from right eyebrow, brain matter coming out.

(iv) Lacerated wound 1" x 1" x bone deep present on left side chin 1" left to the midline, underlying bone fractured.

(v) Lacerated wound ½" x ½" x bone deep present 0.5" medial to the medial canthus of right eye, at bridge of nose.

(vi) Lacerated wound 1" x ½" x lips deep, present on the right side upper lip, 2" right to midline, mucous membrane also lacerated of inner aspect.

(vii) Multiple fire arm entrance wound in an area 4" x 2 ½" present on the upper part of right upper arm at its fronto lateral aspect, 3 ½" above the right elbow joint each wound having size 0.2" x 0.2" to 0.3" x 0.3" skin and muscle

deep, inverted margin, no blackening and tatooing present.

(viii) Multiple fire arm entrace wound present in an area 5" x 3" present on the right side chest upper part, ½" above the right nipple and ½" below the lateral 2/3" of right clavicle, each wound having size 0.2" x 0.2" to 0.3" x 0.3" chest deep, inverted margin, no blackening and tatooing present.

(ix) Multiple abraded contusion in an area 6" x 6" present on right side face below the right lower eyebrow, up to the lower jaw, under lying bone fractured into pieces."

The cause of death spelt out in the autopsy report of the deceased person was coma as a result of head injury.

(9) It is significant to mention that in his deposition in the trial Court, Dr. S.P. Rastogi (P.W. 8) has reiterated the said cause of death and also stated therein that on internal examination of the dead body of the deceased, he found that upper portion of the right chest was punctured. He further stated that he found twenty two small pellets in the muscle of right arm and also twenty two more pellets were recovered from the body and they were sealed. He opined that the death of the deceased could be done on 3.9.1983 at 5 p.m. He prepared the post mortem report as Ext. Ka-5. This witness has also proved the post-mortem examination.

(10) The case was committed to the Court of Sessions by the Chief Judicial Magistrate on 09.09.1984 and the trial Court framed charge against convict/appellants under Section 302 read with Section 34 of the Indian Penal Code. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(11) During trial, in all, the prosecution examined 09 witnesses, namely, P.W.1, informant Darshan, P.W.2-Mohan Lal, P.W.3-Kunwar Pal, P.W.4-Ram Asrey, P.W.5-Ram Vilas, P.W.6-Om Prakash, P.W.7-Mahaveer, P.W.8-Dr. S.P. Rastogi, P.W.9, Raghuraj Singh Sachan.

(12) We would first like to deal with the evidence of P.W. 1-Darshan. P.W.1, Darshan, who is informant and nephew of the deceased, while deposing before the Court, has stated that accused Barjor and Satti are the sons of Sheo Pal while accused Vidya is the son of Mahaveer (P.W.7) and Mahaveer and Sheo Pal were real brothers as well as their wives were real sisters. Therefore, the above three accused persons were related to each other and accused Nawab was their friend. He further stated that there was previous enmity between his uncle (deceased-Daya Shanker) and accused persons with regard to Gram Samaj land which was illegally occupied by accused persons and deceased wanted to get a panchayat-ghar constructed thereupon. He further stated that he was an eye-witness to the murder of his uncle by accused persons. He specifically deposed that while he was returning from the market along with Radhey Shyam, P.W.4-Ram Ashrey and deceased (Daya Shanker) they met with P.W.7-Mahaveer. While P.W.7- Mahaveer and deceased (Daya Shanker) continuously talking, he along with others went few paces ahead. On shouting of deceased (Daya Shanker), he saw the tussle between accused/appellant Barjor and Daya Shanker (deceased) and also there was snatching of lathi between them. He further deposed that when he along with Radhey Shyam and P.W.4- Ram Ashrey moved towards deceased (Daya Shanker) then from the north direction, other accused Nawab armed with country made pistol and from the south direction accused Vidya armed with lathi and accused Satti armed with pistol came running. Accused Satti and Nawab fired on deceased (Daya Shanker), thereafter, accused Barjor and Vidya hit the deceased with lathis. On hearing the gun shot, he was scared and stayed 100 paces away from the place of incident. Because of fire shot, deceased (Daya Shanker) fell on the ground and

then all four accused escaped in the north direction. Thereafter, on reaching near deceased (Daya Shanker), they found him to be dead. He next deposed that there were many persons walking near the place of incident and P.W.2-Mohan and P.W.3-Kunwar Pal also witnessed the incident. Then he went to the Police Station Auras, District Unnao, on the very same day at about 6.45 p.m. and got a written report typed. He gave that written report at Police Station which was shown to him and proved as exhibit ka-1. Chik report was prepared on the basis of the aforesaid written report. In his cross-examination, he denied the suggestion that he was not an eye-witness to the incident and he had lodged a false case making his relatives as eyewitnesses to the incident.

(13) P.W.2, Mohan Lal deposed that the Daya Shanker (deceased) was not murdered in front of him. He testified that he was present at market on the day of incident and saw the tussle between Daya Shanker (deceased) and accused/appellant Barjor. He further stated that other accused Nawab armed with gun, accused Satti armed with Tamancha and accused Vidya armed with lathi had come and accused Nawab and Satti fired at Daya Shanker (deceased) and accused Barjor and Vidya were beating with lathi. He further stated that informant Darshan (P.W.1), Ram Ashrey (P.W.4) and Radhey Shyam were present at the place of occurrence.

(14) P.W.3, Kunwar Pal stated that he was not present at the place of occurrence. The Inspector came to the Village but did not question him. He further stated that when he came to market with Mohan Lal (P.W.2), accused Barjor gave his bundle. He further denied saying that accused Barjor and Vidya armed with lathi and accused Nawab and Satti armed with gun and katta had killed Daya shanker (deceased). The witness stated that he had no information as to who Sub-Inspector wrote any such thing.

(15) P.W.4, Ram Ashrey, who is real brother of deceased (Daya Shanker), deposed that incident dates back to one year, one month ago at about 5 p.m. when he alongwith Darshan (P.W.1) and Daya Shanker (deceased) returned from the market. Daya Shankar (deceased) started talking to Mahaveer (P.W.7) near the field then the rest of us were walking slowly. When he reached near Hiralal's field, accused Nawab, Barjor, Vidya and Satti started beating Daya Shanker (deceased). Accused Nawab was armed with country made pistol and Satti armed with katta and rest were armed with lathi. First the accused, who were armed with gun fired at Daya Shanker (deceased) then all of them started beating Daya Shanker (deceased) with lathis. He further deposed that seeing the fight, he was afraid and could not go near his brother. At the spot, Ram Singh, Buchai Pasi and Chhutai had come and none of them could say anything because of fear. Mohan Lal (P.W.2) and Kuwar Pal (P.W.3) had come later. When he went to the spot the accused persons had fled and Daya Shanker was dead. The Investigating Officer came to the spot around 8 o'clock in the night.

(16) P.W.5, Ram Vilas, deposed that he wrote a report on the dictation of Darshan (P.W.1). Thereafter, it was narrated to Darshan (P.W.1). The report was written and also signed by him. He further stated that when he was writing the report, the Sub-Inspector was not present there. He denied the suggestion that report was written on the dictation of any police personnel.

(17) P.W.7, Mahaveer, deposed that he knew Daya Shanker (deceased). He had taken field of deceased (Daya Shanker) on *batai*. He didn't see the murder of Daya Shankar (deceased). He stated that he and Daya Shanker (deceased) had a crop of maize. Daya Shankar came to his farm on his way back from the market. Daya Shanker (deceased) had told him that the maize is ready but to wait for 15 more

days. Saying this, he went round the *maide* of his farm. He denied hearing any sound of gun shot.

(18) Heard Mr. Brijesh Kumar Yadav, learned counsel for the appellant, Sri Arunendra, learned Additional Government Advocate for the State and perused the record.

(19) Learned counsel for appellant has submitted that the appellant has been falsely implicated in this case because of previous animosity between the parties. The prosecution has not been able to prove its case beyond reasonable doubt. He has further submitted that evidence of the prosecution witnesses is contradictory. The two eye-witnesses P.W.1-Darshan, who is informant of the present case and nephew of the deceased and P.W.4-Ram Ashrey, who is real brother of the deceased, are highly interested and partitioned witnesses and relative of deceased, hence their evidence is unworthy and cannot be believed. He further submits that the trial court committed an error while convicting and sentencing the appellant on the basis of such a contradictory evidence. He further argued that other independent eye-witnesses P.W.2- Mohan Lal, P.W.3- Kunwar Pal and P.W.7-Mahaveer had turned hostile. He next submitted that the appellant as on date is an old man aged about 70 years and he has no criminal antecedents.

(20) Shri Arunendra, learned A.G.A. appearing on behalf of the State, however, supported the judgment of the trial Court and submits that there was no occasion for this Court to interfere it. He argued that the appellant and accused Vidya had assaulted the deceased with lathis, whereas two co-accused fired shot on the deceased and also assaulted the deceased with lathis. The ocular testimony of P.W.1 and P.W.4 is fully supported the postmortem report of the deceased (Daya Shanker), who have received injuries by both lathis and fire arm weapon. He further submits that the argument of learned counsel for appellant that P.W.1- Darshan and P.W.4- Ram Ashrey are highly interested and partitioned witnesses and they are relatives of the deceased, cannot be a ground to disbelieve the evidence as there was no occasion for them to falsely implicate the appellant in the present case. It is further submitted that so far as the old age of the appellant and his clean antecedents are concerned, it is also not a relevant consideration for acquitting him from all the charges as the appellant's participation in the crime is evident from the evidence of P.W.1- Darshan and P.W.4-Ram Ashrey, hence the present appeal on behalf of appellant is liable to be dismissed.

(21) The next submission of the learned A.G.A. is that both P.W.1-Darshan and P.W.4-Ram Ashrey, have explained their presence along with the deceased on the spot. P.W.7-Mahaveer has also supported the prosecution story. The trial Court, after examining the evidences of P.W.1-Darshan and P.W.7-Mahaveer and also considering the fact that the Investigating Officer had found a bag in which there were some potatoes and guavas and its memo was prepared by them, has recorded specific finding of fact that the deceased and P.W.1-Darshan and Ram Ashrey (P.W.4) were returning from the market of Ajgaon. He further submits that the testimonies of P.W.1-Darshan and Ram Ashrey (P.W.4) are trustworthy and credential because both of them have stated in their statement that the appellant had assaulted the deceased by lathi. He submits that the trial Court has rightly convicted the appellant under Section 302 read with Section 34 of the Indian Penal Code and sentenced him to undergo life imprisonment.

(22) We have examined the submissions advanced by the learned Counsel for the parties and gone through record.

(23) The appellant has asserted that P.W.1-Darshan and P.W.4-Ram Ashrey are having

relations with the deceased and no independent witness has been examined, therefore, the adverse inference can be drawn against the prosecution and the evidence of P.W.1 Darshan and P.W.4 Ram Ashrey is not trustworthy as they are not present at the place of occurrence.

(24) The criminal law jurisprudence makes a clear distinction between a related and interested witness. A witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. The witness may be called "interested" only when he or she derives some benefit from the result of a litigation in the decree in a civil case, or in seeing an accused person punished as held by the Apex Court in **Sudhakar Vs. State** : (2018) 5 SCC 435.

(25) At this juncture, we deem it apt to make reference to the recent judgment of Supreme Court, dealing with the question of interested witnesses.

(26) In the case of ***Gumansinh and Ors. vs. The State of Gujarat: AIR 2021 SC 4174,*** the Apex Court in paragraph 22, 23 and 26 observed as under :-

"22. However, when the Court has to appreciate the evidence of any interested witness it has to be very cautious in weighing their evidence or in other words, the evidence of an interested witness requires a scrutiny with utmost care and caution. The Court is required to address itself whether there are any infirmities in the evidence of such a witness; whether the evidence is reliable, trust-worthy and inspires the confidence of the Court. Another important aspect to be considered while analyzing the evidence of interested witness is whether the genesis of the crime unfolded by such evidence is probable or not. If the evidence of any interested witness/relative on a careful scrutiny by the Court is found to be consistent and trust-worthy, free from infirmities or any embellishment that inspires the confidence of the Court, there is no reason not to place reliance on the same.

23. A three-Judge Bench of this Court in the case of Maranadu and Anr. v. State by Inspector of Police, Tamil Nadu (2008) 16 SCC 529, while considering this issue, has observed as under:

Merely because the eyewitnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the Accused cannot be a ground to discard the evidence which is otherwise cogent and credible. *We shall also deal with the contention regarding interestedness of the witnesses for furthering prosecution version.*

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

11. In Dalip Singh and Ors. v. The State of Punjab : (AIR 1953 SC 364) it has been laid down as under:

26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the Accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but

foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general Rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

The above decision has since been followed in ***Guli Chand and Ors. v. State of Rajasthan*** *1974 (3) SCC 698) in which* ***Vadivelu Thevar v. State of Madras*** *(AIR 1957 SC 614) was also relied upon.*

13. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

*25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in -`****Rameshwar v. State of Rajasthan' :*** *(AIR 1952 SC 54 at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel.*

14. Again in ***Masalti and Ors. v. State of U.P. :*** *(AIR 1965 SC 202) this Court observed: (p. 209-210 para 14):*

14. ....But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses..... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast Rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

15. To the same effect is the decisions in ***State of Punjab v. Jagir Singh*** *(AIR 1973 SC 2407),* ***Lehna v. State of Haryana*** *(2002 (3) SCC 76) and* ***Gangadhar Behera and Ors. v. State of Orissa*** *(2002 (8) SCC 381).*

(27) In the instant case, it transpires from the record that both the eye-witnesses, namely, P.W.1-Darshan and P.W.4-Ram Ashrey, have categorically stated in their depositions that they had gone to the market of Ajgaon along with the deceased and while they were returning from the market to their house along with the deceased Daya Shanker, in the way, deceased Daya Shanker started talking with Mahavir in respect of the issue of *batai* of the crops standing on the field of the deceased which was irrigated by Mahavir, however, they (P.W.1, P.W.4) proceeded onward. In the meantime, the deceased was grappling with appellant-Barjor for taking away lathi, which was with the accused/appellant Barjor. Thereafter, the deceased had cried for his help but in the meantime, other accused persons, namely, Satti armed with gun, Nawab armed with pistol and Vidya armed with Lathi also arrived. Thereafter, accused Satti and Nabab fired on the deceased Daya Shanker, as a consequence thereof, deceased Daya Shanker had fallen on the ground. Subsequently, accused/appellant Barjor and accused Vidya had

assaulted the deceased Daya Shanker with lathi. Though P.W.1-Darshan had tried to approach the deceased but when he heard the gun-shots, he and Ram Ashrey (P.W.4) were frightened and they stopped at a distance of about 100 paces. Thereafter, on seeing P.W.1-Darshan, P.W.4-Ram Ashrey and other persons came nearer to them, the accused persons ran away from the spot. Thereafter, when P.W.1-Darshan, P.W.4-Ram Ashrey and others, who were at a little distance, came, then, they found that deceased Daya Shanker was dead. The statement of P.W.4-Ram Ashrey is also in the aforesaid terms. P.W.9-S.I. Raghuraj Singh, who is the Investigating Officer of the case, has stated in his examination-in-chief that he has recovered potato and guava from the place where the deadbody of the deceased was lying under recovery memo (Ext. Ka. 11). It is not the case of the appellant that the recovered potato and guava from the place of deadbody of the deceased, was planted.

(28) Going by the corroborative statements of P.W.1-Darshan and P.W.4-Ram Asrey, it is discernible that though they are related to each other and to the deceased as well, their evidence cannot discarded by simply labelling them as "interested' or witnesses. After thoroughly scrutinizing their evidence, we do not find any direct or indirect interest of these witnesses to get the accused/appellant by falsely implicating him so as to meet out any vested interest. We are, therefore, of the considered view that the evidences of P.W.1- Darshan and P.W.4-Ram Ashrey are quite reliable and we see no reason to disbelieve them.

(29) In respect of forensic evidence, P.W.8-Dr. S.P. Rastogi, who conducted the post-mortem of the deadbody of the deceased, found six lacerated wounds, two multiple fire arm entry wounds and one multiple abraded contusion on the body of the deceased and opined that the deceased died due to coma as a result of head injury. The post-mortem report confirms the injuries occurred on the head of the deceased was by the blunt object like lathi. The ownership of the lathi has not been disputed by the appellant in his statement under Section 313 of the Cr.P.C.

(30) In the present case, the prosecution has been successful in proving the motive. There was a prior long-time enmity between the deceased and the accused/appellant. The accused/appellant has failed to prove any circumstances by which it can be said that he is falsely implicated in the case.

(31) In view of the aforesaid discussions, this Court is in agreement with the findings of the learned trial Court and sees no reason to interfere with the impugned judgment and order dated 28.1.1985 passed by the trial Court convicting and sentencing the accused/appellant for the offence under Section 302 read with Section 34 I.P.C.

(32) The instant criminal appeal is, accordingly, ***dismissed.*** The appellant is in jail and and he shall serve out the remaining sentence as ordered by the trial Court.

(33) Let the lower court record along with certified copy of the present order be transmitted to the trial court concerned for necessary information and compliance forthwith.

(2021)12ILR A848
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.11.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VIVEK VARMA, J.

Criminal Appeal No. 622 of 1982
Connected with
Criminal Appeal No. 623 of 1982

Abbul Hasan **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:

R.N. Gupta,(Amicus Curaie), Dinesh Chandra Shukla

Counsel for the Respondent:
Govt. Advocate

Testimony of two witnesses are reliable-cannot be discarded-merely being mother and friend of the deceased respectively-prosecution case established-rightly convicted.

Criminal Appeals dismissed. (E-9)

List of Cases cited:

1. Manphool Singh & ors. Vs St. of Har. : (2018) 18 SCC 531

2. Lakshmi Singh Vs St. of Bihar : 1976 Law Suit (SC) 325

3. Jai Prakash Singh Vs St. of Bihar & anr. : 2012(2) Supreme Court Cases (Criminal) 468

4. Bur Singh Vs St. of Pun. : (2008) 16 SCC 65

5. St.of Pun. Vs Karnail Singh : 2003 (3) ACR 2961 S.C.

6. Ashok Kumar Chaudhary Vs St. of Bihar : 2008 (2) CAR 652 S.C.

7. Gumansinh & ors. Vs The St.of Guj. : AIR 2021 SC 4174

8. Babu Ram & ors. Vs St. of Pun. : (2008) 3 SCC 709

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

1. The convict/appellant, **Abbul Hasan**, was tried by the Sessions Judge, Hardoi in Session Trial No. 514 of 1981 for the offence under Sections 302, 307 and 324 I.P.C. and in Sessions Trial No. 575 of 1981 for the offence under Section 4/25 of the Arms Act.

2. Vide judgment and order dated 07.08.1982 passed in Sessions Trial No. 514 of 1981, the Sessions Judge, Hardoi convicted the convict/appellant under Sections 302, 307, 324 I.P.C. and sentenced him to undergo :-

"(a) Under Section 302 I.P.C. to undergo life imprisonment;

(b) Under Section 307 I.P.C. to undergo five years' R.I.; and

(c) Under Section 324 I.P.C. to undergo one year's R.I."

All the aforesaid sentences were directed to be run concurrently.

3. Vide judgment and order dated 07.08.1982 passed in Sessions Trial No. 575 of 1981, the Sessions Judge, Hardoi convicted the convict/appellant under Section 4/25 of the Arms Act and sentenced him to undergo six months' R.I.

4. Feeling aggrieved by the aforesaid judgment and order dated 07.08.1982 passed in Sessions Trial No. 514 of 1981, the convict/appellant has preferred Criminal Appeal No. 622 of 1982, whereas convict/appellant has preferred Criminal Appeal No. 623 of 1982 against the judgment and order dated 07.08.1982 passed in Sessions Trial No. 575 of 1981.

5. The aforesaid two sessions trials i.e. Sessions Trial Nos. 514 of 1981 and 623 of 1982, arose out of the common incident and the facts and law involved in the above-captioned criminal appeals are identical, hence with the consent of the learned Counsel for the parties, the above-captioned criminal appeals are being decided by a common order.

A. FACTS

6. Shorn off, unnecessary details the facts of the case are as under :-

Om Prakash (deceased), Abbul Hasan (convict/appellant), Mahesh and Ram Singh

(injured) are the residents of Mohalla Salamullahganj, Qasba Sandi, District Hardoi.

As per the prosecution, convict/appellant-Abbul Hasan son of Sallu was having an evil eye on Kamla (P.W.3), who is the sister of Om Prakash (deceased) and daughter of informant-Gomti (P.W.2). On 05.04.1981, in the noon, a spat and ribaldry took place between Om Prakash (deceased) and convict/ appellant Abbul Hasan and thereafter convict/appellant Abbul Hasan, after giving threatening to Om Prakash (deceased) to look after him, went from there. On the same date i.e. on 05.04.1981, at about 07:00 p.m., son of the informant-Gomti (P.W.2), namely, Om Prakash (deceased), Mahesh Ahir (P.W.4) and Ram Singh Loniya were returning from the market to their house. The informant-Gomti (P.W.2) was also coming behind them from her field. When Om Prakash (deceased), Mahesh Ahir and Ram Singh Loniya came near the house of Dr. Ram Bilash where electric bulb was burning, all of a sudden convict/appellant Abbul Hasan armed with knife came in front of him (deceased Om Prakash) and after challenging her son (deceased Om Prakash), assaulted him with the knife, as a consequence of which, her son, Om Prakash (deceased), raised alarm, thereupon she (informant) had also raised alarm. When Mahesh (P.W.4) and Ram Singh, who were accompanied with Om Prakash, tried to save Om Prakash (deceased) and also raised alarm, convict/appellant Abbul Hasan had also assaulted them with the knife. Thereafter, on listening hue and cry, Jauhari, son of Nav Shanker and other persons came there and challenged the convict/appellant AbbulHasan, thereupon, convict/appellant, after brandishing the knife, ran from there. The son of the informant-Gomti (P.W.2) succumbed to injuries on the spot and Mahesh (P.W.4) and Ram Singh got injured.

7. The FIR of the aforesaid incident was lodged by the informant Gomti (P.W.2) at about 07.15 p.m. on the date of the incident on 05.04.1981 at Police Station Sandi, District Hardoi.

8. The evidence of P.W.10 Chabinath Singh shows that on 05.04.1981, he was posted as Head Moharrir at police station Sandi, District Hardoi and on that date, at about 07.25 p.m., informant Gomti (P.W.2) came at police station Sandi and described him the incident, whereupon after scribing it he read it over to her and, thereafter, she affixed her thumb impression on it and lodged it at police station. The F.I.R. was marked as (Ext. Ka. 3).

9. A perusal of the chik FIR shows that the distance between the place of incident and Police Station Sandi was 2 furlang. It is significant to mention that a perusal of the chik FIR also shows that on its basis, a case crime no. 40 of 1981, under Section 302/307 I.P.C. was registered against appellant. After lodging of the F.I.R., injured Mahesh and Ram Singh, who also came along with the informant Gomti (P.W.2) at Police Station Sandi, were sent along with Homeguard Surendra Kumar and Bhikham to Primary Health Centre, Sandi, Hardoi for medical examination.

10. The injuries of injured Mahesh (P.W.4) and Ram Singh were medically examined at Primary Health Centre, Sandi, Hardoi on 05.04.1981 at 08:00 p.m. and 08.30 p.m., respectively, by Dr. A.K. Dixit (P.W.1), who, on the persons of injured Mahesh (P.W.4) and Ram Singh, found the following injuries :-

"Injury of Mahesh, son of Dawarika

(1) Punctured incised stabbed wound 10 cm x 1½ cm x intestines with other viscera came out through the wound so that depth could not be taken. Fresh bleeding through the wound on the outer and middle of left abdominal trunk just below the left lower part of ribs 7 cm above from axillarial chest."

Dr. A.K. Dixit (P.W.4) opined that the aforesaid injury is sustained by injured Mahesh

was fresh and caused by some sharp pointed object and for the same reason, he was kept under observation.

"Injury of Ram Singh, son of Munshilal

1. Incised punctured stab wound 2 cm x ¼ cm x ¼ cm on the outer and lower part of left neck 4 cm above from left colar bone from its middle part. Margins are sharp cutting type with oozing of blood.

2. Incised punctured wound 1½ cm x 1½ cm x muscle deep on the front and lower part of outer part of left fore-arm 3 cm below from wrist joint. Margins are sharp cutting type with oozing of blood."

In the opinion of Dr. A.K. Dixit (P.W.4), all the injuries are simple and caused by some sharp pointed object and duration is fresh.

11. It is significant to mention that in his deposition in the trial Court, Dr. A.K. Dixit (P.W. 1) has reiterated the said cause of injuries and also stated therein that on 05.04.1981, he was posted as In-charge Medical Officer, Primary Health Centre, Sandi. He had examined the injuries of injured Mahesh (P.W.4) and Ram Singh. He further deposed that the injuries sustained by the injured persons could be attributable by knife (Ext. Ka.1) and these injuries could be attributable on the injured Mahesh and Ram Singh on 05.04.1981 at 07:00 p.m. He further stated that as the injury sustained by injured Mahesh was attributable by a sharp pointing weapon, therefore, while taking the injury of injured Mahesh under observation, he was sent him to District Hospital Hardoi, however, at the time of medical examination, the injury of injured Mahesh was fresh.

12. The evidence of P.W.9 Dr. J.V. Singh shows that he was posted as Reserve Duty Medical Officer at Sadar Hospital, Hardoi between April to May, 1981. On 05.04.1981, injured Mahesh (P.W.4) came on referral from Primary Health Centre, Sandi. On 05.04.1981, at about 09:30 p.m., injured Mahesh was admitted at Sadar Hospital, Hardoi. He performed the operation of the injured Mahesh on 05.04.1981 at 11:45 p.m. He further stated that during the course of operation, the abdomen of injured Mahesh was opened by giving incision on left middle upper and middle paramedian and found that some blood came out from the peritoneum; three incised wounds of 0.75 cm x 0.75 cm. in an area of 2 cm were found on transverse colon; and three incised perforations were found on the upper one-third part of the intestines in an area of 10 c.m. Thereafter, the peritoneum on account of stab wound was also closed and after putting a rubber drain in the abdomen, the stab wound was dressed. Dr. J.V. Singh (P.W.9) has proved his operation notes, recorded on the bed-head tickets. In his opinion, the injury was grievous and the same could be said dangerous to life. He also stated that at the time of admission, injured Mahesh was in a conscious position, hence at 09:40 p.m., he had given a note on the bed-head ticket for recording of the dying declaration of the injured Mahesh but the same could not be recorded till 11:45 p.m. and thereafter, the injured was not in a position to give any statement.

13. The evidence of P.W.8-Harchandra Singh shows that he was posted as Station Officer at police station Sandi in the month of April, 1981. On 05.04.1981, at about 07:25 p.m., informant-Gomti (P.W.2) came at Police Station Sandi and in his presence lodged FIR. The chik FIR was written by Head Moharrir Chabinath Singh (P.W.10) on describing of the incident by informant Gomti and on that basis, F.I.R. was registered by Head Moharrir Chabinath Singh (P.W.10) at 07:25 p.m. on 05.04.1981. He further deposed that injured Mahesh (P.W.4) and Ram Singh were also coming at police station along with informant-Gomti (P.W.2) and they (injured Mahesh and Ram Singh) were sent for medical examination along with Homeguard Surendra Kumar and Bhikham at

Primary Health Centre, Sandi. At that time, spot of blood on the shirt of injured Ram Singh was present, therefore, his shirt was taken by Head Moharrir Chabinath Singh and sealed it as (Ext. Ka 6). The investigation of the case was conducted by him. Thereafter, he went to Primary Health Centre, Sandi for recording the statement of the injured Mahesh and Ram Singh, wherein he recorded the statement of injured Mahesh, whereas Ram Singh was asked to reach on the place of occurrence and injured Mahesh was referred to the District Hospital, Hardoi for further treatment. Thereafter, he reached at the place of occurrence and at the place of occurrence, the deadbody of the deceased Om Prakash was found in front of the house of Ram Bilash Thakur on road. Thereafter, on his direction, S.I. Ram Shukla Awasthi had prepared panchayatnama (Ext. Ka. 8), photo lash (Ext. Ka. 9) and challan lash (Ext. Ka. 10). Thereafter, sealed deadbody of the deceased Om Prakash was sent for post-mortem at Sadar Mortuary, Hardoi along with Homeguard Ram Kishore and Constable Lal Bihari.

14. The post-mortem on the dead body of deceased Om Prakash was conducted on 06.04.1981 at 04:40 p.m., by Dr. S.K. Luthra (P.W. 5), who found on his person ante-mortem injuries, enumerated hereinafter :--

"1. Incised wound 1 cm x .5 cm x muscle deep over left side of face, 1 cm below the left eye, tailing present downward. Margins clean cut.

2. Incised wound 3 cm x 5 cm x muscle deep 1.5 cm below the left eye. Tailing present downward. Margins clean cut.

3. Punctured wound 4.5 cm x 2 cm x chest cavity deep over left side of chest 5 cm away from the left nipple at 1 to 2 O'clock position. Elliptical in shape. Margins clean cut. Director medially and downward.

4. Punctured wound 3 cm x 1.5 cm x chest cavity deep over left side of back of chest x chest cavity deep just above the left scapua. Elliptical in shape. Margins clean cut. Direction downward, forward and medially.

5. Abrasion over left knee joint 3 cm x 1 cm.

6. Two abrasions over right knee joint. Each measuring 2.5 cm x 1 cm x 2 cm x 1 cm."

The cause of death spelt out in the autopsy reports of the deceased Om Prakash was shock and haemorrhage as a result of ante-mortem injuries, which he had sustained.

15. It is significant to mention that in his deposition, in the trial Court, Dr. S.K. Luthra (P.W. 5) has reiterated the said cause of death and also stated therein that on 06.04.1981, he was posted as Medical Officer at District Hospital, Hardoi. He stated that on internal examination, he found that 2nd rib of left side was cut through and through under injuries no. 3 and 4; left pleural cavity contained 350 C.C. clotted blood; in the left lung, incised wound in the upper labe 2 cm x 1 cm communicating with the injury no. 4 was found; a lacerated wound in lower labe size 3 cm x 1.5 cm communicating with the injury no.3 was found, which was through and through in the lung; stomach contained 6 oz. of paste like food material; faecal matter and gas was found in large and small intestine.

In the cross-examination, Dr. S.K. Luthra (P.W. 5) has stated that there was no injury in the wedged shaped. Injuries no. 3 and 4 were made from such weapon of which both sides are sharpen and these injuries could be attributable by the knife (Ext. Ka. 1).

16. The evidence of P.W.8 S.I. Harchandra Singh, who is Investigating Officer of the case, further shows that he inspected the place of the incident in the presence of informant P.W.2-Gomti and injured Ram Singh and prepared the site plan (Ext. Ka. 11). From the place of incident, he seized plain and blood stained earth in containers under a recovery memo. On

06.04.1981, at 08:00 a.m., he went to village Badhrai for recording the statement of Mahipal Singh and he reached Badhrai at about 08:30 a.m. and recorded the statement of Mahipal Singh. In the village Badhrai, informer had informed him that convict/appellant Abbul Hasan is present at Badhrai Bus Station. Immediately thereafter, he reached the Badhrai Bus Station from where he arrested the convict/appellant. On interrogation of convict/appellant, he informed him that he murdered the deceased Om Prakash with knife. Thereafter, on the pointing out of the convict/appellant Abbul Hasan, knife (Ext. ka. 1) was recovered from the house of the convict/appellant in the presence of witnesses Jagannath, Kuber and Ram Laraitey (P.W.7). He further deposed that in the recovered knife, blood mark was present. Thereafter, he deposited the recovered knife in the *malkhana*. He further stated that he had also instructed to lodge an F.I.R. against the convict/appellant under Section 4/25 of the Arms Act. On the date itself i.e. on 16.04.1981, he recorded the statement of witnesses Ram Laraitey (P.W.7), Kuber, Jagannath and others at the police station. On 22.04.1981, after completion of investigation, he submitted the charge-sheet (Ext. Ka. 15) against the convict/appellant under Sections 302, 307 and 324 I.P.C.

In the cross-examination, P.W.8-Harchandra Singh has denied the suggestion that the F.I.R. of the case was not lodged on 05.04.1981 and it has been lodged on 06.04.1981 on his instruction. He further stated that the place from where informant Gomti saw the incident is not shown in the site plan. He did not see any gourd burden (बोझा) and sickle at the place of the incident. The road where the deadbody of the deceased was lying was made of asphalt. There was a drain on the side of the road. The mud was removed from the drain and thrown on the road, which had dried up, the dead body was lying on it and the blood was also spread there. There was no blood spread on the part of the asphalt. He further denied the suggestion that neither the dead body nor the blood was found at the place where the deadbody of the deceased was lying and further Jauhari did not live in the *kothari* (cell) near the spot. He also denied the suggestion that witness Jauhari was an accused at Police Station Sandi. He did not find blood on the clothes worn by the informant Gomti. He had taken the statement of Dr. Ram Bilash, however, none of the residents whose houses are shown in the site plan, had given statement. He denied the suggestion that he did not record the statement of any witness on 05.04.1981. He also stated that when he was at Baghrai, then, he came to know that convict/appellant was going to surrender in Court. As the convict/appellant was trying to escape, he was arrested by police by surrounding him at Badrai Bus Station.

17. The case was committed to the Court of Session by the Chief Judicial Magistrate, Hardoi on 09.07.1981 and the trial Court framed charge against convict/appellant under Section 302, 307, 324 I.P.C. He pleaded not guilty to the charges and claimed to be tried and has stated that Om Prakash was under a wrong belief that he has got illicit relation with his sister, on account of which, Om Prakash along with Ram Singh and Mahesh armed with "dandas' came to his door and beat him mercilessly and thereafter, his father and uncle rushed to save him and in defending him, they cause injuries to Om Prakash, Mahesh and Ram Singh with a *"dharia'* (a grass cutting sharp edged weapon). The same day, he went to lodge the report. He was detained there. His report was not written and then, he was falsely challaned. The recovery of the knife at his instance has also been falsely manipulated. He had a good number of injuries on account of assault by the deceased and his companions.

18. It transpires from the record that on the recovery of the knife on the pointing out/possession of the convict/appellant Abbul Hasan after he was arrested in connection with

Case Crime No. 4 of 1981, under Section 307/34 I.P.C., which was registered earlier against the convict/appellant, the learned Magistrate directed to commit the aforesaid case also for trial before the Court of Sessions and accordingly, Sessions Trial No. 575 of 1981 for the offence under Section 4/25 of the Arms Act against the convict/appellant arose.

19. During trial, in all, the prosecution examined 10 witnesses, namely, P.W.1 Dr. A.K. Dixit, who medically examined the injured Mahesh (P.W.4) and Ram Singh, P.W.2-Gomti, who is the daughter of the deceased and informant of the case, P.W.3-Smt. Kamla, who is the daughter of the informant Gomti and sister of the deceased, P.W.4-Mahesh, who is the injured witness, P.W.5-Dr. S.K. Luthra, who had conducted the post-mortem of the deceased Om Prakash, P.W.6-Jauhari, who is the eye-witness of the incident, P.W.7- Ram Laraitey, who is the witness of recovery of knife, P.W.8-Harchand Singh, who is the Investigating Officer, P.W.9-Dr. J.V. Singh, who had made treatment of injured Mahesh on referral from Primary Health Centre, Sandi, and P.W.10-H.M. Chavinath Singh, who is the scriber of the F.I.R. and on describing the incident by the informant lodged the F.I.R. at Police Station Sandi, Hardoi.

20. The prosecution, in support of his case, has also filed before the trial Court an affidavit of Ram Kishore, Home Guard, who brought the deadbody of the deceased Om Prakash for post-mortem examination; affidavit of Constable Mohan Lal, who brought two sealed bundles on 05.04.1981; affidavit of Bhoop, who brought five bundles on 04.05.1981 to Sadar *Malkhana* and took the same from Sadar *Malkhana* to the office of Chief Medical Officer for dispatch to the Chemical Examiner; affidavit of Head Constable Jagannath, Moharrir *Malkhana*; report of the Chemical Examiner (Ext. Ka. 25); and the report of Serologist (Ext. Ka. 26).

21. From other side, the defence had examined two witnesses, namely, D.W.1-Dr. S.C. Rizvi, who had medically examined the convict/appellant at District Jail, Hardoi and D.W.2-Sripal, who was the x-ray technician at Sadar Hospital, Hardoi and had performed x-ray of the convict/appellant under the supervision of Dr. A.N. Singh.

22. P.W.2 Gomti, who is the informant and mother of the deceased Om Prakash, in her examination-in-chief, has deposed that accused Abbul Hasan was having evil eye on her daughter Kamla and in this regard, on the day when her son Om Prakash was murdered, altercation took place between her son and accused Abbul Hasan in the afternoon and accused Abbul Hasan had threatened her son Om Prakash to see him. This fact has been informed by her son Om Prakash to her on the same day in the afternoon. She further deposed that prior to one day before the date of incident, her daughter Kamla had informed her about accused Abbul Hasan having evil eye on her and at that time, her son Om Prakash was also present in the house when her daughter informed the aforesaid fact to her.

23. P.W.2-Gomti has further deposed that the incident was about ten months ago. She had gone to harvest the crops. She was returning home from the field at around 7 in the evening. She reached in the corridor of Dr. Ramvilas's house from the North direction at seven o'clock in the evening. Her son Om Prakash, Mahesh and Ram Singh were going ahead of her in the same direction. When her son Om Prakash reached in front of Dr. Ramvilas's house, accused Abbul Hasan came with a knife from the south side and challenged her son Om Prakash and started hitting him with a knife. Thereafter, she raised alarm and Mahesh and

Ram Singh also after raising alarm tried to save her son Om Prakash. Accused Abbul Hasan, thereafter, had also stabbed Mahesh and Ram Singh with knife. Thereafter, on raising hue and cry, Jauhari and other passerby came and accused AbbulHasan ran towards South direction with knife. Her son Om Prakash fell there and died instantly. She also deposed that blood was oozing out of his body. Ram Singh and Mahesh also got injuries. She further deposed that lighting was there coming from the house of Dr. Ram Bilas near the place of the incident and from where the passage to her house turns, there was also a light on the electric pole. At the same time, she went to the police station along with Ram Singh and Mahesh and at the police station, report was written on her dictation. She has proved the Ext. Ka.3 before the trial Court.

24. P.W.2-Gomti, in her examination-in-chief, has further deposed that she had no complaint regarding the closed sieve of Kamla. Accused AbbulHasan used to look at her daughter with evil eye since a month ago. The accused Abbul Hasan never molested her daughter in front of her nor in front of her son Om Prakash. When her daughter complained about accused Abbul Hasan to her, then, she told this to Om Prakash as well. Both, she and Om Prakash, felt bad on listening the aforesaid. Om Prakash got very angry, however, he did not say to her that he would see AbbulHasan when he meet him next. She further stated that no report was made against accused Abbul Hasan in the police station after her daughter told that accused Abbul Hasan molested her. Her son Om Prakash did not go in search of accused Abbul Hasan on the day when her daughter complained. On the second day i.e. on the day of the incident, her son Om Prakash came and told her that a quarrel with accused Abbul Hasan took place. Her son Om Prakash did not say that he had gone in search of Abbul Hasan. Her son Om Prakash told her that quarrel took place with accused Abbul Hasan at the flour mill of Juber. She further stated that she and her son Om Prakash did not make complain about the act of the accused Abbul Hasan to his mother or father nor her son Omprakash write any report at the police station. She denied the suggestion that accused Abbul Hasan never had an evil eye on her daughter nor Om Prakash have a fight with the accused Abbul Hasan. She further deposed that she has no agricultural land. Her son Om Prakash was a servant in the confectioner Kishanlal. Keshanlal's shop is in Nawabganj. Her son Om Prakash used to stay at the shop from morning till noon and then he used to go after having food and returned by 8-3 pm. On the day of the market, the confectionery shops were closed at 10 o'clock in the night. On the day of the incident, her son Om Prakash had come to eat food when he complained. She further deposed that on the day of the incident, her son Om Prakash worked in the shop both in the morning and in the evening. She deposed that she did not know the cousin of the accused, Chirag Ali, however, she knew the father of the accused. The house of the accused is at 30-40 steps south from the place of the incident.

25. It has also been stated by P.W.2-Gomti that her son Om Prakash, Mahesh and Ram Singh were not having any weapon. None of these three had beaten accused Abbul Hasan. No blood came out from accused Abbul Hasan. She denied the suggestion that the arm of accused Abbul Hasan was broken during the incident. She further deposed that the Inspector had come to the spot at 8-9 pm on the day of the incident. The deadbody of her son Om Prakash was sealed and left at 10 pm on the same day and when she reached at police station in the morning on the next date of the incident, the body of the deceased was present there. The Inspector was also present at the police station till noon. She denied the suggestion that her son was not murdered in front of the house of Ram Bilas. She also denied the suggestion that her

son Omprakash and injured Ram Singh and Mahesh had beaten the accused Abbul Hasan with "dandas' in front of his house and on hearing the noise of accused Abbul Hasan, his family members came and in defense, they hurt Om Prakash, Ram Singh and Mahesh. She has also stated that her report was written in the evening on the date of the incident and her report was not written on the next date of the incident. She denied the suggestion that the report was written on the next day of the incident on the instruction of police.

26. P.W.3-Kamla, who is the daughter of the informant-Gomti (P.W.1) and sister of the deceased Om Prakash, has deposed that a day prior to the incident, accused AbbulHasan had behaved with her in bad manner while she was returning from the market and she had told about it to her mother (P.W.2-Gomti) and brother (deceased-Om Prakash). She has further deposed that on the day of the incident also, when her brother (deceased Om Prakash) came to the house in the noon, he had told her that he had a quarrel with accused Abbul Hasan and accused Abbul Hasan had threatened to him. She further deposed that it was in the evening that the incident resulting in the murder of her brother (Om Prakash) took place.

27. P.W.4-Mahesh, who is the injured witness, in his examination-in-chief, has deposed that it was about ten months' ago, it was 7 O'clock in the evening. He, Ram Singh and Om Prakash were going towards the house of the deceased-Om Prakash from the market and when they reached the road in front of the house of Ram Bilas, accused Abbul Hasan came from South direction with a knife and accused Abbul Hasan, all of a sudden, became angry and started stabbing Om Prakash. They raised alarm. When he and Ram Singh tried to save Om Prakash, accused AbbulHasan had also stabbed them. At that time, mother of Om Prakash (informant Gomti) came from behind and she had also raised alarm; Jauhari was also coming from his house; and other persons were also coming there. Accused Abbul Hasan, after stabbing with knife, ran towards South direction with knife. Om Prakash died on the spot. The blood from the body of Om Prakash was falling. He and Ram Singh had sustained the injuries. He, Gomti and Ram Singh had gone to police station and Gomti had lodged the report. Thereafter, he and Ram Singh were sent for medical examination at Sandi hospital, where they were medically examined. Thereafter, he was referred to Hardoi Hospital from hospital Sandi, where he was medically examined. He was admitted at Hardoi hospital for about one month.

In cross-examination, P.W.4-Mahesh has stated that he was working at the shop of Gedan Lal and at the time of the incident, he was returning from the said shop. He has also stated that his house and the house of Om Prakash were in the same passage. His house is situated in east direction of accused Abbul Hasan after 5-6 houses. He denied the suggestion that at the time of incident, they were going towards the passage of eastern direction. On that date, they were planned to see drama. Om Prakash told that firstly dinner be taken, therefore, they were going to the house of Om Prakash. He was having friendship with Om Prakash. He further deposed that at the time of incident, no lathi, danda was in the possession of him, Ram Singh and Om Prakash. None of them had beaten accused Abbul Hasan. No blood of accused Abbul Hasan was falling on the spot nor accused AbbulHasan sustained any injury. Accused Abbul Hasan was not beaten by anyone in their presence.

28. P.W.4 Mahesh has further deposed that at the time, when Om Prakash was assaulted, his mother (P.W.2-Gomti) was behind him about 4-6-10 steps. He had sustained one knife blow. He also stated that at the time of incident, Jauhari was residing at Mohalla Salamullaganj nor

residing at Nababganj. Prior to one year ago, Jauhari was residing in one *kothari* of the Thakur Ram Bilash. He denied the suggestion that Jauhari never resided at the *kothari* near the place of the incident. Jauhari used to sell Kewada and Rose. Jauhari was never the servant at police station. He also denied the suggestion that on the date of the incident, at about 07:00 p.m., he, Ram Singh and Om Prakash were assaulted seriously to accused Abbul Hasan by lathi and danda in his house and also family members of AbbulHasan were coming to save him and they were beaten them. He also denied the suggestion that Gomti (P.W.2) did not lodge the report on the date of the incident.

29. P.W.4-Jauhari, in his examination-in-chief, has stated that it was about ten months ago. It was 7 O'clock in the evening. He was in the house. He listened the noises of abuses coming from the road situated in front of his house. He came out from the house. The electricity bulb was lighting in the house of Dr. Ram Bilash and nearer to it also bulb was lighting in the electricity poll. He saw that accused Abbul Hasan was stabbing Om Prakash, Mahesh and Ram Singh with knife. The mother of Om Prakash also raised alarm. Thereafter, accused Abbul Hasan, after stabbing, ran towards the South direction. Om Prakash had sustained injuries and blood was oozing and he died on the spot and Ram Singh and Mahesh had also sustained injuries. He further deposed that firstly he saw the accused stabbing and then he saw Abbul Hasan running from there. After the incident, he stayed there. Inspector came at about 08:00 p.m. The mother of Om Prakash came along with the Inspector. Mahesh, Ram Singh had gone along with the mother of Om Prakash to the police station. The inspector stayed there till 11:00 p.m. and thereafter, the inspector had gone to police station. The mother of Om Prakash had not gone to police station along with Inspector. He denied the suggestion that at the time of incident, he was residing at the house of Ram Lal and he did not see the incident. He also denied the suggestion that he has given false evidence on the pressure of the police against the accused.

30. P.W.7-Ram Laraitey is the witness for the recovery of the knife (Ext. 1) at the instance of the accused Abbul Hasan.

31. D.W.1 Dr. S.C. Rizvi, who was the Medical Officer, Police Lines, has stated that on 06.04.1981, he was posted as Medical Officer, District Jail, Hardoi and on that day, at about 05:00 p.m., after detaining the accused Abbul Hasan in jail, he conducted his medical examination. On examination of accused Abbul Hasan, twelve injuries were found on him, which are as under :-

"1. Lacerated wound 2 cm x 1 cm x scalp deep 10 cm above right ear on right side of head.

2. Traumatic contused swelling (generalized) on whole of lower 1/3 of right upper arm, Right elbow upper 1/3 of right fore arm. Local pain and tenderness present, movements painful and restricted, suspected fracture. Preserved. Advised X-ray

3. Traumatic generalized swelling on whole of right wrist and right hand, local pain, tenderness present, movements painful, and restricted, suspected fracture present.

4. Lacerated wound 1 cm x .5 cm x muscle deep over terminal phalanx of right index finger.

5. Lacerated wound 1 cm x .5 cm x muscle deep over terminal phalanx of right ring finger.

6. Lacerated wound 1 cm x .5 cm x muscle deep on terminal phalanx of right middle finger.

7. Lacerated wound 1 cm x .5 cm x muscle deep on terminal phalanx of right little finger.

8. Contusion 8 cm x 4 cm x blue in colour on top of left shoulder.

9. Contusion 5 cm x 3 cm x blue in colour over left scapular region of back.

10. Traumatic generalized swelling on whole of the left wrist joint, left hand, all the fingers, local pain and tenderness present, movements painful and restricted, suspected fracture. Advised x-ray.

11. Traumatic generalized swelling with blister formation on whole of the lower 2/3 of right leg. Swelling is huge, local pain and tenderness present, movements painful and restricted completely, suspected fracture present. Advised x-ray.

12. Traumatic generalized swelling on whole of the lower ½ of the left leg, local pain and tenderness present, movements of joints concerned restricted, suspected fracture present. Advised for X-ray."

32. It is significant to mention here that D.W.1 Dr. S.C. Rizvi, has deposed that Injuries no. 2, 3, 10, 11 and 12 were kept under observation and rest injuries were simple in nature. All injuries were caused by hard and blunt object. Duration was about 24 hours. He also deposed that all these injuries could have been caused on 05.04.1981 at about 7:00 p.m. and could be attributable by danda. In cross-examination, he has stated that there is lesser possibility of these injuries having been received at 12 noon on 06.04.981. He has proved injury report Ext. Kha. 1.

33. D.W.2-Sripal, who conducted x-ray of the accused/appellant Abbul Hasan, has deposed that on 10.04.1981, he was posted as x-ray technician at Sadar Hospital, Hardoi. On 10.04.1981, accused/appellant Abbul Hasan came in custody at Sadar Hospital, Hardoi for x-ray. He conducted the x-ray of the accused/appellant Abbul Hasan in the presence of Dr. A.N. Singh. He has proved the x-ray report (Ext. Kha.2). He has also filed four x-ray plates (Ext. Kha 3 to Ext. Kha 6). It is relevant to show herein that Ext. Kha 2 shows the fracture of first metacarpal bone, fracture of proximal digit of left index and middle finger. The prosecution has not cross-examined D.W.2.

34. The trial Court believed the evidence of P.W.2-Gomti, P.W.4-Mahesh, P.W.6-Jauhari, P.W.7-Ram Laratiey and found the appellant guilty for the offences punishable under Sections 302, 307, 324 I.P.C. and 4/25 of the Arms Act and, accordingly, convicted and sentenced the appellants in the manner stated in paragraph 2 and 3, by means of judgments and orders dated 07.08.1982 passed in Special Appeal Nos. 514 of 1981 and 575 of 1981, respectively.

B. APPELLANT'S CASE

35. On behalf of the convict/appellant, Mr. Dinesh Chandra Shukla, learned Counsel has made the following submissions :-

(i) The F.I.R. is too prompt to believe and ante-time. As per the prosecution, the incident occurred at 07:00 p.m., whereas F.I.R was lodged by P.W.2-Gomti, who is the mother of the deceased Om Prakash at 07:25 p.m. P.W.2-Gomti, in cross-examination, has stated that on the next date of the incident, Munshi of the police station affixed her thumb impression and at that time, she was not provided a copy of the report and further she stated that on the date of the incident when she lodged the report, at that time also no duplicate was provided to her. Therefore, his submission is that FIR has been lodged on the next date of the incident in the morning. Hence the prosecution case is improbable and doubtful.

(iii) The Investigating Officer P.W.8 Harchand Singh had stated in his examination-in-chief that he arrested the accused AbbulHasan at Bagrai Bus Station on 06.04.1981 i.e. on the next date of the alleged incident. Whereas D.W.1 Dr. S.C. Rizvi, who has medically

examined the accused Abbul Hasan, had stated that the injuries sustained by the accused Abbul Hasan could be attributable to a lathi and the same could have occurred on 05.04.1981 at 07:00 p.m. and in his cross-examination, D.W.1 Dr. S.C. Rizvi has stated that there is lesser possibility to have received injuries by accused on 06.04.1981 (on the date of the incident) at about 12:00 O'clock in the day. Hence, the injuries of the convict/appellant have not been explained by the prosecution and the prosecution story is improbable and doubtful. The trial Court has erred in not considering this aspect of the matter. In support of his submission, he relied upon **Manphool Singh and others Vs. State of Haryana** : (2018) 18 SCC 531 and **Lakshmi Singh Vs. State of Bihar** : 1976 Law Suit (SC) 325.

(iii) The alleged recovery of the knife had not been proved and made in accordance with the provisions of Section 102 Cr.P.C.

(iv) The P.W.2-Gomti, P.W.4-Mahesh and P.W.6-Jauhari are the interested witnesses as P.W.2-Gomti is the mother of the deceased, P.W.4-Mahesh is the friend of the deceased and P.W.6 was not residing in the village Salamullaganj at the time of the incident as he is the resident of Kannauj.

C. RESPONDENT/STATE CASE

On behalf of the State, Mrs. Smiti Sahay, learned Additional Government Advocate has submitted that it is a case of direct evidence. P.W.1-Gomti, injured P.W.4-Mahesh and P.W.6-Jauhari on facts are the witnesses of an eye account. P.W.2-Gomti and P.W.4-Mahesh have clearly stated that at the time of the incident, deceased Om Prakash, injured Mahesh and Ram Singh were returning from the market and at the same time, P.W.2-Gomti was returning on the same way behind them and when deceased Om Prakash, injured Mahesh and Ram Singh reached near the house of Dr. Ram Bilash where the electric bulb was lighting, accused Abbul Hasan, all of a sudden, armed with knife and came in front of Om Prakash and stabbed him with knife and, thereafter, P.W.4-Mahesh and Ram Singh were also tried to save Om Prakash but they were also stabbed by accused Abbul Hasan, therefore, their presence on spot is highly probable and natural. They have given categorical and specific evidence on the point that it was present accused/appellant Abbul Hasan who had stabbed with knife at Om Prakash (deceased) with intention to commit his murder. Their deposition are consistence inter-se and are corroborated by the evidence of each other. The evidence of P.W.2-Gomti, who is the mother of deceased Om Prakash is fully corroborated by the contents of her report Ex. Ka-3 and the medical evidence fully corroborates the evidence of all the aforesaid three witnesses PW-2, PW- 4 and PW-6. They are fully reliable witnesses. Lengthy cross-examination were made but these witnesses remained intact throughout. The motive and intention to commit the murder of the deceased has been fully established and proved by the prosecution. All the aforesaid facts are fully proved by prosecution. The inquest was prepared and the dead body was subjected to post-mortem examination within 24 hours of the incident. Two incised wounds, two punctured wounds and two abrasions were found on the body of the deceased which fully proved the case of prosecution. The weapon used by the appellant in committing the crime; the nature of injury through and through; and strong motive are factors establishing the intention of the appellant to commit the murder of the deceased and, therefore, the case falls within the ambit of Section 302 I.P.C. Lastly, she submitted that the arguments advanced by the learned counsel for the appellant are imaginary which are not supported by the evidence on record. The appeal lacks merit and deserves dismissal.

(D) **DISCUSSION**

36. We have examined the submissions advanced by Dr. Dinesh Chandra Shukla, learned Counsel for the appellant and Ms. Smiti

Sahai, learned Additional Government Advocate for the State and perused the record.

37. It transpires that the incident has taken place on 05.04.1981, at about 7.00 P.M. and the report was lodged on 05.04.1981 at 07:25 P.M. after covering a distance of two farlang (approx 404.4 metres) from the scene of incident to the police station concerned and, therefore, the F.I.R. is prompt which contains the details of the incident, the names of accused, the weapon used, the motive, mode, manner and the result of the assault, the presence and name of witnesses at spot without any ambiguity. Therefore, this prompt F.I.R. rules out any kind of concoction, fabrication, manipulation, maneuvering and after thought of the F.I.R.

38. In **Jai Prakash Singh Vs. State of Bihar and another :** 2012(2) Supreme Court Cases (Criminal) 468, the Apex Court has held that the F.I.R. in a criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt loding of the F.I.R. in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names fo the actual culprits and the part played by them as well as the names of the eye witnesses present at the scene of occurrence. If there is a delay in lodging the F.I.R., it loses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large numbers of consultations/ deliberations. Undoubtedly, the promptness in lodging the F.I.R. reflects the first hand account of what has actually happened, and who was responsible for the offence in question.

39. There does not appear any substance in the contention of the learned counsel for the appellant that the F.I.R. is too prompt to believe because lodging of F.I.R. within a space of twenty-five minutes after covering of distance of 2 furlang cannot be said to be too prompt F.I.R. Furthermore, P.W.2-Gomti and P.W.4-Mahesh have consistently stated in their statement that they along with Ram Singh, immediately after the incident, went to the police station for lodging the F.I.R. P.W.10-Chavinath Singh and P.W.8-Harchand Singh have also supported the aforesaid statement of P.W.2 and P.W.4 that Gomti, Mahesh and Ram Singh reached the police station on the date of the incident i.e. 05.04.1981 at 07:25 p.m. Hence, the submission of the learned Counsel for the appellant that the FIR is ante-time, has no substance.

40. As regards the submission of learned counsel for the appellant that P.W.-2 is the mother of deceased, P.W.-4 is the friend of the deceased, therefore, they are interested witnesses and for the said reason their statements ought to have been discarded, we do not agree with the said submissions.

41. In **Bur Singh Vs. State of Punjab** : (2008) 16 SCC 65, the Apex Court has observed in the following terms :-

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

"12. Merely because the eye witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. **Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible.** We shall also deal with the contention

regarding interestedness of the witnesses for furthering the prosecution version."

42. In **State of Punjab Vs. Karnail Singh** : 2003 (3) ACR 2961 S.C. and in **Ashok Kumar Chaudhary Vs. State of Bihar** : 2008 (2) CAR 652 S.C., the Apex Court has held that mere interestedness of a witness is not sufficient to discard his testimony. The only precaution in appraisal of evidence of such witness is required to be more cautious and the courts are required to test their evidence on the anvil of strict judicial scrutiny. Recently, in the case of **Gumansinh and others Vs. The State of Gujarat** : AIR 2021 SC 4174 has reiterated the aforesaid view.

43. Keeping in the mind the above dictum of the Apex Court and also when we test the evidence of P.W.2-Gomti and P.W.4-Mahesh on the aforesaid anvil, we have no hesitation to hold that these two witnesses i.e. P.W.2 and P.W.4 are wholly reliable witnesses. There is no room for doubt in their testimony. Their testimony is consistent throughout. Their presence at the spot was natural when P.W.4-Mahesh, deceased Om Prakash and injured Ram Singh were returning from the market to their home and behind them, P.W.2-Gomti was coming from the field and when P.W.4-Mahesh, injured Ram Singh and deceased Om Prakash reached in front of the house of Dr. Ram Bilash, all of a sudden, appellant armed with a knife came and challenged Om Prakash and subsequently stabbed Om Prakash with knife and when injured P.W.4-Mahesh and Ram Singh tried to save Om Prakash (deceased), they were also stabbed by the appellant with knife. On hue and cry, P.W.6-Jauhari, who was also residing in front of the house of the place of the incident, came and saw that accused/appellant Abbul Hasan was stabbing with knife to Om Prakash, Mahesh and Ram Singh. The post-mortem report of the deadbody of the deceased Om Prakash reveals that the deceased had sustained one incised wound on the left side of face below the left eye; one incised wound on left eye; one punctured wound on left side of chest; one punctured wound on left side of back of chest; one abrasion over left knee; two abrasion over the right knee joint. As per the opinion of Dr. S.K. Luthra (P.W.5), deceased Om Prakash died due to shock and hemorrhage as a result of ante-mortem injuries sustained by him. It was also opined by the doctor that these injuries could be attributable by a knife.

44. The medical examination of two injured, namely, P.W.4-Mahesh and Ram Singh was conducted by P.W.9 Dr. J.V.Singh, who, after examination, has found that Mahesh sustained punctured incised stabbed wound, whereas Ram Singh sustained two incised punctured stab wounds. As per the opinion of P.W.9, all the injuries were caused by sharp pointed object. This also supports the prosecution case.

45. It transpires from the evidence on record that except Jauhari, no other independent witness has been examined by the prosecution but as per the evidence of P.W.6 Jauhari, his living in that very locality just near the place of incident has been well established. There is no evidence on record which shows that P.W.6 Jauhari was under any cloud or under the pressure of the police while he was residing at Sandi. Hence, the plea of the appellant that testimony of Jauhari cannot be believed, is not sustainable from the evidences on record.

46. The other material, which is available on record, is that deadbody of the deceased was found in front of the house of Dr. Ram Bilas and not in front of the house of accused/appellant. Thus, the plea of the appellant that the incident took place in front of his house as the deceased and his two companions Mahesh and Ram Singh came over there and assaulted the accused,

cannot be believable and appears to be imaginary and accordingly, it is rejected.

47. So far as the assertion of the appellant that the prosecution has failed to explain the injuries sustained by the appellant and the medical evidence supporting the case of the accused/appellant is concerned, it would be relevant to mention that in **Babu Ram and Others vs. State of Punjab** : (2008) 3 SCC 709, the Apex Court has held that :-

"18.It is a well-settled law that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

"1.that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

2.that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

3.that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

19.Further, it is important to point out that the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

48. In the instant case, no doubt, D.W.1-Dr. S.C. Rizvi, who medically examined the accused in jail on 06.04.1981, has given his opinion that these injuries could be received at about 07:00 p.m. on 05.04.1981 i.e. on the date of the incident but in his cross-examination, he has stated that there is lesser possibility of receiving the injuries on 06.04.1981 at 12:00 noon.

49. At this stage, it would be relevant to mention that the testimony of the Investigating Officer shows that the accused received injuries while he was arrested on 06.04.1981. The trial Court, while dealing with this issue, has recorded specific finding on the basis of material evidence on record that the injuries of the accused were found noted in the General Diary (Ext. Ka. 4) entry of 06.04.1981. As comes out from the record, the accused/appellant has gone to lodge the report at the police station on 05.04.1981 and he was detained over there but there is no such evidence on record. Furthermore, it is quite impossible that the accused with such a good number of injuries would have gone alone to lodge the report at the police station and his family members like father and uncle, who are said to have been the witnesses of assault of the acused, would not have cared to accompany him and see that the police give a fair diat to the accused. Moreso, the trial Court has recorded specific finding that this plea at the instance of the appellant has not raised when he moved application for bail. In these backdrops, submission of the appellant that these injuries have been caused to the appellant by deceased Om Prakash, Ram Singh and Mahesh with "danda' in front of his house as on hue and cry, family members had also came there and in defense, injuries ought to have been caused to Om Prakash (deceased), Mahesh and Ram Singh, is not proper and reliable evidence, hence the submission of the appellant in this regard has no force and is rejected.

50. The judgments, which have been relied upon by the learned Counsel for the appellant, are not applicable in the facts and circumstances of the case.

51. So far as the plea of the appellant with regard to recovery of knife is concerned, Ram

Laraitey (P.W.7) is the witness of recovery. He, in his examination-in-chief, has stated that in his presence, the accused/appellant gave the blood stained knife, which was kept on the wall under the thatch from inside his to the police. But this witness, in his cross-examination, has stated that he had not seen the injuries on the person of the accused when he was brought to his house and gave out the knife in his present. However, this witness denied the suggestion in cross-examination that the accused did not give any knife from his house to the police. There is no evidence on record, which shows that accused/appellant has inimical relations with Ram Laraitey (P.W.7), who resides in that very locality in which the accused/appellant has been living. Thus, the plea of the appellant that recovery of knife on his pointing out is not proved, is not sustainable.

52. For the reasons aforesaid, we are of the considered view that the prosecution has proved the case beyond all reasonable doubts and the trial Court, after properly appreciating the evidence in consonance with the settled legal position applicable to the facts of the case, have recorded cogent findings of fact and have rightly convicted and sentenced the appellant by the impugned judgment and order dated 07.08.1982.

53. Accordingly, both the criminal appeals are **dismissed.** Appellant is in jail and he shall serve out the sentence as ordered by the trial Court.

54. Office is directed to transmit the lower court record along with a copy of this order to the court concerned forthwith for necessary information and follow up action, if any required.

(2021)12ILR A863
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.11.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No. 655 of 2002

Ram Avadh Yadav & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Vashu Deo Misra, Anuj Kumar Srivastava, Maneesh Kumar Singh, Navita Sharma

Counsel for the Respondent:
Govt. Advocate

Victim died within seven years of marriage-unnatural death-cut down on railway track by a train-earlier also complaint was lodged-but no mention of cruelty for dowry was there-matter mediated-prosecution witnesses are in contradictions for demand of dowry-all the witnesses are interested witnesses-circumstantial evidence to be conclusive and consistent-conviction bad.

Appeal allowed. (E-9)

List of Cases cited:

1. St. of A.P. Vs Raj Gopal Asawa & anr. reported in (2004) 4 SCC 470

2. Gurmeet Singh Vs St. of Pun. reported in (2021) 6 SCC 108

3. Satbir Singh Vs St. of Har.reported in (2021) 6 SCC 1

4. Sharad Birdhi Chand Sarda Vs St. of Mah. reported in (1984) 4 SCC 4,

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The present Criminal Appeal is preferred under Section 374 Cr.P.C. against the judgment and order dated 16.05.2002 passed by IXth Additional District Judge and Sessions Judge, Lucknow in Crime No.225 of 1997,

Sessions Trial No.586 of 1998, Police Station Gomti Nagar, District Lucknow (State Vs. Ishwar Deen and others) convicting the each appellant to rigorous imprisonment for two years under Section 498-A I.P.C. and a fine of Rs.5,000/- and in default of payment of fine to further undergo six months rigorous imprisonment and under Section 304B I.P.C., ten years rigorous imprisonment and a fine of Rs.20,000/- and in default of payment of fine to further undergo two years rigorous imprisonment.

2. Heard learned counsel for the appellant, Sri Maneesh Kumar Singh, Advocate and learned A.G.A. for the State, Sri Anurag Singh Chauhan, Advocate.

3. In the instant Criminal Appeal against conviction, the brief story in the prosecution case is that Ram Dulari, mother of the deceased "Babita Yadav" lodged a first information report on 07.07.1997 in Police Station Gomti Nagar, District Lucknow that her daughter aforesaid Babita Yadav, who got married on 01.07.1994 with Ram Avadh Yadav, was subjected to cruelty, mental and physical torture in connection with demand of dowry since after the marriage. The aforesaid Ram Avadh Yadav, the son-in-law of the complainant with his father Ishwar Deen Yadav, mother-in-law, brother-in-law and sister-in-law forced her to bring Rs.40,000/- in cash. When the demand could not be fulfilled by the complainant, being a widow of insufficient means, they began to beat and torture her daughter. Severally they threaten in the course of beating the complainant's daughter Babita Yadav that let her ablaze into fire or to push on the railway tracks so that she would die. She further complained that in April, 1966, Ram Avadh Yadav, the son-in-law assaulted the complainant's daughter, inflicting a blow on her head from Banka. A report with regard to which was lodged in Police Station Madiyaon, District Lucknow, pursuant whereof, police recovered the complainant's daughter from the house of appellants brought her into hospital for treatment. Subsequently the in-laws of complainant's daughter, in mediation of some respectable people of the locality, asked pardon for their wrongs and requested to sent back the complainant's daughter to her in-laws house with assurance not to do any such thing any future. However, on 02.07.1997, the complainant got an information received by her in house at Satna, Madhya Pradesh that dead body of her daughter was found at Gomti Nagar Railway crossing in suspicion state. She further informed in the written complaint that her daughter was subjected to cruelty by son-in-law, Ram Avadh Yadav, his father, mother, brother and sister to such an extreme extent that she compelled to commit suicide. The Police instituted Crime No.225 of 1997, under Sections 498-A and 304-B of I.P.C., Police Station Gomti Nagar, District Lucknow on 07.07.1997 whereupon after committal from the Magistrate Court, Session Trial No.586 of 1998 was instituted for trial by the Court of Sessions.

4. In the Course of trial, one of the accused, Ram Kali, mother-in-law of the deceased "Babita Yadav" died and therefore, the case was abated to her extent by the trial judge.

5. Firstly, the charge sheet was submitted against the accused, Ram Avadh Yadav and Ishwar Deen Yadav only, whereupon Sessions Trial No.586 of 1998 was instituted. Thereafter, rest of the accused persons, namely, Ram Kali, mother-in-law, brother-in-law and sister-in-law of the deceased were arraigned in Sessions Trial No.18 of 1999, which was instituted thereupon. Both the sessions trial since pertaining to the same offence, therefore, the accused persons were trialed jointly for the purpose of consolidated hearing and judgment.

6. Firstly, the accused were charged under Section 306 and 498-A of I.P.C. but looking into the facts before

the trial judge with regard to the unnatural death of the deceased "Babita Yadav" within seven years from the date of her marriage in her in-laws house, charges framed were amended and Section 498A I.P.C. read with Section 304 B of I.P.C. was imposed.

7. The prosecution produced witnesses for oral evidences, namely, complainant "Ram Dulari" as PW-1, Smt. Geeta as PW-2, Smt. Anita as PW-3, Dwarika as PW-4, Ram Ratan Yadav as PW-5, R.P. Yadav, Sub Inspector as PW-6 and Radhe Shyam as PW-7.

8. As documentary evidences, the prosecution produces before the Court, the written complaint as Ex. Ka-1, Post Mortem Report as Ex. Ka-2, Site Map as Ex. Ka-3, Chargesheet as Ex. Ka-4 and the First Information Report as Ex. Ka-5, Copy of the G.D. as Ex. Ka-6, Inquest Report as Ex. Ka-7 and other police papers prepared during the investigation as Ex. Ka-8, Ex. Ka-9 and Ex. Ka-10.

9. The accused persons were confronted with the evidence of prosecution witnesses under Section 313 Cr.P.C. though they denied from the allegations but did not adduce any written document in defence and examined witness Tulsiram as DW-1.

10. PW-1 in her examination before the Court proved written complaint made by her before the Police Station. PW-2 being elder sister of the deceased, deposed that just after the marriage, deceased "Babita Yadav" used to cohabit with her husband and another family members in her in-laws house. The behavior of in-laws with her was not good. They used to beat her in connection with demand of dowry. The mother of the witness and her sister lodged the F.I.R with this regard. She has further told that whenever the deceased "Babita Yadav" used to come in maternal house, she tells about the incidence of beating for the reason of demand of dowry. She has also stated the fact of illicit relations of the accused "Ram Avadh", with the wife of his maternal uncle and in order to continue with the illicit relation also, she used to beat severely to the deceased "Babita Yadav".

11. Another sister Anita as PW-3 has reiterated the same facts as stated by the PW-2.

12. PW-4, Dwarika, The chowkidaar deployed at railway station Malhore at Dilkusha in the year 1997. He deposed before the court that at about 2:00 P.M. in the noon of 02.07.1997, a woman was cut down on the railway track by train, the report of which, he lodged in the Police Station Gomti Nagar, District Lucknow.

13. PW-5, the brother-in-law of the deceased also stated about the illicit relations of the accused/appellant "Ram Avadh" with the wife of his maternal uncle which was also a root cause of quarrel between husband and wife and persuasive factor for committing suicide by the wife. He did not affirm allegations as to the dowry death.

14. PW-6, the Sub-Inspector R.P. Yadav who was the investigating officer in the first information report aforesaid, proved the facts came out of his investigation.

15. Postmortem report after the autopsy was done by the Dr. Radhe Shyam, which is proved by the said Doctor PW-7 in the court, on which the death by accident on railway track is found established.

16. PW-8, Smt. Sangeeta is examined as an independent witness, who stated that on 30.06.1997 when she went to bank situated in Gomti Nagar to withdraw cash and after withdrawal, since she mistakenly left the passbook there so she went back to the bank and met with Babita Yadav who told her that her husband is demanding Rs. 40,000/- for purchasing a motor vehicle i.e. tempo and for this he is forcing her. PW-8 told that the mother-in-law of the deceased "Babita Yadav" is in relation with her as wife of maternal uncle of her husband. She also stated that Babita Yadav told her about the cruelty and torture with which in-laws are subjecting to her in connection with demand of dowry.

17. After perusing all the evidences and hearing the parties, learned court below vide it's judgment convicted the accused/appellants, "Ram Avadh and Ishwar Deen" under Section 498 A and 304 B of I.P.C and sentenced them vide order dated 16.05.2002, convicting the each appellant to rigorous imprisonment for two years under Section 498-A I.P.C. and a fine of Rs.5,000/- and in default of payment of fine to further undergo six months rigorous imprisonment and under Section 304B I.P.C., ten years rigorous imprisonment and a fine of Rs.20,000/- and in default of payment of fine to further undergo two years rigorous imprisonment.

18. I perused the judgment and examined the same in light of evidences laid before the court with regard to the charges framed under Section 304B of I.P.C. as a presumptive offence. The section 304B of I.P.C. read with section 113B of the Indian Evidence Act, 1872 is being quoted hereunder for the easy reference:-

" Section 304B of I.P.C.- Dowry death.--

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

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

Section 113B of Indian Evidence Act, 1872-

Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860)."

19. In the case of ***State of A.P. Vs. Raj Gopal Asawa and another*** reported in ***(2004) 4 SCC 470,*** it is held as under:-

"Section 304-B I.P.C. and Section 113-B of the Evidence Act were inserted by the Dowry Prohibition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry deaths. Keeping in view the impediment in the pre-existing law in securing evidences to prove dowry-related deaths, the legislature thought it wise to insert a provision relating to presumption of dowry death on proof of certain essentials. It is in this background that presumptive Section 113-B in the Evidence Act has been inserted.

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 essentials required to be proved for raising the said presumption are that (i) the question before the court must be whether the accused has caused the dowry death of a woman, (ii) the woman was subjected to cruelty or harassment by her husband or his relatives, (iii) such cruelty or harassment was for, or in connection with, any demand for dowry, and (iv) such cruelty or harassment was soon before her death.

Now, one of the essential ingredients, amongst others, in both the provisions i.e. Sections 304-B and 113-B is that the woman concerned must have "soon before her death" subjected to cruelty or harassment "for, or in connection with, the demand of dowry". There must be material to show that soon before her death the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise that in normal circumstances". The expression "soon before" is very relevant where Section 113-B of the Evidence Act and Section 304-B I.P.C. are pressed into service. Evidences in that regard has to be led by the prosecution. "Soon before" is a relative term and it would depend upon the circumstances of each case and no straightjacket formula can be laid down as to what would constitute a period of soon before the occurrence. 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. The expression "soon before her death" used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. The determination of the period which can come within the term "soon before" 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 the 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 cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. 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."

20. In view of the aforesaid provisions of 304B of I.P.C. read with Section 113B of the Indian Evidence Act, 1872 the prosecutions if establishes by its evidences that the unnatural death of the victim of the incident occurred within seven years from the date of marriage and she was subjected to cruelty soon before her death in connection with the demand of dowry and all these conditions are shown to co-exists, it shall be presumed that the offence under Section 304B of the I.P.C. is committed by the in-laws. The presumption raised against the in-laws that the victim died of a dowry death by reason of their behavior and conduct. In the instant case, the mother herself has lodged the F.I.R. under Section 306 of I.P.C. read with Section 498A of I.P.C.. The Section 498A of I.P.C. is also quoted hereunder for the easy reference:-

" Section 498A of the I.P.C.- Husband or relative of husband of a woman subjecting her to cruelty.--Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.--For the purpose of this section, "cruelty" means--

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

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

21. In the case of ***Gurmeet Singh Vs. State of Punbjab*** reported in ***(2021) 6 SCC 108,*** a case before Hon'ble the Supreme Court, it is held that the offence under Section 304B of the I.P.C. and that committed under Section 498A

are held to be independent and not connected with each other. The relevant portion of the said judgment is being quoted hereunder:-

"Sections 304-B and 498-A I.P.C. deal with two distinct offences. It is true that cruelty is a common essential to both the sections and that has to be proved. The Explanation to Section 498-A gives the meaning of "cruelty". In Section 304-B there is no such Explanation about the meaning of "cruelty". But having regard to the common background to these offences it has to be taken that the meaning of "cruelty" or "harassment" is the same as prescribed in the Explanation to Section 498-A under which "cruelty" by itself amounts to an offence. Under Section 304-B it is "dowry death" that is punishable and such death should have occurred within seven years of marriage. No such period is mentioned in Section 498-A. If the case is established, there can be a conviction under both the sections."

22. Section 304-B (i) of the I.P.C. defines Dowry Death of the woman. It provides that dowry death is where the death of a woman is caused by any burns or bodily injury **or occurs otherwise than under normal circumstances** within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband in connection with demand of dowry.

23. In the case of ***Satbir Singh Vs. State of Haryana reported in (2021) 6 SCC 1***, it is held that it is important to appreciate and understand the necessary ingredients required to coexists for the constitution of offence under Section 304-B of I.P.C. The relevant portion of the said judgment is being quoted hereunder:-

"38.1. Section 304-B, IPC must be interpreted keeping in mind the legislative intent to curb the social evil of bride burning and dowry demand.

38.2. The prosecution must at first establish the existence of the necessary ingredients for constituting an offence under Section 304-B, IPC. Once these ingredients are satisfied, the rebuttable presumption of causality, provided under Section 113-B, Evidence Act operates against the accused.

38.3. The phrase "soon before" as appearing in Section 304-B, IPC cannot be construed to mean ''immediately before'. The prosecution must establish existence of "proximate and live link" between the dowry death and cruelty or harassment for dowry demand by the husband or his relatives.

38.4. Section 304-B, IPC does not take a pigeonhole approach in categorizing death as homicidal or suicidal or accidental. The reason for such non categorization is due to the fact that death occurring "otherwise than under normal circumstances" can, in cases, be homicidal or suicidal or accidental."

24. In the present case, the victim "Babita Yadav" is admittedly within seven years from the marriage died of unnatural death on having been cut down on the railway track by a train. The unnatural death may be homicidal, accidental or suicidal. The death by any of such means comes within the ambit of unnatural death for the purpose of constituting offence with other essential ingredients referred hereinabove for constituting offence under Section 304-B of the I.P.C.

25. In the light of the aforesaid legal position, it is necessary to see the evidences proving the demand of dowry and then cruelty in connection therewith committed with the victim.

26. The case lodged by the complainant/mother of the victim, the deceased "Babita Yadav" was duly investigated by the PW-6, R.P. Yadav, the Sub-Inspector. There is no mention of any cruelty or incident of beating to the victim after the earlier first information

report lodged in the year 1996 with regard to the cruelty in connection with demand of dowry and the matter was mediated by some respectable persons. The in-laws of the deceased "Babita Yadav" make pardon and got back the deceased to her matrimonial home. No independent witness of the locality or neighbours is recorded. The mother of the victim used to reside in the State of Madhya Pradesh in Satna, there is no evidence that from where and how she got information of beating and torturing of her daughter after the said mediation and settlement between the parties. Evidence is also not on record as to when the deceased came to visit her before her death so that she knew about any recent and subsequent incident of torture at any point of time prior to her death. Moreover, the other prosecution witnesses like sister-in-law and brother-in-law of the deceased are also not stating about any such recent and subsequent act of cruelty after the mediation pursuant to the earlier first information report lodged by the mother in the year 1996.

27. One of the witnesses, Anita as PW-3 and brother-in-law as P.W.-5, Ram Ratan denying the fact of demand of dowry stated in consonance with the statement of PW-3, Anita that Babita Yadav and her husband were in quarrel and dispute with regard to the illicit relations of Ram Avadh with the wife of his maternal uncle.

28. The prosecution witnesses themselves are in difference and contradictions with regard to the demand of dowry during the period when the deceased "Babita Yadav" came back after mediation in 1996 to reside in her in-laws family. One set of witnesses stated on oath in the course of their examination in trial that demand of dowry was persistent and continuing with cruelty and torture committed on the deceased, whereas, another set of prosecution witnesses have stated on oath before the Court in the aforesaid process of trial that she was in quarrel and annoyed with her husband, the appellant "Ram Avadh" for the reason, his illicit relation with the wife of her husband's maternal uncle (mama). None of the witnesses's statement in oral evidence got corroboration from evidence of other attending facts.

29. None of the witnesses have ruled out any such allegations of illicit relations of the appellant "Ram Avadh". However, the Court has considered this aspect and ruled out the possibility of committing suicide by the deceased "Babita Yadav" by reason of the alleged illicit relations of her husband only for the reason that none of the witnesses have seen ever the appellant "Ram Avadh" and his companion of alleged illicit relations in any objectionable state of things. The eye witnesses account in evidences as to such intimacy between a male and female is generally not possible as it is not an activity done in the day light and openly. Legal or illegal whatever type of intimacy between a male or female may be, it is beyond the vision of people and done secretly, therefore, if witnesses are stating about the illicit relations that could not be disbelieved only for the reason that no one has seen the presence of complained to be in illicit relations in an objectionable state of things.

30. All the witnesses are interested witnesses as they are in relation with the victim as mother, sister and brother of the deceased. Their evidences required strict scrutiny by the Court but the same is not found done in the judgment delivered by the trial court.

31. If the prosecution has taken case of suicide by reason of demand of dowry and cruelty committed in connection therewith, the same is to be proved beyond all reasonable doubts. Prosecution is not relieved from proving it's case for the purpose of securing conviction of the accused thereupon.

32. The demand of dowry in the present case is not proved beyond all reasonable doubts and so far as the cruelty in connection therewith committed upon the victim is concerned soon before her death is also not proved beyond all reasonable doubts. So far as another aspect of the offence under Section 498-A is concerned, mere happening of incidence of victim's having been cut down on railway track is not in itself sufficient to presume that she committed suicide and to draw an inference that she could have not met an unfortunate accident. Here in the present case, right from the first information report lodged by the mother of the deceased/victim. The case of prosecution and it's witnesses, all have stated that the victim has committed suicide. No one even the keyman/chowkidar of the railway track, PW-4, has seen the victim jumping before a train on the railway track. He only saw the dead body cut down and lying on railway track.

33. In ***Sharad Birdhi Chand Sarda vs State of Maharashtra*** reported in ***(1984) 4 SCC 4,*** psychological and mental state of victim likely to commit suicide for the reason of any cruelty committed on her. The railway line, as in accordance with the evidence of prosecution witnesses is not too remote in the near vicinity of the home of the deceased where the incident happened.

34. In 1996, when the victim/deceased went to her mother and complained of the demand of dowry, the panchayat mediated the things and conceived therefrom, the victim returned to her in-laws house. No further complaint to the police is made either by the mother of the deceased or by the victim herself, as she was from the first incidence seems to have been a lady of courage and bold nature to raise voice against wrongs done with her by in-laws. Therefore, in absence of the evidence as to the psychology and personality of the deceased/victim, likely to commit suicide on having been annoyed from the alleged demand of dowry and cruelty committed with her, the prosecution case of commission of suicide by reason of cruelty committed by in-laws is not proved beyond all reasonable doubts. The cutting on the tracks may be accidental, suicidal or homicidal also but how high so ever the suspicion may be, the same could not take place of the proof either as to the accident or as to the suicide or even homicide. The prosecution in the present case failed to prove it's case of suicide by reason of cruelty in connection with demand of dowry. Therefore, learned court below committed error in passing the judgment of conviction under the aforesaid offences under Section 304B and 498A of the I.P.C. The judgment and sentence deserves to be set aside.

35. 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 pendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

36. In view of the aforesaid, the appeal is hereby allowed. The judgment and order dated 16.05.2002 passed by IXth Additional District Judge and Sessions Judge, Lucknow in Crime No.225 of 1997, Sessions Trial No.586 of 1998, Police Station Gomti Nagar, District Lucknow (State Vs. Ishwar Deen and others) convicting the each appellant to rigorous imprisonment for two years under Section 498-A I.P.C. and a fine of Rs.5,000/- and in default of payment of fine to further undergo six months rigorous imprisonment and under Section 304B I.P.C., ten years rigorous imprisonment and a fine of Rs.20,000/- and in

default of payment of fine to further undergo two years rigorous imprisonment is hereby set aside.

37. Appellants, namely, ***Ram Avadh Yadav*** and ***Ishwar Deen Yadav*** are acquitted of the charges levelled against them. They shall be released forthwith if not wanted in any other case.

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

(2021)12ILR A871
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.12.2021

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 702 of 1988
Connected with
Criminal Appeal No. 754 of 1988

Jagannath ...Appellant
Versus
State ...Respondent

Counsel for the Appellant:
P.L. Misra, Amarjeet Singh, Amit Chaudhary, Seraj Ahmad

Counsel for the Respondent:
G.A.

Criminal Law – Indian Penal Code, 1860 – Section - 307 - Proof of grievous hurt not a sine qua non for the offence-12 wounds –weapon used was firearm-intention to murder apparent-second part of section 307 IPC is attracted-prior enmity-motive proved-conviction upheld-sentence reduced.

Appeal disposed. (E-9)

List of Cases cited:

1. Neelam Bahal & anr. Vs St. of Uttarakhand, reported in (2010) 2 SCC, 229

2. St. of Mah. Vs Balram Bama Patill (1983)2 SCC 28

3. St. of M. P Vs Saleem (2005)5 SCC 554

4. Jage Ram Vs St.of Har. (2015)11 SCC 366

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

1. These two criminal appeals arise out of a common judgment and order dated 14.10.1988 passed by VII Additional Sessions Judge, Sitapur in Sessions Trial No.218 of 1987 whereby the appellants Santu, Naresh, Ram Shankar, Prem Narain, Bahori, Jagannath and Bhudhar have been convicted and sentenced to undergo rigorous imprisonment for three years under section 148 I.P.C.. They are further convicted under Section 307 I.P.C. read with section 149 I.P.C. and each of them is sentenced to undergo Rigorous Imprisonment for ten years. Both the sentences of all the accused appellants were directed to run concurrently.

2. As per the prosecution case narrated in the written report, Ex.Ka.6, Lallu, father of the accused Santu and Naresh was murdered. In the said case, Santu had named Shiv Balak Ram, complainant of the present case and others. At the time of the present incident, the murder cases was pending before the trial court. There was enmity between the complainant and Santu and others and a case under Section 107/117 CrP.C. was also pending in the Court.

Due to the said enmity, on 23.6.1986 at about 6.00p.m. in village Shah Singhpur, P.S. Kamlapur, district Sitapur when the complainant Shiv Balak Ram was coming to his home after attending natural call, near Ahata of Ramasrey, situated towards north of the village, he saw accused Santu, Hori Lal

and Jagannath, armed with guns, Naresh armed with double barrel gun, Ram Shankar and Prem Narain armed with addhi (half guns) and accused Bhudhar (since dead) was standing at a distance of 50 to 60 paces. On seeing Shiv Balak Ram, accused appellant Santu exhorted to kill and on this extortion, the accused persons started to fire on Shiv Balak Ram, causing injuries to him. In order to save her son, Smt. Shakunti, P.W.2 ran, however, she also sustained fire arm injuries. In the meantime, witnesses Ram Milan, Ramesh Chandra (P.W.1), Kanauji Lal, P.W.3, Lallu, Shamle and others reached near the place of the occurrence. On challenge being made, the accused persons ran away towards village Santraha. The complainant later on came to know that the accused persons are lying in ambush in the way towards the police station and as such, he did not proceed to police station for lodging the report in the same evening. On the next morning, he got the report of the incident ascribed by Gobardhan Lal, P.W.6 and proceeded towards police station in a bullock-cart along with his injured mother Smt. Shakunti. On reaching the police station at 8.00a.m. on 23.6.1986, he gave a written report, Ex. Ka-6 to Constable Sardar Husain, P.W.4, who prepared chick report, Ex.Ka.1 and registered a case under sections 147, 148, 149/307 I.P.C., P.S. Kamlapur, district Sitapur against all the accused persons. He also prepared Chitthi Majrubi of injured Shakunti and Shiv Balak Ram and referred them to the Medical Officer, Barai Jalalpur for medical examination.

3. The Medical Officer of Primary Health Centre, Jalalpur examined the injuries of injured Shiv Balak Ram at 12.30p.m.. He found the following injuries :

1. Fire arm wound 1.0 x 1.5 on the front of right thigh 16cm below the right anterior superior ilioc spine. Clotted blood present.

2. Fire arm wound 1.0 x 1.5c.m on the anterior aspect of right thigh 19cm above right knee joint

3. Fire arm wound .5cm x 1c.m. on the anterior aspect of right thigh 13cm above right knee joint

4. Fire arm wound 1.00cm x .5c.m. on the medical aspect of right thigh 22cm above the right popliteal fossa

5. Fire arm wound 1.0 x 1.5cm. on the anterior medical aspect of left thigh 21cm below the left anterior superiro ilioc spine. Clotted blood present.

6. Two fire arm wound 1.0 x 1.5cm and 1.5 x .5cm and the anterior aspect of left thigh 18cm and 19.5cm above left knee joint.

7. Fire arm would 1.0 x 1.5cm on the posterior aspect of left thigh 13cm above left popliteal fossa.

On the same day at about 1.10p.m., injuries of Smt. Shakunti were also examined by the doctor who found following injuries :

1. Multiple fire arm wounds in an area of 16cm x 9cm on the lateral aspect of right upper arm. Size about 0.4cm x 0.2cm

2. Multiple fire arm wounds in an area of 19 x 11 cm on the anterio lateral aspect of right lower arm.

3. Multiple fire arm wounds in an area of 13cm x 9cm on the upper part of right breast

4. Multiple fire arm wounds in an area of 7cm x 8cm on the right laterial side of abdomen

5. Multiple fire arm wounds in an area of 10cm x 4cm on the posterior lateral aspect of right knee joint.

All the injuries were found to have been caused by fire arm. The injuries were kept under observation. X-ray of respective parts was advised and duration was about 18 hours.

Injury memos prepared by the doctor are Ex.Ka-4 and Ex.Ka-3 respectively.

4. After investigation, charge-sheet was filed. The Magistrate has committed the case to

the Court of Sessions. Charges were framed and the accused persons have been charged under sections 148 and 307 I.P.C. read with section 149 I.P.C. They pleaded not guilty and claimed to be tried.

5. The prosecution in support of its case. has examined Ramesh Chandra Mishra, P.W.1 , Shakunti, P.W.2, Kannauji Lal, P.W.3, HC Sardar Husain, P.W.4, the writer of chick and C.D. Dr. Pulak Raj, P.W.5 Medical Officer, Gobardhan Lal, P.W.6 the writer of report Ex.Ka-6 and Durga Prasad Singh, the investigating officer of the case.

6. In their statement under section 313 CrPC, the accused persons have stated that father of the accused Santu and Naresh was murdered in the year 1985. The complainant Shiv Balak Ram and others were named in the first information report lodged by Santu. The murder trial was pending against Shiv Balak Ram and others. They have stated that due to enmity and also because they are Khandani of the informant, they have been falsely implicated. The accused Bhudhar, Bahori Lal, Naresh and Rama Shankar being the witnesses in the murder case of Lalji have also been falsely implicated. It is stated that on the date of occurrence, a dacoity was committed in the house of complainant in the night and he along with his companions has been falsely implicated in the case in collusion with the police.

7. Learned counsel for the appellants submits that a perusal of the injury report shows that injures were was kept under observation and none of the injuries received by the injured has been found to be serious or grievous to life. The injured Shiv Balak, informant of the case could not be examined as he had died even before his statement could be recorded. P.W. 1 Ramesh has been declared hostile. P.W.2 Shakunti, injured, though is not an eye-witness,has supported the prosecution case.

It is submitted that even if the entire prosecution story is taken to be true on its face value, the appellants can be said to have been wrongly convicted under sections 307/149 I.P.C. The case will not travel beyond Section 324 I.P.C. for the reason that none of the injuries received by the injured persons was found to be grievous or dangerous to life; the seat of injuries of both the injured, except injuries 3 and 4 of Smt. Sakunti, was also such that none could be said to have been caused on any vital part of the body. Although the accused persons were seven in number and all have allegedly fired shots from their respective fire arms. Only two shots fired on the injured and two from a distance causing no grievous injuries which prove that the intention of the accused was to cause injuries and not to commit any murder.

8. Per contra, learned Additional Government Advocate has opposed the appeals. He submits that a perusal of the injury report shows that the deceased Shiv Balak Ram had suffered seven fire arm injuries and the injured Shakunti has also received multiple firearm injuries on various parts of her body including right breast. Therefore, it cannot be said that there was no intention to commit murder. He also submits that gravity of the injury is irrelevant for conviction under section 307 I.P.C. What is to be seen is the actual intent of the accused persons, the nature of the weapon used, severity of the blow inflicting multiple fire arm injuries for commission of offence under Section 307 I.P.C. There was a definite attempt to commit murder of both the injured persons.

9. P.W.1 Ramesh has not supported the prosecution version. He has been declared hostile.

P.W. 2 Shakunti after hearing the sound of fire ran near the pond and saw that the accused Naresh armed with double barrel gun, Santu, Bahori and Jagannath with guns, Rama

Shankar and Prem Narain armed with half guns and Bhudhar armed with Kanta were assaulting her son. When she went there, they shouted to kill the old lady also. Then, she also suffered fire arm injury and fell down.

P.W. 3 Kannauji Lal has also supported the prosecution version, however, he is not an eye-witness.

P.W.4 HC Sardar Husain has proved the chick report, Ext.Ka.1 and G.D., Ex.Ka-2.

P.W.5 Dr. Pulak Raj, Medical Officer who examined the injuries of both the injured has opined that all the injuries are caused by fire arm. He has prepared the injury memo and proved it as Ex.Ka-3 and Ex.Ka-4. The x-ray plate has been proved as Ex.Ka-5. He has stated that the injuries received by Shiv Balak Ram have been caused from 3-4' distance. He has also stated that all the fire arm wounds of Shiv Balak Ram have been caused by more than one weapon.

10. As regards injuries received by Shakunti, he has stated that these fire arm wounds have come from a distance of 16-17'. It is possible that she has received these fire arm injuries from one weapon.

11. P.W.6 Gobardhan Lal, writer of report, has proved the written report, Ex.Ka-6.

12. S.I. Durga Prasad Singh is the investigating officer. He recorded the statements of complainant Shiv Balak Ram and Smt. Shakunti. He also took into his possession the clothes of both the injured, sealed the same and prepared memo Ex.Ka.7. At the place of occurrence he recorded the statements of Ramesh, Kanauji Lal and Lalau, the witnesses of fact. He collected blood stained and plain earth and prepared site plan Ex.Ka-8. He prepared memo Ex.Ka-9. He also found 7 empty cartridges at the place of occurrence, prepared memo Ex.Ka-10. He proved Ex.Ka.11 which is the gun of accused Jagannath. He has also proved charge-sheet, Ex.Ka-12.

13. The injured Shakunti in her statement has clearly stated that the accused persons Naresh, Santu, Bahori, Jagannath, Ram Shankar and Prem were armed with fire arm and Bhudhar was armed with Kanta and when she came at the place of occurrence, the accused persons also shot her. It is the testimony of the injured witness which is on higher pedestal than eye-witness.. Therefore, there is no reason for this court to disbelieve the testimony of P.W.2.

14. P.W.3 Kannauji Lal, a witness of fact, though is not an eye-witness to the assault, however, after hearing the fire arm shot, he came out of the house and went behind his house and has seen the accused. He took the name after identifying them. Therefore, he has given the evidence against seven accused persons namely Naresh, Santu, Bahori, Jagannath, Ram Shankar, Prem and Bhudhar who were armed with weapons and were running towards west north direction of the village.

15. It is submitted on behalf of the appellants that no grievous injury has been received by the injured and there is no repeated assault and therefore, the case will not travel to Section 307 I.P.C; rather it is to be converted under section 324 I.P.C.

As regards submission of learned counsel is concerned, a perusal of the injuries received by both the injured reveals that they have received multiple fire arm wounds in various areas of the body. The injured Shakunti sustained five fire arm injuries. She was seriously injured. She was a surviving witness. Shiv Balak Ram, compainant has sustained seven fire arm injuries which, according to Doctor, have been caused from more than one weapon. The trial court has held that the prosecution has been successful in proving its case. Participation of all the accused persons with a view to commit murder of the injured

persons has also been proved by the statements of P.W.2 and P.W.3.

16. So far as the arguments of learned counsel for the appellants that the injuries are not grievous or life threatening, the contention of learned A.G.A. as recorded in preceding para 8 of the present judgment carries weight. The intention of the accused has to be seen from the actual injury as well as from the surrounding circumstances, the nature of the weapons used and severity of the blow inflicted. The injury reports of both the injured depict that Shiv Balak Ram has sustained seven fire arm injuries and Shakunti has received five fire arm wounds. All the injuries have been found to be caused by the accused persons. The ocular evidence is intact and corroborated by medical evidence. In reference to record, the trial court has rightly held that the accused persons had common intention of causing fatal injuries to both the injured persons.

17. Before proceeding further, it would be appropriate to extract Section 307 I.P.C. as under :

"307.Attempt to murder.--Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.

Attempts by life convicts.--When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death."

The first part of Section 307 I.P.C.refers to "an act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder". The second part of Section 307, which carries a heavier punishment, refers to "hurt caused in pursuance of such an "act.

18. In **State of Maharashtra v Balram Bama Patill** (1983)2 SCC 28, the Supreme Court held that it is not necessary that a bodily injury sufficient under normal circumstances to cause death should have been inflicted. Relevant portion of para 9 of Balram Bama Patill's case is reproduced as under :

"9...To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. ***The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted.*** *What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof."*

(Emphasis supplied)

In **State of M P v Saleem (2005)5 SCC 554,** the Supreme Court held as under:

"13. It is sufficient to justify a conviction under Section 307 if there is present

an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, an accused charged under Section 307IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt."

In **Jage Ram v State of Haryana** (2015)11 SCC 366, it has been held that to establish the commission of an offence under Section 307, it is not essential that a fatal injury capable of causing death should have been inflicted. To reproduce:

"12. For the purpose of conviction under Section 307IPC, the prosecution has to establish (i) the intention to commit murder; and (ii) the act done by the accused. The burden is on the prosecution that the accused had attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction under Section 307 IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given, etc."

19. From the above judgments, it is evident that proof of grievous or life-threatening hurt is not a sine qua non for the offence under Section 307I.P.C. The intention of the accused can be ascertained from the actual injury, if any, as well as from surrounding circumstances. Among other things, the nature of the weapon used and the severity of the blows inflicted can be considered to infer intent.

20. In the present case, the nature of the injuries shows that there were 12 wounds. The weapon of offence was a firearm. The circumstances of the case clearly indicate that there was an intention to murder. The presence of 12 bleeding wounds as well as the use of a fire arm leave no doubt that there was an intention to murder. Thus, the second part of Section 307 I.P.C. is attracted in the present case.

21. The contention of learned counsel for the appellants that the doctor has not opined that the injuries sustained were grievous or life threatening has no force as the Doctor, P.W.4 has also not said that these injuries received by both the injured are simple injuries. All the injuries have been found to be caused by fire arm. They were kept under observation. X-ray was advised. Multiple fire arms have been used to inflict injuries on the injured persons as per statement of the doctor, therefore, the argument that there was no repeated assault and therefore, there was no intention to commit murder does not appeal. The fact that both the accused persons have received seven and five fire arm wounds does not rule out the possibility of repeated assault, therefore, the trial court has rightly convicted the accused appellants.

22. The accused persons had also clear motive for crime having been committed which is evident from a perusal of the first information report. The complainant Shiv Balak Ram was an accused in the murder of Lalji, father of accused Santu and Naresh and therefore, there was enmity between the parties due to that case. The murder of Lalji and the pendency of the case

against Shiv Balak Ram at the time and date of the incident of this case is admitted to the accused appellants. Thus, motive has also been proved beyond doubt.

23. The accused Bhudhar has been charged under section 148 I.P.C. P.W. 2 Shakunti in her statement has stated that accused Bhudhar was armed with Kanta and was assaulting her son and he also was armed with deadly weapon at the time of occurrence and all the accused persons are closely related. The accused Santu and Naresh are real brothers. The accused Rama Shankar, Prem Narain and Bahori are the sons of Rameshwar, thus, they are the real brothers. It has come in evidence that the accused Bhudhar resides in the house of Naresh and Bahori which also shows that all the accused except Jagannath reside in one and the same house and armed with deadly weapons, they formed an unlawful assembly with a common motive of committing murder of Shiv Balak Ram and Shakunti Devi, P.W.2. Nature of injuries as well as the weapons of offence clearly prove an intention to commit murder and hurt caused satisfies the ingredients of Section 307 I.P.C. Charges against the accused persons have rightly been proved under section 307 I.P.C., read with section 149 I.P.C and they have been rightly found guilty under section 148 I.P.C., and section 307 read with section 149 I.P.C.

24. In view of the aforesaid discussion, the conviction awarded by the trial court is upheld.

25. The Superintendent, District Jail, Sitapur has sent a report dated 3.8.2021 wherein it has been stated that the accused appellants Santu, Naresh, Ram Shankar, Prem Narain and Bahori have already been released from jail way back in the year between 1991 and 1994 after giving them benefit of Remission Rules and they have been released from jail. Bhudhar has already died.

26. As regards accused appellant Jagannath of Criminal Appeal No.702 of 1988, he was released on bail by this court vide order dated 24.11.1994. In the said order, it has been observed that he has remained in jail for six years on the date of passing of the order.

27. In the case of **Neelam Bahal and another Vs. State of Uttarakhand,** reported in (2010) 2 SCC, 229; accused was convicted under Section 307 I.P.C. and was sentenced to undergo seven years' rigorous imprisonment. The Supreme Court has convicted accused under Section 326 I.P.C. and reduced the sentence to period already undergone on the ground that the incident happened in the year 1987 when the accused was of young age of 25 years.

28. Considering the fact that the incident is of 1986, except the appellant Jagannath, who has already undergone a substantial period of six years in jail in the year 1994 at the time of grant of bail to him, all the other accused persons, namely Santu, Naresh, Ram Shankar, Prem Narain and Bahori have already been released from jail way back after giving them the benefit of Remission Rules by the government after serving more than six years of sentence and keeping in view the time lag, their sentence is reduced to the period already undergone.

29. The appellant Jagannath has already served a substantive period of six years in jail, the ends of justice would be served if he is sentenced with the period of imprisonment already undergone and it would be proper to reduce the sentence to the period of imprisonment already undergone by him.

Ordered accordingly.

30. Both the appeals are disposed of, as above.

The Registry is directed to send back the record of the trial court immediately along with a copy of the present order.

(2021)12ILR A878
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.11.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No. 994 of 2021

Hari Prakash Rawat ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Saharsh, Adarsh Bhushan

Counsel for the Respondents:
G.A.

Criminal Law - Scheduled Caste & Scheduled Tribes Act,1989- Sections 14 (A)– Code of Criminal Procedure, 1973 – Section 156 (3) - Learned Judge did not record as to any disclosure of commission of cognizable offence –in Application u/s 156 (3) Cr.P.C.-instead went deep into evidence- and rejected application-required to see prima facie disclosure of cognizable offence-impugned order rejected-Appeal allowed. (E-9)

List of Cases cited:

1. Ramesh Kumari Vs State (NCT of Delhi) reported in (2006) 2 SCC 677

2. Lalita Kumar Vs Govt. of U.P. & ors. reported in 2014 (2) SCC 1

3. St. of Assam Vs Abdul Noor & ors. reported in (1970) 3 SCC 10

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out.

2. Learned counsel for the appellant Sri Saharsh, Advocate and learned A.G.A. for the State Sri Anurag Singh Chauhan, Advocate are present in the Court.

3. The e-court record reveals that office has reported vide it's report dated 24.11.2021, the notice issued pursuant to the order of the Court dated 14.07.2021 has been served personally upon the opposite party no.2 i.e. Raj Kumar Verma. As such service is held sufficient.

4. Despite service of notice, none appeared, either the opposite party no.2, the prospective accused in person or the learned counsel on his behalf to represent him, though, learned A.G.A. was directed vide order dated 26.11.2021 to secure the presence or representation of the said prospective accused, opposite party no.2.

5. Learned A.G.A. submits that the facts averred in the application under Section 156(3) Cr.P.C. against the opposite party no.2 disclose a private dispute between him and the present appellant, the same is dismissed, as such, there is no information or instruction with him in this regard to argue.

6. Sri Ram Kripal Singh, Sub-Inspector, Police Station Alambagh, District Lucknow, pursuant to the direction given to learned A.G.A. to attend the Court with prospective accused, has come but it is informed that the said opposite party no.2 i.e. prospective accused has denied to attend the Court today.

7. The matter is heard on merit on the basis of materials available on the record of appeal.

8. The instant appeal in hand is moved under Section 14(A) of The Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act,

1989 against the impugned order dated 24.03.2021 passed by the Learned Special Judge, S.C./S.T. Act/Additional District & Sessions Judge, in Case No.111 of 2021, (Hari Prakash Rawat Vs. Raj Kumar Verma) under Section 156(3) of Cr.P.C., Police Station Gosaiganj, District Lucknow, whereby the learned Special Judge, S.C./S.T. had rejected the application of the present appellant under Section 156(3) of the Cr.P.C.

9. To appreciate the matter involved in the appeal, a brief account of facts complained in the application under Section 156(3) Cr.P.C. moved by the appellant is being given here under.

The appellant/applicant aforesaid belongs to schedule caste and the opposite party no.2 belongs to other caste. The private respondent no.2, Raj Kumar Verma met the appellant in Mohanlal Ganj and represented himself "Mandal Adhyaksha' of a political party namely "Bhartiya Janta Party'. The Raj Kumar Verma and other workers of the Bhartiya Janta Party induced the appellant to be a member of the party in the year 2016, pursuant to which, the appellant begin to work for the Bhartiya Janta Party as it's active member.

The Raj Kumar Verma offered to the appellant to contest elections in the election of Member of Legislative Assembly, Uttar Pradesh for the Constituency No.176, Mohanlal Ganj, which is a reserved Constituency and promised to make it possible in getting candidature of the Bhartiya Janta Party in the election. On the aforesaid representation, offer and inducement, the appellant began to work for the purpose of electioneering in the Constituency on behalf of the Bhartiya Janta Party. The aforesaid Raj Kumar Verma assured the appellant to arrange a meeting with Bhartiya Janta Party's State President, "Sri Swatantra Deo Singh' with whom the said respondent represented himself to have homely relationship and stated him to be in decisive position in the process of allotment of ticket for candidature of the party in elections.

The appellant/applicant visited Sri Swatantra Deo Singh with private respondent no.2. After the meeting, the private respondent called the appellant/applicant and represented that he has settled the things with the party's high ups for the candidature of appellant in the elections and the appellant/applicant has to deposit Rs.15,00,000/- in the party fund. Believing on the representation and promise, the appellant/applicant deposited a cheque bearing no.129729 drawn on Axis Bank worth Rs.5,00,000/- and deliver in cash Rs.10,00,000/- on 01.12.2016 in the account of private respondent, Raj Kumar Verma on his advice. The payment of the cheque was cleared in the account of respondent no.2.

In the election for Uttar Pradesh Legislative Assembly of year 2017, the appellant/applicant when not given ticket as candidate of Bhartiya Janta Party, he asked the private respondent no.2, Raj Kumar Verma, the receipt of the said amount of Rs.15,00,000/- paid to him but neither the receipt of payment in party fund nor the repayment of the said amount was done by the respondent no.2. He continuously deferred the delivery of receipt or repayment.

Further, after a considerable lapse of time, when the receipt was not delivered, a complaint was made in the party forum, when the opposite party no.2 knew about the complaint, he threatened the appellant/applicant of dare consequences, abused him in the name of caste in filthy languages. He also threatened that now the Government is of Bhartiya Janta Party and if the appellant/applicant continues to persuade his complaint, he will falsely implicate in criminal cases to secure his imprisonment, so that receipt of the money would not be claimed by the appellant/applicant for the whole life.

10. The complaint of the said incident was made to Police Station Gosaiganj, District

Lucknow on 25.11.2020. The police did not take any action. Thereafter, on 05.12.2020, the matter was complained to I.G.R.S. On their instruction, the Police Station Alambagh, District Lucknow started the preliminary inquiry and afterward transferred the inquiry to the Police Station Gosaiganj, District Lucknow. The Police of Police Station Gosaiganj, District Lucknow recorded the statement on the pretext of doing action in the said inquiry but due to political pressure they did not proceed further. The inaction on the part of the police was reported on 19.01.2021 through a complaint to the Police Commissioner, Lucknow and when no action was taken by him also, the application under Section 156 (3) Cr.P.C. was moved before the Court of Special Judge (S.C./S.T.) Act.

11. The order dated 24.03.2021 whereby the application of the applicant/appellant under Section 156(3) Cr.P.C. was rejected, when examined for the purpose of finding out the reasons why the said application is rejected, it is found in observation of the Court that the entire facts seems to be confusing and unbelievable for the reason when the appellant/applicant and private respondent no.2, Raj Kumar Verma met together to Sri Swatantra Deo Singh then why all the things were conversed between them again separately.

12. Learned court below, the Special Judge has also on the aforesaid "confusion' recorded that seemingly there might have been mutual transaction of money between the appellant/applicant and the private respondent no.2 which has been twisted by framing story under Section 156(3) Cr.P.C. He further declined to act upon the application under Section 156(3) Cr.P.C. for the reason that there is no mention of date in the complaint as to the appellant/applicant was given threat of life and abused with the name of caste in filthy language by the private respondent no.2.

13. It appears that in passing the order under appeal, the Special Judge wanted to go deep into the allegations searching for the evidences, while he is required under the law to gather the facts emerging from the contents of the application under Section 156 (3) Cr.P.C. so as to infer the disclosure of information as to commission of a cognizable offence, which the Officer In-charge of the Police Station had to register under Section 154(1) Cr.P.C. for instituting the criminal case against the accused. This is to be done by looking into facts prima facie constituting any cognizable offence.

14. Section 154 of the Cr.P.C. is quoted hereunder:-

"154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the

powers of an officer in charge of the police station in relation to that offence."

15. The case of ***Ramesh Kumari Vs. State (NCT of Delhi) reported in (2006) 2 SCC 677*** is cited to impress on the duty of the Officer Incharge of the Police Station under Section 154(1) of the Cr.P.C.:-

"33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

16. As such, for cognizable offence a duty has been caused upon the police to mandatorily register a first information report shall given it's ordinary meaning of being "mandatory" in character as held in ***Lalita Kumar Vs. Government of U.P. and others reported in 2014 (2) SCC 1.***

17. The appellant belongs to Schedule Caste community. This was well known to the private respondent no.2, Raj Kumar Verma. The Schedule Castes and The Schedule Tribes (Prevention of Atrocities) Act, 1989 is enacted to prevent the commission of offence of atrocities against the members of the Schedule Castes and the Schedule Tribes, to provide for (Special Courts and the Exclusive Special Courts) for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto.

18. The word "atrocity" in the Act is defined in Section 2 of The Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989, the definition clause (1)(a) provides means an offence punishable under Section 3.

19. The appellant/applicant has specifically alleged in his application under Section 156(3) Cr.P.C. that when the police did not act even on the instructions issued to them by the government pursuant to the complaint dated 05.12.2020 then he moved a complaint again to the Senior Superintendent of Police, Lucknow on 19.01.2021. It is specifically alleged further that when no action was done on his complaint and information as to the commission of offence, the daring accused, respondent no.2 used to abuse the appellant/applicant with the name of his caste on telephones and threatened to cause injury to his life and property because of which the appellant/applicant apprehended to his life.

20. The paras from the application under Section 156(3) Cr.P.C. moved before the Special Judge, S.C./S.T. Act, Lucknow are reproduced hereunder for reference:-

"12- *यह कि प्रार्थी अपने साथ घटित घटना व जालसाजी की सूचना थाना गोसाईगंज, लखनऊ में दिनांक 25.11.2020 को दिया जिस पर थाने की पुलिस द्वारा किसी प्रकार की कोई कार्यवाही नहीं की गयी।*

13. यह कि जब थाना गोसाईगंज, लखनऊ मे प्रार्थी की कोई सुनवाई नहीं हुयी तब प्रार्थी विवश होकर दिनांक 5.12.2020 को आई0जी0आर0एस0 के माध्यम से शिकायत की गयी जिसके उपरान्त आलमबाग पुलिस थाने से प्रारम्भिक जांच करके मामला गोसाईगंज पुलिस थाने को अन्तरित कर दी गयी।

14. यह कि थाना गोसाईगंज की पुलिस द्वारा मात्र दिखावे के लिये प्रार्थी के बयान लिये गये चूंकि विपक्षी की राजनीतिक पहुंच होने के कारण उसके विरूद्ध कोई कानूनी कार्यवाही पुलिस द्वारा नहीं की गयी।

15. यह कि इसके बाद भी जब प्रार्थी की कही पर कोई सुनवाई नही हुयी तब प्रार्थी क्षुब्द होकर दिनांक 19.1.2021 को एक प्रार्थनापत्र शिकायती पुलिस आयुक्त महोदय लखनऊ को दिया, किन्तु उस पर भी अभी तक कोई कार्यवाही नहीं हुयी। दिये गये प्रार्थनापत्रों की छायाप्रतियां तथा संलग्न प्रार्थना पत्र है।

16. यह कि विपक्षी के विरूद्ध कोई कार्यवाही न होते हुये देख विपक्षी के हौसले और बुलन्द हो गये है वह आये दिन प्रार्थी को जाति सूचक गालियां फोन द्वारा

देता है तथा जानमाल की धमकी बराबर दे रहा है प्रार्थी को अपनी जान का सख्त खतरा विपक्षी से उत्पन्न हो गया है।'

21. The allegations no doubt coming under the offence as described in Section 3 of The Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 then also the police had not taken any action against the mandatory requirement of the Rules [The Schedule Castes and Schedule Tribes Act (Prevention of Atrocities) Rules, 1955]. Rule 5 is quoted hereunder:-

"5. Information to Police Officer in-charge of a Police Station.--

(1) Every information relating to the commission of an offence under the Act, if given orally to an officer incharge of a police station shall be reduced to writing by him or under his direction, and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the persons giving it, and the substance thereof shall be entered in a book to be maintained by that police station.

(2) A copy of the information as so recorded under sub-rule (1) above shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in-charge of a police station to record the information referred to in-sub-rule (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who after investigation either by himself or by a police officer not below the rank of Deputy Superintendent of Police, shall make an order in writing to the officer in-charge of the concerned police station to enter the substance of that information to be entered in the book to be maintained by that police station."

22. Learned Special Judge, S.C./S.T. Act when found the occasion to apply his mind over the contents of the application under Section 156 (3) Cr.P.C. did not record in impugned order under appeal that he did not find disclosure of the commission of any cognizable offence punishable under the Indian Penal Code and in The Schedule Castes and The Schedule Tribes (Prevention of Atrocities) Act, 1989. Even, he has not discussed about the requirement of taking action by a competent police officer on information as to the offence committed by a person not belonging to schedule caste with another person knowingly belongs to schedule caste and schedule tribe.

23. The appellant having moved an application on the denial from registering the first information report by the concerned Police Officer of the Police Station Gosainganj, District Lucknow to move the same before the Commissioner of Police, Lucknow on 19.01.2021.

24. Section 156(3) Cr.P.C. is being quoted hereunder for easy reference in the course of discussion in the matter:-

"156. Police officer' s power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

25. The Magistrate can also issue warrant for production before taking cognizance, if after the cognizance has been taken and the Magistrate wants any investigation, it will be

under Section 202 of the Cr.P.C. as it is held in the ***State of Assam Vs. Abdul Noor and Ors. reported in (1970) 3 SCC 10.***

26. The Magistrate can under Section 190 Cr.P.C. before taking cognizance ask for investigation by the police under Section 156(3) Cr.P.C. Section 190 Cr.P.C. is quoted hereunder:-

"190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try."

27. In the present case, the Special Judge obviously has not exercised power vested in him rather he rejected the application obviously disbelieving the material allegations made in the aforesaid application disclosing an offence alleged to have been committed by the prospective accused by fraud upon the applicant in the name of his high approaches in a political party, inducing him to believe on the facts he represented and thereby gaining undue advantage of huge amount of Rs.15,00,000/- on the promise of securing his candidature on the party symbol in the forth coming Uttar Pradesh Assembly Elections from the reserved seat.

28. Section 415, 420 and 506 of the I.P.C. are being quoted hereunder:-

***"415. Cheating.**--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat". Explanation.--A dishonest concealment of facts is a deception within the meaning of this section. Illustrations*

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(c) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby, dishonestly induces Z to buy and pay for the article. A cheats.

(d) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonored, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e) A, by pledging as diamonds article which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces

Z to lend him money. A not intending to repay it. A cheats.

(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(i) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

***420.** Cheating and dishonestly inducing delivery of property.--Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

***506.** Punishment for criminal intimidation.--Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If threat be to cause death or grievous hurt, etc.--And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or 1[imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."*

29. Section 3(1)(s), 3(2)(v) and 3(2)(v-a) of The Schedule Castes and Schedule Tribes (Prevention of Atrocities), Act, 1989 are being quoted hereunder:-

*"**Section 3(1)(s)**:- abuses any member of a Schedule Caste or a Schedule Tribe by caste name in any place within public view;*

***Section 3(2)(v):**- commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property [knowing that such person is a member of a Scheduled Caste or a Schedule Tribe or such property belongs to such member], shall be punishable with imprisonment for life and with fine;*

***Section 3(2)(v-a):**- commits any offence specified in the Schedule, against a person or property, knowing that such person is a member of a Schedules Caste or a Scheduled Tribe or such property belongs to such member shall be punishable with such punishment as specified under the Indian penal Code (45 of 1860) for such offences and shall also be liable to fine."*

30. Bare perusal of the contents in the application under Section 156(3) Cr.P.C. moved before the court of Special Judge undoubtedly discloses the information as to the offence under the aforesaid provisions of law. Learned Special Judge, S.C./S.T. Act was to find out the disclosure of the offence, if any, from the information contained in the application under Section 156(3) Cr.P.C. to direct the concerned police officer to register the first information report and investigate the matter, but he opted to

go deep into the evidences of behind such information for which he was not required under law.

31. On bare perusal of the aforesaid Section in Indian Penal Code, it is sufficiently clear from the allegations made in the application under Section 156(3) Cr.P.C that there is a complaint against the acts of private respondent no.2, namely, Ram Kumar Verma falling under the offence which is cognizable and non-bailable under the aforesaid Sections of the Indian Penal Code and the special enactment of The Schedule Castes and The Schedule Tribes (Prevention of Atrocities) Act, 1989. The information as to which was also given earlier to the Station House Officer, Police Station Gosaiganj, District Lucknow, who has not acted even when the recourse was taken by sending the complaint to the Commissioner of Police, Lucknow on 19.01.2021 and the Police Station was instructed to inquire into and lodge first information report but same was denied by inaction on the part of Police Station. This compelled the appellant to move the application under Section 156(3) Cr.P.C. before the Special Judge (S.C./S.T.) Act, Lucknow.

32. The complaint lodged in the Consolidated Complaint Redressal System of the Uttar Pradesh by the appellant "Hari Prakash Rawat" and the complaint in written sent through post on 19.01.2021 are annexed with the affidavit in appeal. The copy of the application under Section 156(3) Cr.P.C. which was moved before the learned court below is also on record.

33. Learned Court below was not required to go deep into the evidence but to see whether the allegations made in the application/complaint, even if they are taken at their face value and accepted in their entirety prima facie disclose a cognizable offence and make out a case against the accused. He failed to do so and instead of directing the police for investigation, rejected the application on flimsy grounds.

34. In the present case where the police despite repeated efforts made by the appellant did not lodge the first information report as it is disclosed from the materials available on record and the pleadings in the memo of appeal, no first information report was lodged under Section 154 Cr.P.C. though there was sufficient material to gather information as to the commission of offence, the Special Judge (S.C./S.T.) Act, Lucknow ought either to issue direction for the registration of the first information report or to treat the application as complaint.

35. Hon'ble the Supreme Court in the case of ***Lalita Kumar Vs. Government of U.P. and others (Supra)***, has held in para 120 as under:-

"120) In view of the aforesaid discussion, we hold:

i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if

information received by him discloses a cognizable offence.

v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

a) Matrimonial disputes/ family disputes

b) Commercial offences

c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

36. The learned trial judge has erred in passing the order impugned in the appeal as neither he has held that there is no material allegation which if taken together, disclose prima facie a cognizable offence. Though the complainant himself is a material witness in the case and the documentary evidence placed by him before the Court below were also sufficient to disclose prima facie an offence believably have been committed by the private respondent no.2, Raj Kumar Verma. This also ought to have kept into mind by the court below that allegedly a huge amount of Rs.15,00,000/- was grabbed by cheating and thereby dishonestly inducing the appellant/applicant to deliver the huge sum of money i.e. Rs.15,00,000/- to him, which the private respondent no.2 got in his account and thus undue gain was earned by him on his inducement on promise to secure in lieu thereof, the candidature of the appellant/applicant in State Assembly Elections from the reserved seat of Mohanlal Ganj.

37. The offences disclosed from application under Section 156(3) Cr.P.C. are not only cognizable but also non-bailable. The attitude of the Special Court specially made for redressing the atrocities or wrongs committed by a person belonging to other caste with a person belonging to schedule caste or schedule tribe obviously seems to have swayed upon the magnanimity of the political party and it's leaders, rather to see the conduct of private respondent no.2, namely, Raj Kumar Verma, an office bearer as "Mandal Adhyaksh' of the Mohanlal Ganj, Lucknow. The order of the Court below therefore deserves to be set aside.

38. Accordingly, the present Criminal Appeal filed under Section 14(A) of The Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 against the impugned order dated 24.03.2021 passed by the Learned Special Judge, S.C./S.T. Act/Additional District & Sessions Judge, in Case No.111 of 2021, (Hari Prakash Rawat Vs. Raj Kumar Verma) under Section 156(3) of Cr.P.C., Police Station Gosaiganj, District Lucknow succeeds

and is **allowed.** The accused person, as he had no right to be heard at pre cognizance stage, was given opportunity of being herad, the efforts were taken to secure his presence at the time of hearing, as the court below has dismissed the application under Section 156(3) Cr.P.C. against him, creating a right of hearing at this stage, but he did not avail the opportunity.

39. The order dated 24.03.2021 passed by the Learned Special Judge, S.C./S.T. Act/Additional District & Sessions Judge, in Case No.111 of 2021, (Hari Prakash Rawat Vs. Raj Kumar Verma) under Section 156(3) of Cr.P.C., Police Station Gosaiganj, District Lucknow is set aside.

40. The learned Court below i.e. Learned Special Judge, S.C./S.T. Act/Additional District & Sessions Judge, Lucknow is directed to exercise it's discretionary power and decide afresh the application under Section 156(3) Cr.P.C. moved by the appellant and to pass an appropriate order in accordance with law, keeping in view the observations made by this Court as well as the direction given by Hon'ble the Apex Court in the case of ***Lalita Kumar Vs. Government of U.P. and others(Supra)*** within a period of one month from the date, certified copy of the order is produced before it.

41. Accordingly, the present criminal appeal stands ***disposed of.***

(2021)12ILR A887
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.11.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VIVEK VARMA, J.

Criminal Appeal No. 1002 of 2003

Saleem ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
S. Rehman, Anita Singh, Gauri Suwan Pandey, Khalid Khan, Qazi S.R. Rahman, Rajiv Mishra, Raza Zaheer, Rizwanul Haq

Counsel for the Respondent:
Govt. Advocate

Accused being driver of deceased-pressurizing deceased to make him permanent in his job-upon deceased showing inability-locked the deceased in the car-and set him ablaze-dying declaration-95% burn injuries-eye witnesses-son and wife-both the statement tallies-cannot be discarded merely on ground of related witnesses-prosecution proved beyond doubt.

Appeal dismissed. (E-9)

List of Cases cited:

1. Munni Devi & ors. Vs St.of U.P.; 2020 (5) ALJ 653

2. Bhagaloo Lodh & anr. Vs St. of U.P., 2011 (13) SCC 206

3. Gangabhavani Vs Rayapati Venkat Reddy & ors., 2013 (15) SCC 298

4. Laltu Ghosh Vs St. of W.B., AIR 2019 SC 1058

5. Md. Rojali Ali & ors. Vs. St. of Assam, AIR 2019 SC 1128

6. Ganeshlal Vs St. of Mah., (1992) 3 SCC 106

7. Kundula Bala Subrahmanyam & anr. Vs St. of A.P. , (1993) 2 SCC 684

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

1. The present Criminal Appeal has been preferred by the appellant against the judgment and order dated 04.06.2003 passed in Session Trial No.3 of 2002, arising out of Case Crime No.241 of 2001, under Sections 302, 435, 427

I.P.C., Police Station Aliganj, District Lucknow, by Additional Sessions Judge (Fast Track Court III) Lucknow, whereby the Additional Sessions Judge (Fast Track Court III), Lucknow, convicted and sentenced him in the manner stated hereinafter :-

"(i) Under Section 302 I.P.C. for rigorous imprisonment of life and a fine of Rs.10,000/-;

(ii) Under Section 435 I.P.C. for five years R.I. and a fine of Rs.5000/-;

(iii) Under Section 427 I.P.C. for one year's R.I. and a fine of Rs.1000/-"

It was also directed that in default of payment of fine, appellant would further undergo imprisonment of three years, one year and six months, respectively.

2. The prosecution case, in nutshell, is that an FIR was lodged by informant-Nitin Jain (P.W.2), at the Police Station Aliganj, District Lucknow alleging that his father Vijay Kumar Jain, who was Chief Engineer (Electric) in B.S.N.L., was returning from his office to his residence at Sector-D, B.S.N.L., Aliganj in his official ambassador car bearing No. U.P.32 W 4341, which was driven by driver Saleem son of Mohd. Shahid. The driver was pressurizing the deceased to make him permanent in his job but the deceased showed his inability as the same could be done by the Department and in that regard there was an order for transfer of a permanent driver. The driver Saleem apprehended that he would be removed and other driver would be appointed and the said driver was to join the next day on account of which the driver Saleem after bringing the deceased back from his office to the residence of the deceased which was situated at Sector D, Aliganj stopped the car at the side of house of deceased and locked the doors of car from both sides and poured petrol on the deceased from plastic *'can'* which he was carrying and set him ablaze. The driver while committing the alleged offence was shouting that he would not leave him and threatened the people present there not to come for rescue of deceased. On seeing the car set ablaze and deceased locked inside, the son (complainant), wife of deceased Smt. Mamta Rani Jain (P.W.3), Smt. Inu Parihar, Smt. Ambika Singh and with the help of other persons took out deceased in a burnt state from the car and after getting examined him in Lifeline Hospital, Aliganj got him admitted in Emergency in Medical College. The driver was caught at the spot itself by the local residents.

3. On the basis of said written complaint (Ex.Ka-1) being made by P.W.2 Amit Jain, son of deceased, at Police Station Aliganj, District Lucknow about the incident dated 12.07.2001, FIR was registered immediately after the alleged incident at 7.30 p.m. on the same day under Sections 307, 435, 427 I.P.C. Later on, when the father of the complainant succumbed to his injuries, the case was converted from Section 307 I.P.C. to Section 302 I.P.C.

4. After investigation, charge sheet was submitted against the accused Mohd. Saleem under Sections 302, 435, 427 I.P.C. before the Competent Court and the case was committed to the Court of Sessions by the learned Magistrate.

5. On 15.01.2002 the learned Sessions Judge, F.T.C.-III, Lucknow framed charges against the accused Saleem for offence under Sections 302, 435, 427 I.P.C. Accused denied the charges and claimed to be tried.

6. The prosecution, in support of his case, has examined P.W.1 Constable Vinod Kumar, P.W.2 Nitin Jain, P.W.3 Smt. Mamta Rani Jain, P.W.4 Dr. Prem Kumar, C.M.O. Safdarganj, New Delhi, P.W.5 Abdul Haleem Khan, Sub-Inspector, P.W.6 Ikrar Ahmed Khan, P.W.7 Suneel Goswami, P.W.8 S.N. Mishra, Chief Engineer, B.S.N.L. P.W.9 A.S.I. Sovan Singh, New Delhi, P.W.10 Surendra Pratap Singh, S.I.,

P.W.11 R.R. Singh Rana, Station Officer (Investigating Officer), P.W.12 Kifayat Ali, Head Constable.

7. The statement of the accused was recorded under Section 313 Cr.P.C., wherein he denied the prosecution evidence and has stated that he was wrongly charged in the instant case. The accused/appellant Saleem has taken a plea that deceased had undergone a surgery of brain few days ago and was suffering from some pain, due to which he often talked about committing suicide. In his defence, the accused/appellant has produced D.W.1 Suresh Kumar Gupta and D.W.2 Mohd. Shafeeq.

8. Court has summoned Dr. Amit Bhatnagar as C.W.1 and examined bed head ticket which is annexed as Ex.C1 where the deceased was admitted and died in the Medical College.

9. P.W.1 Virendra Kumar, Constable, in his deposition, has stated that on the day of incident, i.e. 12.07.2001 he was posted as Constable in Police Station Aliganj and he was the scriber of the chik FIR under Crime No.241 of 2001, under Sections 307, 435, 427 I.P.C. against accused appellant Saleem s/o Mohd. Shahid. The aforesaid chik FIR was written by him on the written complaint brought by Nitin Jain and Vinod Agrawal and proved the same as Ex.Ka-1. He next stated that he made the G.D. entry of accused Saleem on 12.07.2001.

10. P.W.2 Nitin Jain, son of deceased, is the eye witness of the alleged incident. He, in his deposition, has supported the prosecution case and stated that the accused appellant Mohd. Saleem was the driver of his father. On the day of incident at 6.00 p.m. the accused brought his father in official ambassador car and parked the same on the side. At that time, he along with his mother went towards the car and saw the accused appellant driver Mohd. Saleem picked up the *'can'* which was kept near his legs and poured on his father and rushed outside litting the car with match stick, as a result of which his father along with car started to burn. The accused appellant Mohd. Saleem locked the car and shouted that he would not leave Vijay Kumar Jain and also threatened complainant not to come near the car else he would meet the same fate. P.W.1 further deposed that somehow he managed to open the door of the car by breaking the back glass of car and took out his father in a burnt state. Thereafter he took his father to hospital. P.W.1 Nitin Jain, in his deposition, further stated the reason for committing the offence by accused Saleem was that he was pressurizing his father (deceased) to make him permanent but his father showed his inability and the accused appellant apprehended that he would be removed from the service.

11. P.W.3 Smt. Mamta Rani Jain, wife of deceased, is also an eye witness of the incident. She, in her deposition, states that the incident is of 12.07.2001 at about 5.45 p.m. to 6.00 p.m. on that date her husband (deceased) after attending the department work at Patna returned by flight and driver Saleem took the deceased from airport to office and brought the deceased back to home by official ambassador car. She further deposed that while she was strolling with her son Nitin Jain, unlike everyday on that date official Ambassador car drove towards the side, which created suspicion in her mind, so she walked towards the side where the car went and on reaching the spot she saw accused appellant Saleem bending and taking out something from near the seat of car; he opened the same and threw it in the back. She next stated that she rushed towards the car quickly, but till then the accused got down from the car and threw the lit matchstick on the car, due to which the car started burning. She also deposed that the accused shouted and threatened that anyone who comes near him would be killed. She further deposed that her son and the people of the

locality tried to save the deceased by opening the back doors of the car, but they failed. Thereafter, they broke the glass of the front door by stone and opened the door from inside and thereafter, wrapped the deceased in the blanket and took him to the hospital. The people from the locality caught hold of the accused. The deceased was taken to the Lifeline Hospital in departmental jeep and from there he was referred to KGMC, Lucknow where he was admitted in emergency ward and thereafter he was taken to Delhi by flight. This witness also categorically stated that in the hospital, her husband told the police that Saleem had burnt him to death for not making him permanent in his job. On a query put to her in her cross-examination she stated that her husband did not smoke cigarettes and her husband's clothes were burnt which was taken off and were put in the car by the people of Lifeline hospital and the same were taken by police. On a query put to her in cross examination she stated that she knew the accused appellant Saleem for more than two years that is why she didn't raise any suspicion as to what he was pouring on the deceased while sitting in the car.

12. Dr. Prem Kumar, C.M.O. Safdarganj, New Delhi has been examined as P.W.4, who in his deposition, stated that on 13.07.2001 he was posted at Forensic Medicine Department at Safdarganj, New Delhi and conducted the autopsy of the dead body of Vijay Kumar Jain on 13.07.2001 at 12.55 p.m. to 1.45 p.m. The dead body was identified by Nitin Jain son of Vijay Kumar Jain (deceased). During the time of autopsy Dr. M.V. Shekhar, working in the same hospital, was present along with him.

13. At the time of post mortem, following general observations were made :-

(1) Rigor mortis was present on the whole body of deceased.

(2) Post mortem staining was not present as the body of the deceased was in burnt condition.

(3) Both eyes were closed and cornea on both sides were hazy. Conjuctiva on both sides were congested.

(4) Scalp hair, both eyelids and eyebrows of the deceased were found in burnt and singe condition; genital hair and armpit hair were not found in burnt condition.

(5) There was no clothes on the body of the deceased.

Ante-Mortem External Injuries

1. Epidermal/ Dermo-Epidermal burn injuries were present on all over the body except patch over the upper back of chest and back of neck. Patch over right glutal region and in between glutal fields. Patch over the lower point of abdomen and pubic area. Patch over the dorsum of foot.

2. Line of redness, erythema present on all the inverted area of burn. Peeling of skin at places.

3. Approximate percentage of burn injuries is 95%.

4. Old healed wound 7 cm long on the top of the scalp (mid Parietal region) 14 cm from upper border of right ear.

Internal Examination

Head: No extravasation of blood underneath the scalp and brain was congested.

Neck & Spine: Mucosal congestion

Chest: Congestion in both lungs, Mucosal congestion in trachea & bronchi, Patent coronaries.

Abdomen: 100 ml liquid substance found in stomach. Liver, spleen and both kidneys were congested.

Pelvis: bladder was empty.

14. The reason of the death was assigned due to shock as a result of ante mortem thermal burn injuries. The time of the death of deceased was shown to be approximately four and a half hours before conducting post mortem. He further

deposed that death of the deceased could have occurred at 6.00 p.m. on 12.07.2001, but he could not able to state the exact time of the death.

15. P.W.5 Abdul Haqeem, Sub Inspector has deposed before the trial court that on 13.07.2001 he was posted as Head Moharrir at Police Station Aliganj, District Lucknow and on that day informant Nitin Jain informed him on telephone regarding the death of Vijay Kumar Jain in New Delhi during the course of treatment. On receiving the said information, he converted the case registered in Case Crime No.241 of 2001, under Sections 307, 435, 427 I.P.C. to Sections 302, 307, 435, 427 I.P.C. entry of which was amended in G.D. no.34 dated 13.07.2001 in his own handwriting and proved the same. In his cross-examination he deposed that to carry out any amendment in the G.D. he does not require any order and it would be erroneous to say that he is not competent to carry out any such amendment in G.D.

16. P.W.6 Ibrar Ahmed Khan in his examination before the trial court has stated that he was working in the B.S.N.L. department where deceased Vijay Kumar Jain was posted. He got the information about the death of Vijay Kumar Jain from the people and also from reading newspaper. He further deposed that police seized the ambassador car and prepared the memo of the same. He read the contents of the same and put his signatures over it. On a query put to him by court, he stated that he did not see the car getting burnt.

17. P.W.7 Suneel Goswami has established that police sealed and prepared the memo as Ex.Ka-3 of burnt clothes and blanket in front of him and he has proved the same by putting his signature on the memo.

18. P.W.8 S.N. Mishra, Chief Engineer, B.S.N.L., Patna in his deposition has stated that he was posted at Lucknow on the day of incident. He stated that on 13.07.2001 in front of him the police has sealed the burnt ambassador car and five litre plastic *'can'* which was without cap and in the bottom of which there was petrol of little quantity. After sealing and preparing the memo by police he signed the same.

19. P.W.9 Soban Singh, A.S.I. in his deposition stated that he was posted at Police Station Sarojini Nagar, New Delhi at the time when the deceased succumbed to his injuries. He stated that panchayatnama and identification statement - Ex.Ka-8 was prepared by him in his own handwriting which he proved in the Court and thereafter sent the dead body of deceased for post mortem. He further stated that he had prepared cause of death in concise form in his own handwriting and signature and proved the same as Ex.Ka-9. Identification statement given by Nitin Jain, son of deceased, and Narendra Jain was prepared by him and proved Ex.Ka-10 and Ex.Ka-11 respectively. The letter requesting C.M.O. Safdarganj Hospital for conducting post mortem of the deceased was prepared by him under his signature and proved the same as Ex.Ka-12.

20. P.W.10 Suresh Pratap Singh, Sub-Inspector, Chauki Para, Police Station Talkatora, Lucknow in his deposition stated that on 12.07.2001 he was posted at Chauki Incharge, New Galla Mandi, Police Station Aliganj, Lucknow who conducted the initial investigation of the incident. He stated that he reached the place of incident and found an ambassador car bearing No. U.P.32W4341 in a burnt condition and huge crowd had gathered there and on asking he was told by people there that two police personnel, namely Surya Pal and Sudhir Pal had taken the accused appellant Saleem who was caught by the crowd. For supervision of the burnt car he left two constable at the place of incident and he himself went to bed no.1 of emergency ward, K.G.M.C. where deceased

Vijay Kumar Jain was admitted in a burn state. He further stated that Vijay Kumar Jain (deceased) gained consciousness and tried narrating about the incident which was recorded by him. Deceased in his statement before this witness has specifically stated that "मै कार से घर आया था ड्राइवर सलीम ने गाडी मोड पर खडी की, मै समझा नही उसने अपने पास रखा पीपिया का पेट्रोल भीतर और उपर सीटो पर डाल दिया, माचिस से उसने आग लगा दी, मै कार मे जलने लगा, लोगो ने निकाला, सलीम मुझे मारना चाहता था, उसकी नौकरी पक्की नही"

21. He further stated that thereafter the condition of the injured started deteriorating and family members got busy in looking after Vijay Kumar Jain and due to this reason he could not record the statement of other witnesses. Thereafter he went to police station to inquire from accused Saleem where accused Saleem was present and his statement was recorded in which he confessed his guilt for recording the same under Section 164 Cr.P.C. and a report was sent to court. On 13.07.2001 he recorded the statement of scriber of the FIR Virendra Kumar and thereafter went to emergency ward KGMC and recorded the statement of complainant Nitin Jain. No further statement could be recorded as Vijay Kumar Jain (deceased) was referred to New Delhi for treatment and his relatives also accompanied him to New Delhi. Then he went to the place of incident where he recorded the statement of one Inu Parihar and on her identification examined the place of incident and prepared the site plan Ex.Ka-14 and took into possession five litre plastic *'can'* having some amount of petrol in the bottom without cap, ambassador car in burn condition and sealed the items in front of witnesses and prepared a report on the spot in his handwriting as Ex.Ka-7. All these recovered items were deposited in Malkhana of the police station which were entered in the G.D. Thereafter he got the information regarding the death of deceased through the wireless, entry of which has been made in the G.D., and after that the investigation was transferred to one Shri R.R. Rana.

22. P.W.11 R.R. Singh Rana, Station Officer (Investigating Officer), who did the final investigation and filed the charge sheet in the Court, in his deposition stated that on the date 12.07.2001 he was posted as Station Officer, Police Station Aliganj, Lucknow and on that day in his presence Crime No.241/2001, under Sections 307, 433, 427 I.P.C. was registered whose investigation was done by Sub Inspector S.P. Singh. The information of the death of Vijay Kumar Jain (deceased) in Delhi on 13.07.2001 during the course of treatment was given to him by complainant Nitin Jain via telephone and thereafter case was converted to Sections 302 I.P.C. and the same was entered in G.D. No.34 at time 18.25. He has proved the statements of the witnesses recorded by him and items collected including burnt clothes, blanket etc. during course of investigation and thereafter filed the charge sheet Ex.Ka-15. In his cross-examination he had deposed that immediately after receiving the information of the incident he reached the place and got to know that Vijay Kumar Jain (deceased) was sent to Lifeline hospital in a burnt condition and from there to Medical College. He went to Medical College and had seen the injured Vijay Kumar Jain there, however, he could not say about the percentage of burn on deceased, but he clarified that Vijay Kumar Jain was almost burnt. He further deposed that he saw the face of the deceased which was burnt. However, he did not remember whether face and neck were burn or not. He was told by erstwhile Investigating Officer S.P. Singh (P.W.10) that to take the statement of injured information was conveyed, which was denied by the doctor to record the statement. He next deposed that he did not know whether any intimation to the officer to record the statement was given or not. He was also not aware about the fact whether anyone came to record statement or not. He also denied about having any knowledge if doctor has recorded any statement of deceased. During the investigation he got to know that the accused used *'can'* to

pour petrol on the deceased sitting in the car and also poured petrol on the car, however, nobody saw as to how accused poured petrol. He had no knowledge if the scalp hair, chest and stomach of the deceased were burn or not as the doctor did not let him see the dead body of deceased. He was not told by anyone that deceased used to smoke. He proved the recovery memo with respect to clothes Ex.K-3, burn ambassador Ex.Ka-6, however, he mentioned that he was not scriber of the aforesaid memo and he did not give any reason for the same. He next submitted that he did not know about the working time of the accused or whether the accused used to commute by cycle and parked at the house of deceased. He denied the suggestions that he did not carry out investigation properly and filed the charge sheet in a forged manner. He identified the material produced in the court in a sealed cover which included one woolen blanket, one vest, shirt, pant, underwear, socks in a burnt condition which were collected from the car of the deceased, sealed by him. On a query put to him, he states that blanket was put on the deceased to cover him after he got burn, due to which blanket was not burnt.

23. P.W.12 Kifayat Sharma, Head Constable (Driver), Security Headquarter, Lucknow, in his deposition, stated that on 13.07.2001 he was posted as H.C.M.T. at Police Lines, Lucknow. On the said date, he personally inspected the car bearing No.U.P.32W4341 which was parked at B.S.N.L. Colony. He next stated that the car was standing in burn condition, the engine, steering, brakes (foot brake and hand brake), clutch, horn, driving meter, battery, light were all destroyed as a result of burning of car, however, the tires were in good condition. He further stated that it can be said that if any person pours petrol to a person sitting inside the car and set car ablaze, then the car would be burn in such a way. The report describing the condition of the car, prepared and signed by him, was proved as Ex.Ka-16.

24. The defence in support of its case has examined D.W.1 Suresh Kumar Gupta, D.W.2 - Mohd. Safeeq, C.W.1- Dr. Amit Bhatnagar.

25. D.W.1 Suresh Kumar Gupta, in his deposition, stated that he knew accused Saleem, who was working in B.S.N.L.. He heard about the accused Saleem getting arrested from the newspaper.

26. D.W.2 Mohd. Safeeq, in his deposition, stated that he was not present at the place of incident. He also heard about the accused Saleem getting arrested in the newspaper. He further stated that accused Saleem met him at betel shop between 9.00 to 9.30 a.m. one day prior to news of incident getting published in newspaper where accused Saleem asked him to help in getting job. He further stated that he had knowledge of Saleem working in B.S.N.L. but he was unaware of whose car he was driving.

27 C.W.1 Dr. Amit Bhatnagar posted at K.G.M.C. Surgery Department, Lucknow submits that on 12.07.2001 he was posted as Junior Resident, K.G.M.C., Lucknow and on that day at about 6.45 pm V.K. Jain got admitted in K.G.M.C., Lucknow with 95% burn and he was given treatment by the team of Professor M.S.D. Jaiswal, Dr. J.D. Rawat, Dr. Vivek Kumar, Senior Resident, Dr. Arif Arya, Dr. O.P. Yadav, Amit Sharma and myself. He stated that the bed head ticket of the V.K. Jain (deceased) was prepared by him which was produced in the court in a sealed envelop. He next deposed that at the time of admission in hospital, V.K. Jain (deceased) was in his senses and was speaking and answering to the questions asked. On the day of admission, V.K. Jain told about the incident which was entered on the bed head ticket by this witness. He further stated that he

was the scriber of the bed head ticket and proved the same as Ex.C1.

28. V.K. Jain (deceased) was shifted to Safdarganj Hospital on 12.07.2001 which is also mentioned on bed head ticket. In his cross-examination he stated that V.K. Jain (deceased) got 95% burn, which comes in serious category and in such type of cases chances of survival depends on the type of treatment given to the patient. V.K. Jain (deceased) was given treatment by the team of Professor M.S.D. Jaiswal and Dr. J.D. Rawat. The memo of the statement of the deceased was sent to police and Magistrate on the very same day whose carbon copy is retained in bed head ticket. On a query made to him, he failed to recall if there were blisters present on the body of deceased or not, however, he clarified that only in case of minor burn, blisters are found on skin, however, in case of serious burn, blisters are not formed. He next stated that Vijay Kumar Jain (deceased) was referred to Safdarganj Hospital, New Delhi at the instance of Nitin Jain, son of deceased. Thereafter he was taken to New Delhi by air. He denied the suggestions that the statement of the deceased was prepared by him on the directions of family members of the deceased.

29. Learned trial Judge believed the evidence of eye witnesses Nitin Jain (P.W.2) and Mamta Rani Jain (P.W.3) as it is supported by the medical evidence and dying declaration of the deceased and found the appellant guilty for the offences punishable under Sections 302, 435, 417 I.P.C. and accordingly convicted and sentenced the appellant Saleem in the manner stated in paragraph 1.

30. Aggrieved by the same, the appellant has preferred the instant appeal.

31. Heard Shri G.S. Pandey assisted by Ms. Anita Singh and Shri Arunendra, learned A.G.A. for the State.

32. The learned Counsel for the appellant argued that the appellant who was the driver of the deceased has been falsely implicated in the present case though the deceased committed suicide into his car. The said defence was also taken by the appellant in his statement under Section 313 Cr.P.C. as he was suffering from some mental disorder. He next argued that the appellant after sprinkling petrol on the deceased, who was inside his car, set ablaze him and he remained standing at the place of occurrence, which is unnatural conduct of the appellant which shows that he was falsely implicated in the present case by the family members of the deceased. He urged that if the appellant wanted to kill the deceased then he would have murdered him at a lonely place when he was being brought by him in his car as he returned from out of station.

33. He next submitted that P.W.2 Nitin Jain and P.W.3 Mamta Jain who are the eye witnesses of the occurrence, their statements are unworthy to be believed as they highly interested and partisan witnesses. He further argued that no independent witness of the incident were either produced or examined by the prosecution before the trial court in order to support the prosecution case. Further, the dying declaration, which has been recorded of the deceased, no certificate has been issued by the Doctor nor the deceased was in a fit mental state for giving the dying declaration, as he was rushed to Lifeline hospital and referred to K.G.M.C. and thereafter was taken to Safdarganj Hospital, New Delhi where he died on the same day.

34. It was further argued that the dying declaration which was written by C.W.1 Dr. Amit Bhatnagar was on the bed head ticket when the deceased was admitted in K.G.M.C. He also submitted that the Investigating Officer in his evidence before the trial court he has admitted the fact that no certificate was taken by

the doctor before recording the dying declaration of the deceased, hence the dying declaration of the deceased is unworthy and not at all a relevant piece of evidence on the basis of which the conviction of the appellant could be sustained. There was no smell of kerosene or petrol found in the post mortem report which further belies the prosecution case. The spot arrest of the appellant is also a false one as the appellant did not make any effort to escape from the place of occurrence after the incident. He lastly argued that the appellant has been in jail since 13.07.2001, i.e. for the last 20 years and 5 months, therefore, the conviction and sentence of the appellant by the trial court is against the evidence on record, hence the same be set aside and the appellant be acquitted.

35. Learned A.G.A., on the other hand, has opposed the arguments of learned Counsel for the appellant and submitted that the appellant has committed brutal murder of the deceased who was the Chief Engineer, Electric in BSNL and the appellant had gone to take him from the airport as he had returned from Patna after official work place of posting and in the evening he was being brought by him to his house from office in his official vehicle no.UP-32 W4341 by the appellant who was the driver. The appellant was pressurizing the deceased to make him permanent but the deceased showed his inability as the same could be done only by the Department and in that regard there was an order for transfer of a permanent driver. The appellant apprehended that he would be removed and other driver would be appointed in his place and the said driver was to join the next day on account of which the appellant after bringing the deceased from his office to his house locked the doors of car of appellant and poured kerosene oil on his body and lit him on fire and started shouting that he would not leave him and on the alarm raised the appellant threatened saying if any person comes to save him then he would be also burnt alive. It was submitted by him that soon after the incident the appellant was arrested by the public at the place of occurrence and handed over to the police on 12.07.2001. The FIR of the incident was lodged promptly at 7.30 p.m. by P.W.2 Nitin Jain - son of the deceased. He submitted that the dying declaration of the deceased was recorded when he was rushed to Lifeline hospital to K.G.M.C. by C.W.1 Dr. Amit Bhatnagar which was found on the bed head ticket and his left thumb impression was taken on the dying declaration by C.W.1 who was examined by the trial court and he deposed about the said fact before it. The deceased died on 13.07.2001 at Safdarganj Hospital, New Delhi on the same day when he was taken from K.G.M.C. to Delhi by his son P.W.2. He argued that the incident has taken place at 6.00 p.m. in the evening in front of the house of the deceased and the same was also witnessed by his son P.W.2 and P.W.3 wife of deceased from whose evidence the prosecution case finds support. The appellant has given a false defence as the deceased has committed suicide which is not corroborated by any other evidence though he himself has burnt the deceased in his car. He further stated that the evidence of P.W.2 and P.W.3 cannot be discarded by this Court simply because the two eye witnesses happens to be the son and wife of the deceased as there was no occasion for them to falsely implicate the appellant who is the real culprit of the incident.

36. We have examined the rival contentions advanced by the learned Counsel for the parties along with the impugned judgment and order passed by the trial Court and also perused the lower court record.

37. The Apex Court has expounded definition of the dying declaration and its condition which are required at the time of accepting it as an evidence was considered by

this Court in the case of **Munni Devi & Ors. vs. State of U.P.; 2020 (5) ALJ 653.** Paras-33, 36 and 39 of the said judgment which are relevant to note are reproduced hereunder:-

"33. ... 22. The legal position about the admissibility of a dying declaration is settled by this Court in several judgments. This Court in ***Atbir v. Government of NCT of Delhi - 2010 (9) SCC 1,*** *taking into consideration the earlier judgments of this Court in* ***Paniben v. State of Gujarat - 1992 (2) SCC 474*** *and another judgment of this Court in* ***Panneerselvam v. State of Tamilnadu - 2008 (17) SCC 190*** *has given certain guidelines while considering a dying declaration:*

1. Dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.

2. 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.

3. Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

4. 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 corroborative. The rule requiring corroboration is merely a rule of prudence.

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

6. A dying declaration which suffers from infirmities, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

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

8. Even if it is a brief statement, it is not to be discarded.

9. When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

10. If after careful scrutiny the Court is satisfied that it is 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 basis of conviction, even if there is no corroboration.

36. In the aforesaid judgment of ***Sudhakar (Supra),*** *the Hon'ble Supreme Court has discussed the concept of dying declaration in detail in paragraph 18 by considering the case of* ***Laxman vs. State of Maharashtra*** *reported in (2002) 6 SCC 710 which is quoted below :-*

"18. In the case of Laxman (supra), the Court while dealing with the argument that the dying declaration must be recorded by a Magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows:

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is 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 the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result

of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. ***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.*

39. For accepting the dying declaration, the Hon'ble Supreme Court has expounded the conditions which are necessarily to be followed. In State of Gujarat v. Jayrajbhai Punjabhai Varu reported in (2016) 14 SCC 152, the Supreme Court held in paragraph nos. 15, 17, 19 & 20 as under :

"15. The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.

17. A number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. In case of more than one dying declaration, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests.

19. ..... A dying declaration is entitled to great weight. The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can be a result of afterthought. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. 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.

20. The burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted."

38. In view of the law as enunciated and discussed by the Apex Court on the reliability of the dying declaration, we proceed to examine the statement made by the deceased before P.W.10 Surendra Pratap Singh - S.I. and C.W.1 Dr. Amit Bhatnagar, who was posted at K.G.M.C. Surgery Department, Lucknow as Junior Resident.

39. From perusal of the evidence of P.W.10 Surendra Pratap Singh- Sub Inspector, Chauki Para, Police Station Talkatora, Lucknow, in his deposition, before the trial court has stated that he went to bed no.1 of emergency ward, K.G.M.C. where the deceased Vijay Kumar Jain was admitted in a burn state and in a conscious state, he narrated him about the incident and the same was recorded by him. From perusal of the same, it is evident that the deceased had categorically stated that when he returned to his house, his driver Saleem -appellant stopped the vehicle on a turning. He could not understand as to why the vehicle was stopped. Thereafter, the driver who had kept a can of petrol came near him, had poured the same inside the car and on the seat and lit a matchbox, due to which the deceased was burnt and thereafter, the people had taking him out from the car. He further stated that the appellant wanted to kill him as he could not get him permanent employee. Similarly, C.W.1 - Dr. Amit Bhatnagar, in his deposition, before the trial court, has stated that on 12.07.2001 he was posted as Junior Resident at K.G.M.C., Lucknow and on that day at about 6.45 p.m. Vijay Kumar Jain (deceased) was admitted in K.G.M.C., Lucknow with 95% burn injuries and he was given treatment by a team of doctors and by him. The bed head ticket of Vijay Kumar Jain was prepared by him which was produced by him in the court in a sealed envelop. He further stated before the trial court that at the time of taken in hospital, Vijay Kumar Jain (deceased) was conscious and was speaking and was answering to the questions put to him by C.W.1. The deceased told about the incident which was entered on the bed head ticket by the said witness in which the deceased had stated as under :-

"मै विजय कुमार जैन अपने पूरे होशो हवास में यह बयान देता हूँ कि दिनांक 12.07.2001 को शाम 5. 30 चण्उण को अपने घर के बीच जब मै अपने ऑफिस से लौटा तो मैं अपनी गाडी में घर के नीचे खडा था । वो गाडी ड्राइवर चला कर लाया था और मुझे ऑफिस से घर लाया था। तभी वो उतरा और गाडी पर पेट्रोल डालकर गाडी में आग लगा दी और दरवाजे बंद कर दिये जिससे मैं जल गया।"

40. Below the aforesaid statement, the impression of left and right toe of the deceased had been affixed, which also bears the attestation of this witness, i.e. C.W.1 Doctor Amit Bhatnagar.

41. Thus, it is clear from the two statements made by the deceased which can be termed as a dying declaration that it was the appellant who had burnt the deceased in his car as the deceased refused to get his job permanent in the department.

42. The argument of learned Counsel for the appellant that the said dying declaration which has been made the basis of conviction of the appellant by the trial court is not a reliable piece of evidence as the same has not been taken in the presence of doctor nor any fitness certificate has been given, has no substance as the deceased had received 95% burn injuries on his person and at the conscious state of mind he made statement before P.W.10 - Sub Inspector and C.W.1 Dr. Amit Bhatnagar when deceased was admitted in K.G.M.C. There appears to be no flaw on the part of the trial court in recording the finding of conviction of the appellant on the basis of dying declaration. The statement made by the deceased before P.W.10 and C.W.1 can be very much accepted on relevant piece of evidence in view of the proposition of law as has been discussed by the trial court in the above referred judgment.

43. Besides the above statement made by the deceased, there appears to be two eye-witnesses of the incident, namely, P.W.2 Nitin Jain and P.W.3 Mamta Rani Jain, who are the son and wife of the deceased respectively. They are the witness of incident which had taken place near the house of the deceased where he arrived in his official vehicle which was driven by the appellant and two witnesses were strolling near the house and saw the appellant pouring petrol inside the car in which the deceased was locked by him and the car was set ablaze. They broke open the glass of ambassador car, took out the deceased with the help of the public and immediately after the incident lodged the FIR and rushed to the Lifeline Hospital and to K.G.M.C. thereafter. The deceased was taken to Safdarganj Hospital, New Delhi by air. The two witnesses have categorically stated before the trial court regarding the manner in which the incident has taken place and the appellant being responsible for the same. There appears to be nothing in the evidence which may compel this Court to disbelieve their testimonies simply because they are the family members of the deceased, their evidence cannot be discarded on the ground that they are highly interested and partisan witnesses.

44. At this juncture, it would be apt to mention that evidence of a close relation can be relied upon, provided it is trustworthy, credible and is cogent. Regarding the reliability of oral testimony of the closely related eye-witnesses, Hon'ble Apex Court in case of **Bhagaloo Lodh and another Vs. State of Uttar Pradesh, 2011 (13) SCC 206** held as under: -

18. Evidence of a close relation can be relied upon provided it is trustworthy. Such evidence is required to be carefully scrutinised and appreciated before resting of conclusion to convict the accused in a given case. But where the Sessions Court properly appreciated evidence and meticulously analysed the same and the High Court re-appreciated the said evidence properly to reach the same conclusion, it is difficult for the superior court to take a view contrary to the same, unless there are reasons to disbelieve such witnesses. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are inter-related to each other or to the deceased."

45. The Apex Court further in case of **Gangabhavani Vs. Rayapati Venkat Reddy**

and Ors, 2013 (15) SCC 298, while considering the evidentiary value of interested witnesses held as under:-

"15. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

16. In ***State of Rajasthan v. Kalki,*** *this Court held: (SCC p. 754, para 7) "7. As mentioned above the High Court has declined to rely on the evidence of P.W. 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased".....For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True, it is, she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested.* ***A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested'.*** *In the instant case P.W.1 had no interest in protecting the real culprit, and falsely implicating the respondents.*

17. In Sachchey Lal Tiwari v. State of U.P., while dealing with the case this Court held: (SCC pp.414-15, para 7)

"7. .....Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence."

18.In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim/deceased."

46. Dealing with the reliability of related witness, the Apex Court in the case of **Laltu Ghosh versus Sate of West Bengal, AIR 2019 SC 1058** held as under:-

"13. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in ***Dalip Singh v. State of Punjab, 1954 SCR 145,*** *wherein this Court observed:*

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause,

such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person..."

14. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in ***Jayabalan v. Union Territory of Pondicherry,*** *(2010) 1 SCC 199:*

"23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

47. It is requisite to quote observation made by the Apex Court in the case of **Md. Rojali Ali & Ors. Versus State of Assam, AIR 2019 SC 1128** which is reproduced herein under :-

"10. As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now well settled that a ***related witness cannot be said to be an ''interested' witness merely by virtue of being a relative of the victim.*** *This Court has elucidated the difference between "interested' and "related' witnesses in a plethora of cases, stating that a* ***witness may be called interested only when he or she derives some benefit from the result of a litigation,*** *which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused."*

48. Thus, it is consistent view of the Apex Court that when the version of witness tallies with each other, it cannot be discarded merely on the ground that they are related witnesses.

49. It transpires from the evidence on record that the appellant was arrested on the spot by the public immediately after the incident and handed over to the police which further goes to show that after committing such brutal and gruesome murder, the appellant did not leave the place and was standing at the place of occurrence. The argument of learned Counsel for the appellant that it was a quite unnatural conduct of the appellant to remain present even after the incident, is also of hardly any substance as it depends upon the conduct of an accused as to how he behaves in the manner in a particular situation.

50. In **Ganeshlal v. State of Maharashtra,** (1992) 3 SCC 106 the Supreme Court held as under:

"It is settled law that the conduct of an accused in an offence previous and subsequent to the crime are relevant facts. Absence of any attempt to save the life of the deceased while she was burning and was charred to death, the conduct of the accused in not attempting to give any medical aid, the conduct of the appellant immediately after the death and falsely proclaiming that there was short circuit implying to scare away the people from attempting to save the deceased-these are most telling and relevant crucial facts apart from repulsive inhuman conduct. ***The false plea of suicide is yet another relevant fact. When the death had occurred in the custody of the accused the appellant is under an obligation in***

Section 313 Cr.P.C. statement at least to give a plausible explanation for the cause for her death. No such attempt was even made except denying the prosecution case. These facts completely are inconsistent with the innocence, but consistent with the hypothesis that the appellant is a prime accused in the commission of gruesome murder of his wife."

51. In **Kundula Bala Subrahmanyam and another v. State of Andhra Pradesh ,** (1993) 2 SCC 684, while dealing with the aspect of conduct of the accused immediately after the incident, the Supreme Court observed as under:-

*"...The normal human conduct of any person finding someone engulfed in flames would be to make all efforts to put off the flames and save the life of the person. Though, the appellants were the closest relations of the deceased, they did not do anything of the kind. Let alone making any effort to extinguish the fire, according to P.W. 2 when the father-in-law of the deceased, at her request, was giving her the bontha to extinguish the flames, appellant 2, the mother-in-law of the deceased, objected to the same. This conduct speaks volumes about the extent of hatred which the mother-in-law exhibited towards her daughter in-law. They rendered no first-aid to the deceased. Their conduct at the time of the occurrence, therefore, clearly points towards their guilt and is inconsistent with their innocence. ... ...**The theory of suicide has no legs to stand upon. The conduct of the appellants who did not try to extinguish the fire or render any first-aid to her, also totally betrays the theory of suicide and we agree with the High Court that the theory as set up by the appellants is highly unbelievable or unacceptable. The prosecution has, thus, successfully established that the conduct of both the appellants both at the time of the occurrence and immediately thereafter is consistent only with the hypothesis of the guilt of the appellants and inconsistent with their innocence."*

52. In view of the foregoing discussions, the prosecution has proved its case beyond reasonable doubt against the appellant and the finding of conviction and sentence recorded by the trial court against the accused appellant Saleem under Sections 302, 435, 427 I.P.C. does not call for any interference by this Court, hence the conviction and sentence recorded of the appellant by the trial Court is hereby upheld.

53. The appeal lacks merit and is, accordingly, **dismissed.**

54. The appellant is stated to be in jail. He shall serve out the sentence as awarded by the trial Court.

55. Office is directed to transmit the lower court record along with certified copy of this order to the court concerned forthwith for necessary information and follow up action, if any required.

(2021)12ILR A902
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.12.2021

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE MANISH KUMAR, J.

Criminal Appeal No. 1181 of 2008
&
Criminal Appeal No. 1479 of 2008

Vishal Gupta ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Nadeem Murtaza, Ashok Kumar Verma, Pradeep Kumar Tripathi, Ramesh Chandra Gupta, Shivaam Shaarma, Sidharth Dhaon, Subodh Kumar Shukla, Sushil Shukla, Yogesh Bhasin

Counsel for the Respondent:
Govt. Advocate, Salik Kumar Srivastava

Prosecution story regarding time and occurrence of the incident is improbable-no other witnesses corroborates with prosecution story-about place , time and occurrence of incident.

Appeal allowed. (E-9)

List of Cases cited:

1. St.of U.P. Vs Gokaran & ors. [1985 SCC (Cri) 41],

2. Pala Singh Vs St. of Pun. [1973 SCC (Cri) 55

3. Brahm Swaroop & anr. Vs St. of U.P. [2011 CRI LJ 306]

4. St. of Raj.Vs Teja Singh & ors. [2001 3 SCC 147]

5. Badam Singh Vs St. of M.P. [(2003) 12 SCC 792]

6. Meharaj Singh Vs St. of U.P. [(1994) 5 SCC 188],

7. Bir Singh & ors. Vs St. of U.P. [(1977) 4 SCC 420]

8. Shaikh Nabab Shaikh Babu Musalman & ors. Vs St. of Mah. [(1993) Supp. (2) SCC 217]

9. Meharaj Singh (supra) & St. of Pun. Vs Harbans Singh & anr. [(2003) 11 SCC 203]

10. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj. [(1983) 3 SCC 217]

11. Gangadhar Behra & ors. Vs St. of Orissa [2003 SCC (Cri) 32]

12. Vinay Kumar Rai & anr. Vs St. of Bihar [2008 CRI. L. J. 4319]

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

The aforesaid criminal appeals arising out of the same crime were heard together and are being decided by a common judgment.

1. The two criminal appeals have been filed against the common judgment and order dated 23.04.2008 passed by Additional Sessions Judge, Court No. 1, Lucknow in Sessions Trial Nos. 140 of 2007 (State Vs. Alok Gupta), 520 of 2006 (State Vs. Smt. Kalpana) and 644 of 2005 (State Vs. Vishal Gupta) relating to Case Crime No. 129 of 2004, under Sections 302, 120 B IPC, Police Station Ashiyana (CBCID), whereby, the appellants have been convicted under Section 302 IPC and sentenced to life imprisonment and fine of Rs. 10,000/- and in default of payment of fine, they shall undergo rigorous imprisonment for a further period of one year, whereas, Smt. Kalpana was acquitted.

2. We have heard Shri Pradeep Kumar Tripathi, learned counsel, who appeared for the appellants. Shri Vaibhav Kaliya, learned counsel, on our request, volunteered to assist the Court and was permitted to do so on behalf of the appellants. Shri Umesh Verma, learned Additional Government Advocate appeared for the State. Learned counsel for the parties argued at length and took us through the record.

3. According to the prosecution case, on 29.08.2004 an FIR was lodged under Section 302/120- B IPC by the complainant, who was the father of the deceased/PW-1-Ashok Gupta, at about 5.25 P.M. stating therein that on 29.08.2004 at around 5.00 P.M., when the complainant along with his daughters namely, Alka, Anita, Aparajita, Anamika and son-Sachin were present at home, at that time the appellants namely, Alok Gupta and Vishal Gupta along with one unknown person knocked the door and on opening the door, they barged into the house having *Tamancha* in their hands. The three accused persons indiscriminately fired on his daughter namely Aparajita, wife of Ajay Gupta with the intention to kill her while she was sitting with her sisters in the second room. On shouting, they ran away. The neighbours in fear closed their windows and doors. Thereafter, the complainant took her daughter to the Awadh Hospital where the doctor declared her brought dead. Smt. Kalpana Gupta is the first wife of the

Ajay Gupta, thus, the present appellants kept enmity with the deceased and her husband Ajay Gupta. After two years of marriage of Ajay Gupta with the deceased, they had kidnapped him and for that the FIR was lodged at Sitapur. The Kalpana Gupta instigated his brothers i.e. the present appellants to murder the daughter of the complainant.

4. After investigation, the charge sheet was filed under Section 302 read with Section 120-B IPC in the Court concerned against the present appellants. Thereafter, the trial court framed charges against the appellants under Section 302 read Section 120-B IPC for hatching the conspiracy along with other co-accused namely, Kalpana Gupta.

5. The prosecution in order to prove its case had produced four witnesses of fact namely Ashok Kumar Gupta (the complainant and father of the deceased) as PW-1, Sachin Gupta(the brother of the deceased) as PW 2, Sudheer Kumar Gupta as PW -3 (private servant of Ajay Gupta), Ajay Gupta (the husband of the deceased) as PW-4 and also produced four formal witnesses i.e. Dr. Harshwardhan as PW-5, HCP Raj Kumar Srivastava as PW-6, Inspector Rangeela Singh as PW-7 and Arjun Prasad Mishra as PW-8.

6. As documentary evidences, the prosecution has proved the copy of FIR as Ext. Ka-7, the Post Mortem Report as Ext-Ka-6, Forensic Report as Ext. Ka-20, Recovery memo as Ext Ka-3, Recovery memo as Ext. Ka-4, Recovery Memo as Ext. Ka-5, Chik FIR as Ext. Ka-7, Extract of chick report in GD as Ext. Ka-8, Inquest Report as Ext. Ka-2, Preparation of Inquest Report and got prepared other relevant papers as Ext. Ka-9, Photo Lass as Ext. Ka-10, Letter of the police form of sending the dead body to the headquarter as Ext. Ka-11, Sample seal as Ext. Ka 12, Spot where the site plan was prepared as Ext. Ka-13 and recovery seizure memo of one empty cartridge of .315 bore from the spot as Ext. Ka-5, blood stained bed sheet of the double bed and two pieces of these bed sheets as Ext. Ka-4, blood stained and plain earth from the spot as Ext. Ka-3, Charge sheet against Vishal Gupta, Alok Gupta and Kalpana under Section 302/120 IPC as Ext. Ka-19, Medical examination report of the maxi as Ext. Ka-20.

7. After closure of the evidence of prosecution, the statement under Section 313 Cr.P.C. attributable to all the three accused were recorded and all three accused denied their involvement in the incident. Kalpana Gupta has specifically told in her statement that she and Ajay were staying together till the date of the incident. The appellant namely Vishal Gupta has stated in his statement that he was not present at the place of incident when the incident occurred. He was busy in the departmental duty on the day of the incident.

8. After recording of the statement of the accused/appellants, they preferred to enter into the defense and examine as many as seven defense witnesses namely Dinesh Kumar Pandey, Assistant Registrar, Kanoongo, Tehsildar Puwayan, District Shahjahanpur as DW-1, Ram Sahayas DW-2, Jamun Prasad, Revenue Inspector as DW-3, Om Prakash Gupta, Ex-MLA as DW-4, Vinod Kumar Arora as DW-5, Tauhid Ahmad, Supervisor of Avadh Hospital as DW-6 and lastly Jaswant Singh, Income Tax Inspector examined as DW-7.

9. The trial Court on appreciation of evidence placed before it had opined that the FIR was lodged by the complainant, who is an eye witness/father of the deceased, which was duly proved by evidence of PW-1. According to the trial Court, the FIR of the case is not anti time and the Crime No./Special Report was sent to the court after ten days of the incident and further observed that Court was not convinced

with the arguments of the learned defense counsel because PW-1 has clarified in his cross examination that he had written the Tehrir in Police Station by taking 10 to 15 minutes. So far as the statement of PW-1 that the inquest proceeding started at 8.00 P.M. is concerned, it will also not belie the entire prosecution case.

10. Further, the trial court did not accept the argument that the inquest on the body of the deceased was not conducted in Awadh Hospital nor the body of the Aparajita was even taken to Awadh Hospital for treatment. It has also not been accepted that no death certificate was produced by the prosecution. The mere assertion of the witness that the inquest proceedings were conducted in the house of the complainant was not enough to prove that fact. The presence of Padma Thapa is not quite seriously disgranted by the learned counsel for the defence. The trial court did not accept the evidence on record that despite indiscriminate firing by three persons on Aparajita, no pellet or any firing remains were found on the spot; any sign of the fire was not on floor or furniture; no report of the serologist was available on the record regarding the blood stain, plain earth and blood stained bed sheet; no hole with blackening were found on the Maxi worn by the deceased; that in spite of three others sisters, who were sitting close to Aparajita, none of them got fire arm injuries; that in Site Plan the Investigating Officer has not shown any *Takhat* on which the deceased would have been sitting. On the aforesaid facts on the record, the trial court did not find much force.

11. The evidence of the case was proved against the accused/appellants, thus the trial court convicted and sentenced them as mentioned above.

12. The learned counsel for the appellant has submitted that the FIR is anti time for the reason that as per the prosecution case, the incident took place at around 5.00 P.M. and the FIR was lodged at 5.25 P.M. i.e. within 25 minutes of occurrence, which is highly improbable for the reason that as according to the version in the FIR, the appellants along with one unknown person reached the house of the complainant at around 5.00 P.M. and knocked the door and when door was opened by the complainant/PW-1, the appellants along with one unknown person directly entered in the second room, where the daughters of the complainant were sitting including the deceased Aparajita and all the three started indiscriminate firing and ran away. Thereafter, the injured Aparajita was taken to the Awadh Hospital, which is around 1.5 to 2 Kms away from the house of the complainant, where the doctor declared her brought dead. After the declaration by the doctor, the complainant went to the Police Station which was four Kms away from the hospital. On reaching Police Station, the complainant took ten to fifteen minutes in writing the *Tahreer* and thereafter it was lodged at the Police Station. All the aforesaid exercise is not possible to be made within a short span of 25 minutes especially when the complainant does not own any vehicle by which he had gone to the Hospital. Arranging a Car for taking the injured to Hospital must have taken some considerable time.

13. It is further submitted that the crime report/special report was not enclosed with the inquest report, whereas as per Section 157 Cr.P.C. after the information of the offence, the same has to be intimated to the Magistrate forthwith.

14. It is further submitted that in the enclosures with the inquest report, two pages have been shown for the FIR and one page for GD, whereas the FIR is of three pages, so neither any FIR was in existence at the time of inquest nor any special report/ crime report was there till then. The purpose of Special Report/Crime Report is to make check or

supervise over the investigation by the Magistrate.

15. As per the statement of Head Moharrir, the Special Report/Crime Report might have been forwarded but the same is not on the record. Meaning thereby, the Special Report/Crime Report was never forwarded to the Magistrate in compliance with Section 157 Cr.P.C.. It is further contended that it has been mentioned in the judgment impugned that the Special Report/Crime Report was filed after ten days. The same was never proved and no opportunity was given to the defence to make any suggestion on the Special Report/Crime Report.

16. On the other hand, learned Additional Government Advocate has submitted that the purpose of the Special Report/Crime Report is to supervise the investigation by the Magistrate and filing it with delay will not vitiate the trial and benefit of it can not be given to the accused/appellants. In support thereof, he placed reliance upon the judgment rendered by Hon'ble Supreme Court in the cases of ***State of U.P. Vs. Gokaran and others [1985 SCC (Cri) 41], Pala Singh Vs. State of Punjab [1973 SCC (Cri) 55 and Brahm Swaroop & Anothers Vs. State of U.P. [2011 CRI LJ 306]*** wherein, it has been held that no adverse inference can be drawn on the ground that the Special Report/Crime Report was sent with a delay to the Magistrate, if the same has been explained.

17. After hearing the learned counsel for the appellant and the learned AGA, it is found that the prosecution story regarding the time and occurrence of the incident and lodging of an FIR within twenty five minutes is highly improbable & doubtful for the reasons that it is an admitted case of the prosecution that the alleged incident took place at around 5.00 P.M..

18. After the incident, the injured was taken to the Awadh Hospital in the Maruti Car. The Awadh Hospital is 1.5 to 2 KMs from the place of incident, where the doctor declared brought her dead. Thereafter, the complainant had gone to the police station, which is 4 Kms from the hospital, where he taken 10 to 15 minutes to write down the long Tehreer and some time would have been in arranging the vehicle for taking the deceased to the hospital. All this could not been done within a short period of 25 mintues and it makes the story of the prosecution doubtful.

19. The non forwarding of the Special Report/Crime Report forthwith by the Police to the Magistrate, as mandated by Section 157 Cr.P.C. also deprives Magistrate to supervise the investigation and creates credibility about the FIR. The only inference, which can be drawn from the statement of Head Moharrir is that no Special Report/Crime Report was forwarded to the Magistrate though in the judgment, it has been recorded that it has been filed with delay of ten days but there is no finding that any reason for delay was indicated by the Investigating Officer while filing the Special Report/Crime Report nor at any point of time any opportunity was provided to the defence side to make their submissions either in support or against the Special Report/Crime Report. The same has not been proved nor made exhibit. The judgments cited by the learned AGA are not applicable in the present case for the reason that the Hon'ble Supreme Court in the judgment of ***Gokaran (supra)*** has relied upon the judgment of ***Pala Singh (Supra)***. The relevant extract of **Pala Singh (Supra)** is being quoted hereunder for ready reference:-

"Shri Kohli strongly criticised the fact that the occurrence report contemplated by S. 157, Cr.P.C. was sent to the magistrate concerned very late. Indeed, this challenge, like the argument of interpolation and belated despatch of the inquest report, was developed for the purpose of showing that the investigation

was not just, fair and forthright and, therefore, the prosecution case must be looked at with great suspicion. This argument is also unacceptable. ***No doubt, the report reached the magistrate at about 6 p.m. Section 157, Cr. P.C. requires such report to be sent forthwith by the police officer concerned to a magistrate empowered to take cognisance of such offence.*** *This is really designed to keep the magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under s. 159. But when we find in this case that the F.I.R. was actually recorded without delay and the investigation started on the basis of that F.I.R.* ***and there is no other infirmity brought to our notice (emphasis laid by us),*** *then, however improper or objectionable the delayed receipt of the report by the magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. It is not the appellants case that they have been prejudiced by this delay."*

20. After going through the aforequoted judgment, the position, which emerges out is that the aforesaid judgment is not applicable in the present case, as there was no other infirmity brought to the notice of the Court whereas there are many in the present case, as already mentioned above. The another judgment relied upon by the learned AGA i.e. ***Brahm Swaroop (supra)*** is also not applicable in the present case, as in the said judgment, the Hon'ble Apex court has relied and quoted the judgment rendered in the case of ***State of Rajasthan Vs. Teja Singh and others [2001 3 SCC 147]*** wherein it has been held that, if the Special Report/Crime Report has been forwarded with delay then the explanation so furnished by the prosecution must be convincing and acceptable. The para nos. 13 and 16 of the said judgment is being quoted hereunder :-

" 13. In State of Rajasthan v. Teja Singh & Ors., (2001) 3 SCC 147, this Court held that the receipt of special report by the Magistrate is a question of fact and the ***prosecution may explain the delay in sending the special report. However, the explanation so furnished by the prosecution must be convincing and acceptable. (emphasis laid by us)*** *The same view has been re-iterated in Ramesh Baburao Devaskar & Ors. v. State of Maharashtra, (2007) 13 SCC 501."*

"16. In State of Kerala v. Anilachandran @ Madhu & Ors., AIR 2009 SC 1866, this Court placed reliance upon its earlier judgments in Pala Singh v. State of Punjab, AIR 1972 SC 2679; and Sarwan Singh v. State of Punjab, AIR 1976 SC 2304 and ***held that the police should not unnecessarily delay sending the FIR to the Magistrate as the delay affords the opportunity to introduce improvement and embellishment thereby resulting in a distorted version of the occurrence (emphasis laid by us).*** *However, in case the prosecution offers a satisfactory explanation for the delay, the court has to test it.* ***An un-explained delay by itself may not be fatal, but it is certainly a relevant aspect which can be taken note of while considering the role of the accused persons for the offence.(emphasis laid by us)***

A similar view has been re-itereated in Pandurang Chandrakant Mhatre & Ors. Vs. State of Maharashtra, (2009) 10 SCC 773 (2010 AIR SCW 236; 2010 (2) AIR Bo R 209 (SC)"

21. The Hon'ble Supreme Court in the case of ***Brahm Swaroop (supra)*** has also relied upon the judgment rendered in the case of ***Badam Singh vs. State of Madhya Pradesh [(2003) 12 SCC 792]*** wherein, it has been held that if the Investigating Officer categorically states that he is not in a position to give any explanation for the delay in sending the special report, it may be fatal to the prosecution case.

22. The judgments cited hereinabove, by the learned AGA are on the point that if the special report is submitted with delay and it has properly been explained, which is convincing and without infirmity, then it could not be fatal, whereas in the present case, neither any reason for delay has been furnished nor it has been explained.

23. In view of the facts placed before us as mentioned in preceding paragraphs, it is evident that the delay without any explanation in submitting the special report makes the prosecution case doubtful, when the same is read along with other infirmities brought before the Court.

24. We have seen from the facts stated as mentioned hereinabove that all that what is said to have been done till the actual lodging of the report in no case probably could be done within 25 minutes. It leads to the inference that the report has been ante-time which fact also stands supported by not sending the Special Report/Crime Report forthwith or promptly to the Magistrate for which no explanation comes forward from prosecution side.

25. Learned counsel for the appellants has further submitted that when the prosecution witnesses are near relative/interested witnesses, then their statement needs corroboration and close scrutiny by the Court. In the present case, it has been contended that PW. 1 & 2 are the interested witnesses, as the PW-1 is the complainant/father of the deceased/eye witness while PW 2 is the brother of the deceased. The statements of the PW-1 and 2 do not corroborate with the prosecution story. The prosecution also failed to disclose the facts that as to why the vehicle used for taking the deceased to the hospital was never taken into the custody. Further, it has also not been disclosed by the prosecution that what is the number of the vehicle and who was owner & driving it at that time.

26. In support of his submission, learned counsel for the appellant relied upon various judgments of Hon'ble Apex Court in the cases of ***Meharaj Singh vs. State of U.P. [(1994) 5 SCC 188], Bir Singh & Ors. vs. State of Uttar Pradesh [(1977) 4 SCC 420], Shaikh Nabab Shaikh Babu Musalman & Ors. vs. State of Maharashtra [(1993) Supp. (2) SCC 217].***

27. It has further been submitted that no blood stained clothes of the prosecution witnesses were ever recovered, which makes the presence of the appellant at the time of incident doubtful. In support of his submission, he placed reliance on the judgments rendered by the Hon'ble Supreme Court in the cases of ***Meharaj Singh (supra) and State of Punjab Vs. Harbans Singh and another [(2003) 11 SCC 203]***. The para no. 9 of the said judgment is being reproduced hereunder for ready reference:-

"9. It is the prosecution case itself that Darshan Singh who was one of the witnesses to the incident who also helped PWs.4 and 11 to carry the injured to the hospital and remained with them almost right through has not been examined by the prosecution. The explanation given is that he has been won over by the accused. But then it is also to be noted that there were many neighbours also who came to the place of incident but none of them have been examined as witnesses leaving only PWs 4 and 11 as the sole eye- witnesses in this case. ***Further it is to be noticed that these two witnesses along with Darshan Singh carried both the injured persons in the vehicle and thereafter helped in carrying the injured persons to the Primary Health Centre but no blood stained clothes were recovered from the possession of these witnesses which also throws considerable doubt about the presence of these***

witnesses at the time of incident (emphasis laid by us). *PW-11 though says that there was a little blood stain on his cloth, he washed the same in the hospital which explanation, in our opinion, is highly artificial. "*

28. It has further been submitted that no blood trail was found from the place of incident, which makes the alleged incident doubtful. In support of his submissions, he placed reliance on the judgments passed in the cases of ***Meharaj Singh (supra)*** and ***Bir Singh (supra) .***

29. It has also been submitted that as per the prosecution witnesses, indiscriminate firing was done by the appellants but no one got injured especially when the three daughters of the deceased were sitting along with the deceased. It makes the prosecution case doubtful. In support thereto, he placed reliance in the case of ***Harbans Singh (supra).***

30. Learned counsel for the appellants has next contended that, as per the admitted case of the prosecution that there was an indiscriminate firing but no bullet mark was found either on the furniture in the room or on the walls of the room, where the incident as alleged had occurred. It makes the place of occurrence doubtful. It is an admitted case of the prosecution witnesses that the deceased was wearing a saree at the time of incident but as per the inquest report, she was wearing maxi and there is no explanation for the same. During the cross-examination, the P.W. 2 had stated that he is not aware about the clothes of her sister. It is further submitted that there is a major contradiction in the statements of PW 1 & 2 as far as the fact that body of the deceased was taken to the Awadh Hospital and inquest was made there. The PW-1 in his examination in chief as well as in cross examination has stated that he took her daughter to the Awadh Hospital where the inquest was done, whereas, PW 2 in his cross examination has stated that the investigating officer along with constable came to the house and made the inquest at 8.00 P.M.. It belies the prosecution story. It is further submitted that there are same contradictions in the statements of Investigating Officer who had given the statement that inquest was prepared in the Hospital which started at till 5.50 P.M. and the statements of PW 2, who had given statement that police came to house and inquest was made at 8.00 P.M.

31. It is further submitted that as per the admitted case of the prosecution that when the appellants along with one unknown person were firing indiscriminately on the daughter of the complainant, she was sitting and could not get up. The said statement does not corroborate with the medical evidence, as in the post mortem report, one gun-shot injury is in upwards direction, which is highly improbable.

32. Learned counsel for the appellants has further submitted that as per the prosecution case, the three sisters of the deceased were accompanied her in the room at the time of incident, they covered her but no one got injured. Their statements was recorded under Section 161 Cr.P.C. and their names were also in the charge-sheet but they were not produced as a prosecuting witnesses during the trial nor any application for discharge has been moved.

33. On the other hand, learned AGA has submitted that these are the minor contradictions and will not adversely affect the prosecution case. In support thereof, he placed reliance on the judgment of Hon'ble Apex Court rendered in the case of ***Bharwada Bhoginbhai Hirjibhai vs State of Gujarat [(1983) 3 SCC 217]*** wherein it has been held that discrepancies, which do not go to the root of the matter and shake the basic version of the prosecution, will not vitiate the trial. He further placed reliance on the judgments of the Hon'ble Supreme Court in the cases of ***Gangadhar Behra and others Vs. State***

of Orissa [2003 SCC (Cri) 32], Vinay Kumar Rai and anothers Vs. State of Bihar [2008 CRI. L. J. 4319]. It has been argued on behalf of the State that it is not necessary to produce all the witnesses, it is the choice of the prosecution to choose and produce the witnesses. It is the quality of the evidence which matters not the quantity. It has lastly been submitted that the defence has been failed to demolish the prosecution case that the prosecution witnesses had not seen the incident and the Court has to separate the grain from the chaff to find out the truth.

34. After hearing the learned counsel for the respective parties and going through the record available, the position which emerges out in the present case is that mere making a statement that appellants made indiscriminate firing and killed her daughter is not sufficient to prove the prosecution case beyond reasonable doubt, especially, when the prosecution witnesses are close relatives of the deceased. Where the prosecution witnesses are the interested witnesses, their testimonies or statements require close scrutiny, as per the law laid down by the Hon'ble Apex Court in the cases of **Meharaj Singh (supra), Bir Singh (supra)** and **Shaikh Nabab Shaikh Babu Musalman (Supra).** The para nos. 13 and 15 of the judgment passed in the case of Meharaj Singh (supra) is being quoted hereunder :-

"13. It appears that it was a blind murder and none of the eyewitnesses were actually present at the scene. The ante-timing of the FIR was obviously made to introduce eyewitnesses to support the prosecution case. We may demonstrate this by noticing that though PW 3 Smt Kamlesh the widow of the deceased claimed that she was present with her husband at the time of the occurrence, her conduct was so unnatural that not only she did not try to save her husband by trying to provide a cover but even after her husband fell down and was inflicted repeated injuries with the knife by the appellant Meharaj Singh, she did not even try to go anywhere near her husband and even later on hold his head in her lap and try to provide some comfort to him. ***This becomes obvious from the absence of any bloodstains on her clothes. She admitted that she had not even received a scratch during the occurrence. In a situation like this,(emphasis laid by us)*** *the normal conduct of any wife would be firstly to make an effort to save her husband even by taking the blow on herself and if that is not possible then at least to go so close to his person,* ***at least after the assailants had left that there would be no escape from the blood oozing out of the injuries of the deceased to come on to her clothes.*** *Similar criticism is also available against Balbir PW 2, Shiv Charan PW 4 and Satkari PW 5.* ***It is not the case of the prosecution that the clothes of any of them had got bloodstained.*** *The very fact that none of these witnesses went to lodge a report and instead left it to the father of the deceased to lodge the FIR would also go to show that the witnesses in all probability were not present at the spot.* ***The absence of any blood in the field of Kirpal Singh as also the absence of blood trail from the field of Kirpal Singh to the place where the dead body was found, as admitted by PW 8, also suggests that the occurrence did not take place in the manner suggested by the prosecution and that the genesis of the fight has been suppressed from the court.***

.....That being the position, it is obvious that the ocular testimony does not fit in with the medical evidence and instead it contradicts it. (emphasis laid by us)"

"15. The alleged eyewitnesses are undoubtedly deeply interested in the prosecution but that by itself cannot be a ground to discard their testimony. It, however, certainly puts this Court on its guard to scrutinise their evidence more carefully and keeping in view their unnatural conduct, as noticed above, it appears to us that none of the

alleged eyewitnesses had actually seen the occurrence and they were introduced as eyewitnesses after thoughtful deliberations and consultations. (emphasis laid by us) *It appears, that since it was a blind murder, the appellants have been roped in on account of misguided suspicion because of the previous enmity. Our independent analysis of the evidence on the record coupled with the infirmities which we have noticed above has created an impression on our minds, that the prosecution has not been able to bring home guilt to either of the appellants beyond a reasonable doubt. The trial court was, therefore, right in acquitting them and the High Court even after noticing the infirmities, in our opinion, fell in error in convicting the appellants. The reasons given by the High Court, to set aside the order of acquittal do not commend to us. They are neither sufficient nor adequate or cogent much less compelling."*

35. The para nos. 8 ,9 and 18 of the judgment passed in the case of **Bir Singh (supra)** are being quoted hereunder for ready reference:-

"8. P.W. Vidya Devi is the daughter of the own uncle of Surajpal Singh and deeply interested. P.W. 4 Roshan Singh is the own brother of Hira Singh who was an accused in a case under Section 307 which was started against him for shooting Sheo Shankar Singh Bhanja a nephew of Ramoo Singh. P.W. Sughar was also a co-accused along with Hira Singh the brother of this witness. ***It would thus appear that all the eye-witnesses are interested, inimical and belonging to the faction of the deceased and have taken sides with them and against the accused in earlier litigations. The learned Additional Sessions Judge, therefore, rightly thought that it was not safe to rely on the evidence of these witnesses unless their evidence was corroborated by independent witnesses (emphasis laid by us).*** *In this connection it may be noted that in the F.I.R. it is clearly mentioned that while the altercation between Bans Gopal and the accused was taking place Shambhu Bhujwa and Bhikari apart from Roshan Singh had come to the scene of occurrence. Both Shambhu Bhujwa and Bhikari were independent witnesses and bore no animus against the accused. Even from the evidence it would appear that these two persons had seen the entire occurrence."*

"9. P.W. 2 Sughar has clearly stated that at the time of altercation Roshan and Bhikari were present at that place. Similarly, P.W. 3 Vidya Devi has stated at page 29 of the paper book that while the altercation was going on Roshan and Bhikari came to the scene of occurrence. Similar is the evidence of P.W. 4 Roshan Singh at page 35 of the paper book where he says that when the altercation was going on Shambhu Bhujwa and Bhikari Khatic were at that time present there. ***It would thus appear from the evidence of eye- witness that Shambhu and Bhikari were exactly in the same position as the eye-witnesses and yet no reasonable explanation has been given by the prosecution for not examining them. It is true that it was not incumbent on the prosecution to examine each and every witness so as to multiply witnesses and burden the record. This rule however does not apply where the evidence of the eye-witnesses suffers from various infirmities and could be relied upon only if properly corroborated. In the instant case all the eye-witnesses had serious animus against the accused and they were interested in implicating the accused.*** *The substitution of Ram Dularey Singh in the general diary was a suspicious circumstance. The fact that the police was not able to re-cover any weapon or to explain how the appellants got hold of the guns was yet another circumstance that required a reasonable explanation from the prosecution. According to the finding of the learned Sessions Judge even the F.I.R. was ante-timed and although the High Court has not accepted this*

finding we feel, that the High Court on this aspect has entered into the domain of speculation. ***In view of these special circumstances it was incumbent on the prosecution to examine the two witnesses at least to corroborate the evidence and if they were not examined the Sessions Judge was justified in drawing an adverse inference against the prosecution.*** *At any rate it cannot be said that if under these circumstances the Sessions Judge was not prepared to accept the evidence of these witnesses his judgment was wrong or unreasonable. It may be that the High Court could have taken a different view but that by itself as held by this Court is not a sufficient ground for reversing an order of acquittal."*

"18. Another important argument advanced by counsel for the appellants is that there is absolutely no evidence to show that there was any blood at the place where P.W. 2 fell down. It was contended that according to the Doctor's version having regard to the injury, blood must have been oozing out. If the blood was there then the Investigating Officer could not have failed to notice the same. ***The fact that blood at that place was not indicated in the sketch map clearly shows that P.W. 2 did not receive injuries at the place. This is undoubtedly an important aspect which merits serious consideration.*** *The Sessions Judge seems to have commented on the fact that P.W. 2 did not accompany the dead body but in our opinion nothing much turns on that because P.W. 1 must have been in a hurry to rush to the Police Station and as P.W. 2 was seriously injured, he may not have thought it advisable to carry him.* ***But the fact remains that the prosecution has not been able to show that there was any blood at the place where P.W. 2 fell down which raises a reasonable inference that P.W. 2 may have been assaulted elsewhere and once that is so then the case regarding the assault of the deceased at the place of occurrence also automatically fails*** *because the two incidents are parts of the same transaction.*

36. The para no. 6 of the judgment rendered in the case of **Shaikh Nabab Shaikh Babu Musalman (supra)** are being extracted hereunder :-

"6. Both of them did not attribute any other overt act to Appellants 2 to 5. ***Since both the witnesses are highly interested and partisan, their evidence has to be subjected to a greater scrutiny. In a case of this nature there is a likelihood of false implication and having regard to the version, we find it difficult to accept the evidence of these two witnesses as against Appellants 2 to 5, who are not attributed any overt acts without any further corroboration.*** *It is not necessary in every case there should be such corroboration, but having regard to the part attributed to the Appellants 2 to 5, the possibility of false implication of one or more cannot be ruled out. Therefore, we think it is not safe to convict Appellants 2 to 5. So far as Appellant 1 is concerned, the version of these two witnesses is consistent, namely, that he was the person who inflicted the fatal injury. Therefore, his conviction need not be disturbed. But, however, in view of the fact that he died the appeal abates so far as he is concerned."*

37. From the judgments quoted hereinabove, the situation which emerges out in the present case is that the statements of PWs are self contradicting and also do not corroborate with the prosecution story. On being scrutinized the evidences carefully, it has come out that non disclosure of the facts that whose car was used, what is the number of vehicle, who was driving it, who accompanied the injured to the hospital, absence of trail of blood, the clothes of PW 1 must were not stained with blood, ,which has also not been recovered. The prosecution has put forth a story wherein it has been depicted that there was an indiscriminate firing by three persons but except one empty shell in the room and two bullets found from the body of the deceased. Apart from that, no other pellets and

mark was found on the alleged place of occurrence. Thus, while taking into consideration the aforequoted judgments and scrutinizing the evidences, it appears that none of the eye witnesses was present at the time of incident. Further, the inquest report is also doubtful, as after lodging the FIR at 05.25 P.M., the Investigating Officer left the police station at the same time and he first went to the house of the complainant, where he came to know that the complainant took her daughter to the Awadh Hospital and thereafter, he proceeded to the Awadh Hospital and started the inquest at 05.50 P.M.. This prompt action of the Investigating Officer creates doubt over the prosecution story for the reason that the time of lodging the FIR i.e. at 05.25 P.M. and leaving the police station at the same time, as per the entry in the GD, is highly improbable and also that in the FIR, it has been mentioned by the complainant that the body was in the Awadh Hospital, then there was no occasion for the Investigating Officer to go first to the house of the complainant and then come to know there only the body is in the hospital, the Investigating Officer collected the inquest witnesses. This whole exercise was done only in 25 minutes creates a shadow of doubt over the prosecution story. It is highly improbable especially when there is a statement and record produced by the defence witness-the Manager of the Hospital before the Court that the deceased was never brought to the Hospital, as it is not in there records. Further, the statement of PW-2 that the inquest was conducted at the home at 8 P.M. makes the prosecution story doubtful.

38. It is an admitted case of the prosecution and it is also to be seen as relevant circumstances that they were residing in an EWS house having two rooms and the room in which the incident alleged to be occurred was a very small room and the presence of nine people including the appellants and other unknown person and no one got injured except the daughter of the complainant makes the prosecution story doubtful. The three sisters, who had covered the deceased at the time of alleged indiscriminate firing and as per the statement of PW-1, he reached in the room thereafter, the three sisters would be more natural and competent witnesses of the first part of the story of the assault as compared to the complainant i.e. PW-1. Suppressing these witnesses in the evidences to prove the prosecution case makes the prosecution case gravely doubtful. It is a settled law that the interested witnesses must be scrutinized with more caution and care. No other evidence corroborates with the prosecution story i.e. about the place, time and occurrence of the incident and as per the settled law of the Hon'ble Supreme Court as discussed hereinabove, the benefit of doubt goes in favour of the accused persons, as the prosecution failed to prove the case beyond reasonable doubt.

39. The very foundation of implicating the present appellants, as per the prosecution case, is that the accused persons including Smt. Kalpana Gupta keeping grudge against the daughter of the complainant (deceased Aparajita) for the reason that husband of Smt Kalpana Gupta said to be married with Aparajita and having son from the said wedlock and on the instigation of Smt. Kalpana Gupta, the appellants murdered the Aparajita whereas Smt Kalpana was acquitted from the charge under Section 120 B IPC so the very foundation of the allegation against the appellants does not stand.

40. There are contradictions in the statement of PW-1 at various stages regarding the marriage of the Ajay Gupta with Aparajita. In the FIR, the Ajay Gupta has been shown as husband of the Aparajita but during the trial the PW-1 has stated that the daughter was living with Sri Ajay Gupta and marriage was not solemnized. There is a contradiction in the statements of PW-1 and 2 pertaining to the

marriage as PW -2 during the trial has stated in his cross examination that he is not knowing the facts that whether the Aparajita was married to Ajay Gupta, when the marriage was solemnized and whether they had any child from the wedlock. It makes the prosecution story doubtful.

41. The medical evidence is also not in corroboration with the prosecution case the victim was sitting on the Takht when she was fired at by the accused persons after barging into the room, in so far one bullet wound is through and through was found to be in upwards direction, which would normally would not be the case while victim is fired at while sitting from a higher level. True the doctor was not asked anything about this aspect of the matter but the facts that as they cannot be ignored to be seen. As the medical evidence does not support the manner of assault on the victim. It also lends support to the defence case, such a wound could not be possible looking to the position of the victim & persons firing her. It does throw a doubt on the truthfulness of prosecution story and result in some doubt about it. The whole picture of the present case except the statement of the PWs, nothing has been corroborated with the other evidences on the record either ocular or documentary evidence and makes the place and time of the incident and presence of eye witnesses doubtful.

42. Learned AGA tried to point out on the defects in the defence taken by the appellants and tried to say that the plea of alibi is not correct but in this connection suffice it to say that the prosecution case must stand on its own legs. It cannot sustain on the weakness, if any, in the defence case. As discussed above, it is clear that the prosecution case is highly doubtful & improbable, hence, we hold that the prosecution has failed to prove its case.

(Per Hon'ble Attau Rahman Masoodi, J.)

43. The two significant features of the trial in the present criminal appeal questioning the correctness of conviction and sentence are firstly as to whether cross examination of the star witness Ashok Kumar Gupta, father of the deceased i.e. PW-1 conducted on 26 dates, by any measure, would amount to torture or oppression as argued by learned counsel for the prosecution while defending the impugned judgement; and secondly as to whether the oral testimony of such an eye witness who fails to prove the vital/major fact as a whole comprising of a chain of events would render the ocular evidence as inadmissible and the residual part would not be regarded as qualifying the benchmark of "beyond reasonable doubt'.

44. In the present case involving murder of the deceased Aparajita at about 5 pm, PW-1 is relied upon as an eye witness whose presence at the place of occurrence i.e. E-479, Sector-I, LDA Colony, Ashiyana, Lucknow, on 29th August, 2004 of which the FIR was registered at 5.25 pm is essentially the foundation of the conviction and sentence for life. The occurrence was witnessed by other three daughters of the informant (PW-1) viz. Alka Gupta, Anvita Gupta and Anamika Gupta, besides his own son (PW-2), the brother of the deceased.

45. The two accused persons named in the FIR and one unnamed having barged into the house were stated to have indiscriminately fired aiming at the deceased closely from the front who was sitting with her three sisters in the other room of the house where the occurrence took place. The father Ashok Kumar Gupta (PW-1)- the informant who while sitting in the front room had opened the door when knocked by the assailants, did not receive a scratch but was swift enough to take the injured to the nearby hospital, namely, Awadh Hospital by hiring the services of a car, where she was declared as "brought dead'. Thus, the ocular evidence of PW-1 was not only restricted to seeing the accused persons

firing at the deceased but he was a concomitant witness of taking the injured to hospital single handedly where the injured was found "brought dead'. The fact that the occurrence took place at the residence after arrival of Aparajita (deceased) on Raksha Bandhan, who was injured and was taken to Awadh Hospital is a chain of events of which the prosecution owes an unimpeachable burden to prove. No other witness except PW-1 is the author of this testimony which according to the prosecution is direct, reliable and proved beyond reasonable doubt.

46. Be it noted that PW-1 was none other than the father of the deceased. The ocular testimony was not corroborated by any other witness of the charge sheet except one, namely, Sachin Gupta (PW-2) who was the son of the informant and real brother of the deceased. Insofar as the examination-in-chief of the main witness placed on record is concerned, PW-1 has deposed the same version as was narrated in the FIR but in the cross examination when his testimony was questioned on the aspect of several probabilities, namely, as to how did the deceased travel to her parental house on the occasion of Raksha Bandhan on 29.8.2004, whether any other person present alongwith the injured received any fire arm injury or whether there was any trace of the use of fire arms on the walls, floor, on the unpierced clothes of deceased or on the body of any other person present alongwith the deceased, the evidence led by the prosecution is unconvincing and dissatisfactory. Not a drop of blood much less than trail was found in between the place of occurrence upto the point connecting transport of the injured body to the Awadh Hospital. The prosecution on such a vital aspect of the matter failed to fill up the gaps through any corroborative evidence-forensic, recovery or any site plan. What is most surprising is that the witness kept the prosecution clueless about the manner in which Aparajita (deceased) had travelled to the parental house on 29.8.2004 and as to how her injured body was brought to the Awadh Hospital. The investigating officer took no pain to collect any inforation from the neighbourhood and fill up the gaps except collecting sample of the blood stained floor showing no trace of a drop of blood in the site plan at any other place in between the place of occurrence and from where the injured was transported to Awadh Hospital. The unpierced clothes recovered on the body of injured offered no support to indiscriminate firing. The ocular evidence has a primacy over the corroborative evidence. The later plays role of strengthening the weight of direct evidence, therefore, the burden to prove the direct evidence was a fundamental duty of the prosecution by establishing a clean nexus between arrival of Aparajita (deceased) at the place of occurrence on 29.8.2004 and then taking her injured body to Awadh Hospital where she was declared brought dead and lastly to the Government Hospital where post mortem was conducted.

47. The cross examination of PW-1 in the present case has certainly taken place from 16.2.2006 to 20.4.2006 almost on alternate days but the record available before this Court does not reveal that the prosecution at any point of time had objected to any question put to the witness which might have been irrelevant or oppressive. The defence through cross examination is a rule of fairness of which the boundaries will differ from case to case and the nature of evidence relied upon by the prosecution. In the present case, however, the Court is not taken through any question or suggestion during cross examination, of which the relevance was objected or the same was forbidden in the eye of law. Rule of fairness is the bedrock of faith in any judicial system and the courts of law are duty bound to associate with this process effectively.

48. This Court has carefully gone through the oral testimony of PW-1. It is more than evident that the witness in his cross examination

has firstly evaded revealing full facts with respect to the arrival of Aparajita (deceased) on Raksha Bandhan i.e. 29.8.2004 when the occurrence took place; and secondly, the testimony as regards the transport of injured to Awadh Hospital is completely blank and the questions were sidetracked by the witness in oblivion. Failure of Investigating Officer to collect any information from densely populated neighborhood was a clear abuse of investigation once he acted so promptly as is evident from the record. The credibility of such a testimony by any stretch of imagination does not satisfy the standard of beyond reasonable doubt unless the material gaps were filled by the investigation. The case of the prosecution had no legs to stand irrespective of the fact how strong the corroborative evidence collected by the investigation was claimed to be. Moreover, the unnamed person in the FIR could not be traced at all.

49. The trial court while dealing with the evidence of PW-1, has drawn overreaching conclusions both on the aspect of arrival of the deceased at the place of occurrence and her transport as injured to Awadh Hospital. The conclusions drawn by the trial court on these two vital facts for want of a definite stand of the witness (PW-1) belie his residual testimony. Thus, the judgement impugned heavily relying upon the direct evidence of PW-1 is erroneous, perverse and shocking to the conscious of justice. A witness whose testimony is tainted must be visited with a consequence but the issue is left open in an appropriate case.

50. Having had the privilege of going through the judgement authored by my esteemed brother, Manish Kumar, J. I fully concur with the reasoning, position of law and the conclusions drawn. The testimony of PW-1 being the main witness was peculiar hence deemed proper to be dealt with in the light of what has been recorded above.

51. For the reasons given and discussions held in the judgment as above, we hold that the prosecution case is not proved and the conviction of the appellants and the sentence awarded by the trial court is not sustainable.

52. The appeals are thus, ***allowed*** and the judgment and order dated 23.04.2008 sentencing and convicting the appellants i.e. Vishal Gupta and Alok Gupta under Sections 302 read with Section 120-B IPC is hereby set aside. The appellants, who are in jail shall be released and set free forthwith, if not wanted in any other case.

53. A copy of this judgment shall be kept in the record of Criminal Appeal No. 1479 of 2008 as well as in Criminal Revision No. 294 of 2008.

(2021)12ILR A916
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.11.2021

BEFORE

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

Criminal Appeal No. 1706 of 2004

Ram Bali & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri H.N. Singh, Sri Arvind Srivastava, Sri B. Narayan Singh, Sri Rajiv Lochan Shukla, Sri Rishabh Kumar, Sri Manish Dwivedi, Sri Anil Kumar Pandey

Counsel for the Respondent:
Govt. Advocate, Sri Nagesh Kumar, Sri Pandey Balkrishna, Sri S.C. Pandey

Probability of FIR being ante-timed cannot be ruled out-no forensic report to confirm that the weapon was used in causing injury-doctor's version about the

fatality of injury is not based on any supporting material.

Appeal allowed. (E-9)

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

(1) Heard Sri Raijv Lochan Shukla, Sri Arvind Srivastava, learned counsel for the appellants as well as learned counsel for the informant and Sri Bhanu Prakash Singh, learned Brief Holder for the State and perused the record.

(2) By way of instant criminal appeal, challenge has been made to the authenticity and sustainability of the judgement and order dated 25.03.2004 passed by Additional Sessions Judge/F.T.C. No.-3, Mirzapur in Sessions Trial No. 224 of 1998 **(State Vs. Ram Bali and others)**, under Sections 307, 504, 506 IPC, and Sessions Trial No.396 of 1999, under Section 25 Arms Act, Police Station- Kotwali Dehat, District- Mirzapur, whereby in **Sessions Trial No.224 of 1998** the appellant- Ram Bali has been convicted and sentenced to undergo 7 years R.I. coupled with fine Rs.3000/- and the two other co- accused- appellants- Prakash Chandra and Subhash Chandra have been convicted and sentenced for offence u/s 307 read with Section 34 IPC to undergo 7 years R.I. coupled with fine Rs.3000/- and default clause stipulated additional R.I. for one year to be suffered by the concerned (defaulter) appellant's- aforesaid.

Further, in **Sessions Trial No.396 of 1999** appellant- Ram Bali who was tried alone has been convicted and sentenced to undergo two years R.I. coupled with fine Rs.1000/- and default clause stipulated four months additional imprisonment.

(3) Prosecution case as discernible from record appears to be that the informant- Servesh Kumar Mishra s/o Radhey Shyam Mishra resident of Bhueli Pandey, Police Station Kotwali Dehat, District Mirzapur lodged written report- Exhibit Ka-1 at Police Station- Kotwali Dehat around 11.20 A.M. on 28.08.1995 regarding the incident that took place at village- Bhueli Pandey around 9.30 A.M. the same day (28.8.1995) by describing that there is enmity on account of landed property between the informant's family and the accused- say- Rambali and others. On 28.08.1995 at about 9.30 A.M. Ram Bali s/o Rajroop Mishra possessing country-made gun in his hand accompanied by his two sons- Prakash Chandra Mishra and Subhash Chandra Mishra both possessing *'lathi'* and '*danda*' (stick) in their hands, arrived on the spot and insisted for raising construction (wall) over the disputed land. When they were intercepted by the uncle of informant- Bihari, they felt agitated and accused-appellant- Ram Bali with intention to kill fired with the countrymade gun on the uncle of informant- Bihari due to which he fell down on the ground and in the meanwhile, the informant- Servesh Kumar Mishra, Doodh Nath Choubey and Tikori Dubey arrived on the spot, saw the incident and intervened in the matter, when the accused abusing the informant fled away from the scene. This written report is Exhibit Ka-1.

(4) Contents of this written report were taken down in the concerned Check FIR on 28.08.1995 at 11.20 A.M. at case crime no.251 of 1995, under Sections 307, 504, 506 IPC at Police Station- Kotwali Dehat, district- Mirzapur. The copy of the Check F.I.R. is Exhibit Ka.5. Consequent upon entries so made in the Check FIR, a case was registered against the accused at aforesaid case crime number, under aforesaid sections of Indian Penal Code vide entry made in the concerned General Diary. The relevant G.D. Entry is Exhibit Ka-6.

(5) The investigation ensued and it was taken over by S.I. Ram Dhani C.W.1 on 28.08.1995. He obtained the copies of the

relevant document the written report, check F.I.R. etc. made relevant entries in the case diary arrived on the spot inspected the spot and prepared the site plan, which is Exhibit Ka-2.

(6) The injured- Bihari s/o Jag Mohan aged about 42 years resident of Bhuli Pandey, Police Station Kotwali Dehat, District- Mirzapur was brought by Constable Shambhu Nath Yadav at District Hospital, Mirzapur on 28.8.1995 and injured- Bihari was medically examined at 12.00 noon. The following injuries have been noted by Dr. I.N. Tiwari C.W.2 at the time of medical examination on the person of injured Bihari.

(1) Firearm injury 0.3 cm x 0.2 cm wound of entry and blackening around the wound in area of 0.4 cm x 0.3 cm with contused swelling in area of 3.5 cm x 2 cm around the wound, situated on left side of forehead 1 cm above the outer part of left eyebrow, serous oozing present, K.U.O., advised X- ray skull

(2) Abrasion 0.4 cm x0.4 cm on right side of chest 2 cm medial to right nipple.

(3) Abrasion 0.4 cm x0.2 cm on dorsal aspect of left thumb 4 cm proximal to tip of thumb.

In the opinion of Doctor all injuries were fresh in duration. Injury no.1 was kept under observation. Advised X-ray skull and injury nos.2 and 3 were stated to be simple in nature caused by friction, whereas injury no.1 was opined to have been caused by firearm and referred to surgeon for expert opinion. This injury report is Exhibit Ka-11.

(7) During the course of investigation on 29.8.1995 at 13.30 hours accused- appellant- Ram Bali was arrested and got recovered the country-made gun from his house. The Investigating Officer prepared the memo of arrest and recovery- Exhibit Ka-7- and lodged report under Arms Act against the accused Ram Bali. Consequently, on the basis of aforesaid memo of arrest and recovery, a case was registered at Police Station- Kotwali Dehat at Case Crime No.254 of 1995, under Section 25 Arms Act on 29.8.1995 at 13.30 hours. Consequently, vide relevant GD entry of the above date, case was also registered under aforesaid Section of Arms Act. The relevant General Diary entry is Exhibit Ka-10.

(8) After completing the investigation, charge-sheet was filed against the accused-appellants by the Investigating Officer on 3.10.1995 under Sections 307, 504, 506 IPC, Exhibit Ka-4. This witness has also proved the Check FIR, Exhibit Ka-5 and has also proved the relevant entries made in the concerned General Diary on 28.8.1995 and has proved copy of General Diary as Exhibit Ka-6. He prepared the site plan of the place of recovery of country-made gun, pertaining to case crime no.254 of 1995, under Section 25 Arms Act which is Exhibit Ka-8 and proved also on the basis of recovery of country-made gun, fact that report was lodged under Arms Act at aforesaid case crime no.254 of 1995 and the relevant check FIR is Exhibit Ka-9. He also has proved the relevant General Diary entry, whereby the case was registered under 25 Arms Act as Exhibit Ka-10. He has also proved the country-made gun as material Exhibit-1.

(9) It is to be clarified that as per the record available and the testimony of doctor witness C.W.2 Dr. I.N. Tiwari, he has proved the medical examination report as Exhibit Ka-11.

(10) Perusal of the record and the testimony on record further reveal that the letter dated 28.8.1995 for conducting medical examination of the injured addressed to Medical Officer Incharge Sadar Hospital, district Mirzapur was inadvertently misspelled as Exhibit Ka-11 (due to clerical error), whereas for the purpose of convenience the Exhibit number of the aforesaid letter should be

anything than 11-A now for sake of convenience the same is re-numbered as Exhibit 11-A and the same shall be referred as such from hence onward as and when so required (hereinafter referred to as paper no. Exhibit no.11-A).

(11) Constable Diwakar Rai C.W.3 has proved the death of the Investigating Officer- D.N. Tiwari who conducted investigation in case crime no.254 of 1995, under Section 25 Arms Act, accordingly, he has proved the charge-sheet filed by the aforesaid Investigating Officer in the aforesaid case.

(12) Similarly, sanction for prosecution was also obtained by the Investigating Officer from the District Magistrate, Mirzapur which is dated 12th October, 1995 and the same has been proved by Constable Diwaker Rai C.W.3 as Exhibit Ka-13.

Both the cases at case crime numbers 251 of 1995 and 254 of 1995, under Sections 307, 504, 506 IPC and u/s 25 Arms Act were consolidated and tried by the Sessions Judge together.

After hearing the prosecution and the defence charges under Sections 307, 504 and 506 IPC were framed against the accused-appellants, whereas charge under Section 25 Arms Act was framed against the accused-Rambali.

(13) Noticeable that in this case simplicitor charge u/s 307 IPC has been framed against the accused- appellant Rambali, whereas charge under Section 307 IPC read with Section 34 IPC has been framed against other two co- accused Prakash Chandra and Subhash Chandra. To prove its case, prosecution examined as many as six witnesses. Brief sketch of the prosecution witnesses is ut-infra:-

Bihari P.W.1 is the injured himself and has proved the written report. Sarvesh Kumar Mishra P.W.2 is eye-witness of the occurrence. Tikori P.W.3 and Doodh Nath P.W.4 are the witness of recovery of country-made gun, but they have not supported the prosecution case and have turned hostile.

The Investigating Officer- S.I. Ram Dhani C.W.1 has proved the investigation pertaining to case crime no.251 of 1995 as aforesaid whereas Dr. I.N. Tiwari C.W.2 has proved the medical examination report as Exhibit ka-11 and lastly, Constable Diwaker Rai C.W.3 has proved various papers pertaining to case crime number 254 of 1995, under Section 25 Arms Act.

(14) After closure of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C., wherein the accused-appellants denied their involvement and claimed to have been falsely implicated, whereas, Prakash Chandra Mishra has taken plea of alibi and stated that he was not present on the spot at the time of the occurrence and accused-appellant- Rambali has stated that some altercation took place on account of point of construction being raised and both the sides pelted stone upon each other and someone suddenly fired from amongst the crowd. The case has been lodged under mis- impression. Report of medical examination was availed and thereafter in collusion with the police, the entire proceeding done was ante-timed.

The accused did not lead any evidence on their part, consequently, the matter was heard by the trial Judge and after considering the merit recorded conviction and passed sentence as aforesaid.

(15) Consequently this appeal.

(16) Contention in brief is that in this case there was no occasion to commit the crime in question like the present one as alleged by the prosecution side. It so happened that out of

animosity, a false case was set up for the specific reason that a number of persons had collected on the spot during the course of altercation between the appellant- Ram Bali and the injured Bihari and both the sides indulged in brick- batting and pelted stones on each other and clamorous circumstances creating confusion on the spot was developed automatically and someone mischievously fired from country-made gun which caused injury on the person of the victim- Bihari.

(17) The two sons of Ram Bali- Prakash Chandra and Subhash Chandra- have been wrongly attributed as playing role of assault by *lathi* and *danda* by the prosecution. They were not present on the spot. They never possessed *lathi* nor present on the spot nor participated in the commission of the offence nor did they cause any *lathi* blow to the victim- Bihari.

The witnesses of fact are highly interested witnesses. One independent witness is said to be Tikori- P.W.3 but he has not supported the prosecution case and has refused to acknowledge fact that the offence was committed by the appellants. This way, things have been manipulated on account of enmity with the informant side and the accused side due to disputed piece of land.

(18) The incident is not admitted in the way and in the manner alleged by the prosecution but it is denied that it was so caused by the appellants. The police planted false recovery, which carries no weight for several reasons.

The copy of the memo of arrest and the recovery of accused Rambali were not given to the appellant- Ram Bali and there is no independent witness to the fact of recovery of country-made gun from inside the house of the appellant- Ram Bali. That being the case, it is noticeable that two supporting witnesses of fact of recovery of the country-made gun have not supported the factum of recovery being effecuated from the appellant Ram Bali. It is surprising that straight-way the inhabitants residing in the neighbourhood of the Ram Bali had also arrived on the spot but they have not been made witnesses for reasons best known to the Investigating Officer S.I. Ram Dhani. The Investigating Officer could not even spell name of a single person who arrived on the spot. Infact, the entire exercise has been done by the Investigating Officer secretly and a false recovery planted which carries no weight in the eye of law.

So far site plan is concerned, it is so vaguely prepared that it tells truth for the reason that there is no place shown from which the shot was fired and no distance shown in the map. It is not shown as to where *lathi* blow was caused by the other two accused the sons of Ram Bali- Prakash Chandra and Subhash Chandra.

(19) That being so, it is obvious that the prosecution case is full of improvement and full of embellishments. Once the site plan itself creates doubt about the spot on which the fire was opened, how can it be said that appellant- Ram Bali infact opened fire which hit above the eye- brow on the forehead of victim- Bihari. Assuming it to be that any offence was so committed, then it would be a case of sudden provocation and sudden fight on account of altercation due to dispute that arose on the point of landed property.

(20) F.I.R. is ante-timed. There is no supplementary report and X-ray report prepared, which can establish and affirm claim that the case is fit one for being considered under Section 307 IPC and in the absence of any supporting material which is admitted to the doctor witness- I.N. Tiwari- C.W.2- that he did not prepare any supplementary report nor did he come across any x- ray report, then how can it be said that statement of Dr. I.N. Tiwari C.W.2

can be read as genuine one and injury no.1 caused on the fore- head of the injured- Bihari could have been serious and fatal. Thus, the basis of grievous injury is altogether missing in this case.

(21) So far as the conviction of the two accused Prakash Chandra and Subhash Chandra is concerned, their conviction by way of application of Section 34 IPC is not sustainable in the eye of law. There is no evidence which may indicate that the aforesaid two co- accused acted with the same and identical intention to commit the crime in question and each one of the three accused shard common intention.

(22) Further, contended that the site plan is silent about the specific position of the accused as to from which place the fire was shot and the doctor witness I.N. Tiwari C.W.2 has recorded 'blackening' found in the gunshot wound- the injury no.1,- which means the fire was opened from a short range and that cannot be a distance beyond 5-6 steps from the position of the injured and the doctor has opined that the injury in the form/shape of 'blackening' in respect of injury no.1 reveals that fire might have been opened from a distance of six feet and there is nothing of the sort which may prove that any fire was opened from a distance of six feet, whereas the statement of the injured- Bihari also reflects that the fire was opened from a distance of 8-9 feet. Then, it is apparent that the distance of fire being shot as stated by the victim is in utter contrast to the medical examination report.

(23) The other two injuries have been caused by friction and they are simple in nature. Then in the absence of any supporting medico-legal paper, how can it be said that the injury no.1 was fatal in the medical examination report. There is gross contradiction in the testimony of both the witnesses of fact in particular Bihari P.W.1 and Servesh Kumar Mishra P.W.2. Bihari P.W.1 says that he went to the police station on bare foot and on way to police station someone on scooter met him and he sat on the scooter and arrived at the police station, whereas Servesh Kumar Mishra says that he had gone to the police station on bicycle. Further, as per the testimony, it is obvious that the report was scribed in- side the police station- Kotwali Dehat itself, whereas Servesh Kumar Mishra P.W.2 claims that he had scribed the report at home and went to lodge the same along with the victim to the police station.

That being so, which of the two version is the truthful version cannot be ascertained. Lastly, learned counsel contended that in this case, punishment awarded against the appellants is too harsh and is not justified under facts and circumstances of the case. The prosecution evidence is shallow and sketchy and it does not inspire confidence.

(24) Per contra, learned AGA and the learned counsel for the informant vehemently opposed the contention and have submitted that the trial court rightly evaluated and appraised the testimony on record and it properly scrutinised the same and recorded finding of conviction based on materiel on record. Some variation in the testimony of the witnesses of fact is natural and bound to occur, but minor variation in the testimony of witnesses of fact is not of a degree, which may occasion over throwing case of the prosecution. Ocular testimony of the witnesses of fact of the occurrence inspires confidence. Finding of conviction and the sentence awarded under circumstances of the case is justified. So far as the witnesses of recovery Tikori P.W.3 and Doodh Nath P.W.4 are concerned, they have been won over by the prosecution.

(25) Upon consideration of the submissions so raised and the respective claim made by both the sides, the moot point that arises for adjudication of this appeal relates to fact whether the prosecution has been successful

in establishing charges beyond shadow of reasonable doubt against the appellants?

Discussion and finding-

(26) While proceeding with the case, upon careful perusal of the record of the lower court reveals that the motive behind the crime in question has been stated to be some property dispute pertaining to abadi land and as per the contents of the first information report the incident took place at 9.30 A.M. on 28.8.1995 and the report was lodged promptly at 11.20 A.M. Same day. The report has been scribed by the informant- Servesh Kumar Mishra- and he has proved it as Exhibit Ka-1. Regarding the injuries being caused to the injured Bihari the doctor C.W.2 has opined that these injuries could have been caused on 28.08.1995 around 9.30 A.M.

(27) Before proper analysis of merit is made it would be convenient to take into account the narration contained in the written report, Exhibit Ka-1. The written report was lodged by Bihari- the injured though, it was scribed by Servesh Kumar Mishra,- the nephew of the victim Bihari, wherein allegation was made to the ambit that on 28.08.1995 around 9.30 A.M. Ram Bali- the accused appellant possessing country-made gun while his two sons possessing stick *(lathi)* arrived on the spot which is disputed land and insisted-on for raising construction over there. The injured- Bihari asked them not to do so, then he was abused by the accused- appellant Ram Bali fired with his country-made gun with intention to kill and the fire hit the injured- Bihari- who fell down on the ground. At the same time the informant and Doodh Nath Chaubey and Tikori arrived on the spot, saw the occurrence and intervened when the assailants fled away from the scene after extending threats.

(28) So far as perusal of this report is concerned, it does not entail any description that any *'lathi'* or *danda* blow was caused by the two other co-accused- Prakash Chandra and Subhash Chandra. However, in the testimony of both the witnesses of fact Bihari P.W.1- the injured and Servesh Kumar Mishra P.W.2 they have stated that it was around 9.30 A.M. in the morning on 28.8.1995 when the three accused arrived on the spot and insisted for raising construction of wall over the disputed piece of land which is *'abadi'* land adjoining to the house of the informant. On being asked not to do so, accused- appellant- Ram Bali fired upon the Bihari (injured), which fire hit on the head due to which he fell down and at that point of time accused- appellants- Prakash Chandra and Subhash Chandra caused *lathi* blow to him. Besides, they also abused him and it is claimed that P.W.2 Servesh Kumar Mishra, P.W.3 Tikori, P.W.4 Doodh Nath of the village arrived on the spot and saw the incident and intervened only then assailants made their escape good. However, so far as lodging of the FIR is concerned, the same was lodged at 11.20 hours the very same day of the occurrence i.e. 28.08.1995 at Police Station Kotwali Dehat, district Mirzapur.

(29) In that regard, bare perusal of the site plan, Exhibit ka-2, indicates that the place where the occurrence took place is marked by word 'A'- it is the place where, no particular positioning of the assailants or the victim has been specified/fixed in the site plan prepared by the Investigating Officer. It has not been mentioned as to where the accused- appellant- Ram Bali was standing and from which side, he fired upon the injured- Bihari. All the relevant details as where required to have been included in the site plan are missing. On the very face, it only says about the place of occurrence marked by word 'A' as the place where the occurrence took place. No other relevant detail.

(30) Position of the other two co- accused- Subhash Chandra and Prakash Chandra have also not been shown in the entire map. This map was prepared at the strength of Servesh Kumar Mishra P.W.2. This by itself creates a doubt whether the scribe- Servesh Kumar Mishra in fact saw the occurrence or not? And why did not he tell the police about the actual fact, regarding particular position of the assailants and the injured.

(31) In so far as testimony of Servesh Kumar Mishra is concerned, he himself says that he had shown the place of occurrence to *daroga ji* and *daroga ji* did not ask anything more. He has not stated that he had specified position of each assailant on the spot at the relevant point of time. It is quite interesting to note that this witness says that he wrote the written report at his home whereas P.W.1 Bihari says that the report was written at the police station after the occurrence was narrated to *daroga ji* and *daroga ji* asked him to write the report, whereupon, the report was written in the police station- Kotwali Dehat district- Mirazapur itself.

These are the slight deviations that cannot be said hit at the route of the prosecution case but in so far as the version of the prosecution witness P.W.2 Servesh Kumar Mishra is concerned then he has categorically stated (at page no.2 of his testimony in his cross- examination) that he included all details in his report (regarding the assault being caused by *lathi*), whereas the report is silent about the assault being caused to the victim by the other co- accused by using *lathi* and *danda*. Now, P.W.2 Servesh Kumar Mishra being nephew of the victim corroboration of his testimony should supported by testimony of other witnesses, whereupon, it is noticeable that the statement of Tikori the witness named in the FIR itself is reflective of fact that Tikori was not present on the spot on 28.8.1995 around 9.30 A.M. at village- Bhueli Pandey within Police Station- Kotwali Dehat, District Mirzapur.

(32) That being so, the very authenticity and the veracity of the version of P.W.2 Servesh Kumar Mishra becomes doubtful. As such the scrutiny of the testimony of the eye-witnesses and in particularly that of the victim-Bihari is required to be properly done in this case. If the description of occurrence appearing in the testimony of P.W.1 Bihari is seen then obviously regarding the incident it is stated that the appellants- Prakash Chandra, Subhash Chandra and Ram Bali arrived on the spot- the abadi land- adjoining to the western side of the house of this witness and tried to raise a wall on that land when asked by Bihari, they refused, instead became angry and the accused-appellant Ram Bali with intention to kill fired with his country-made gun, which hit on his head and he fell down. While he fell down appellants- Prakash Chandra and Subhash Chandra dealt with *lathi* blow on him besides abusing and threatening him. When alarm was raised, victim's nephew Servesh Kumar Mishra P.W.2, Tikori P.W.3, Doodh Nath P.W.4 and a number of villagers arrived on the spot, when they intervened due to which the victim could be saved.

(33) Now, in so far this ocular version of the occurrence is concerned, injured- Bihari P.W.1 sustained gunshot wound fired by appellant- Ram Bali. At this stage, it would be appropriate to have a glance and scrutiny of the injury report of the injured- Bihari, which is Exhibit Ka-11 on the record and the same has been proved by Dr. I.N. Tiwari. He has stated that he conducted medical examination of Bihari on 28.8.1995 at 12.00 noon, wherein he found the following injuries;

Injury no.1 is stated to be firearm injury 0.3 cm x 0.2 cm wound of entry with

blackening around the wound in an area of 0.4 cm x 0.3 cm with contused swelling in an area of 3.5 cm x 2.00 cm around the wound, situated at left side of forehead. 1 cm above the outer part of left eyebrow, serous oozing present. Kept under observation and advised X-ray skull. Apart from it the doctor witness also noticed the two injuries in the shape of abrasion as follows;

Abrasion 0.4 cm x 0.4 cm on right side of chest 2 cm medial to right nipple.

Abrasion 0.4 cm x 0.2 cm on dorsal aspect of left thumb 4 cm proximal to tip of thumb.

In the opinion of doctor all injuries were fresh in duration. Injury no.1 was kept under observation and advised X-ray skull, whereas injury nos.2 and 3 were stated to be simple in nature and caused by friction whereas it was also opined that injury no.1 was caused by firearm and the case was referred to surgeon for expert opinion.

(34) Now, in so far as the description of occurrence as stated by Bihari is concerned, in his cross- examination, he has stated that appellants- Prakash Chandra and Subhash Chandra- the two accused gave *lathi* blow at full stream while he fell down on the ground. However, he has stated that only one *lathi* blow on his hand was given, therefore, there is no specification as to whose assault infact hit the victim when it was given by the two accused person- Praksh Chandra and Subhash Chandra, and this version regarding assault by *lathi* also does not figure in his statement under Section 161 Cr.P.C. when this witness was confronted with the situation of causing *lathi* blow but no statement recorded under Section 161 Cr.P.C. regarding the same he drew blank and stated that he cannot assign any reason as to why *daroga ji* did not record this fact.

(35) Assuming it to be that it so happened then the testimony of another eyewitness- Servesh Kumar Mishra P.W.2 another eye-witness is also relevant. Servesh Kumar Mishra P.W.2 has not stated in his entire examination-in-chief that any *lathi* blow was caused by the two accused- Prakash Chandra and Subhash Chandra. Further, in his cross- examination the testimony has come-forth to the effect that after the occurrence he took the injured straight to the police station and further he scribed the report at his home whereas, in that regard the testimony of Bihari P.W.1 on internal page 3 of his cross- examination reveals that prior to the lodging of the report, the injured narrated the incident to the police at the police station then police personnel asked him for giving written report then Servesh Kumar Mishra P.W.2 scribed the report in the presence of the police at the police station and handed it over to them. The testimony of Servesh Kumar Mishra P.W.2 is absolutely silent about any *lathi* blow being caused. That being so, as a measure of caution in the absence of any independent corroboration to the factum of assault being caused by the two accused- Prakash Chandra and Subhash Chandra also it would not be safer to place reliance on his testimony. However, no independent witness has been produced to consider the ocular version of the occurrence.

(36) Now, in so far as causing firearm wound on injured- Bihari is concerned, contention has been made to the magnitude that there was blackening around the wound and that means the fire was shot from a close range and that cannot be beyond 5 to 6 feet from the injured and the doctor witness Dr. I.N. Tiwari C.W.2 in his cross- examination has categorically stated that since the blackening was found in the wound, therefore, the shot must have been fired from a distance of 6 feet. Further, he has stated in his cross- examination that so far as injury nos.2 and 3 are concerned that may be caused by friction due to fall on the ground but these injuries can not be caused by *lathi* blow.

(37) While scrutinizing aforesaid specific testimony regarding the fact of manner and style

of assault being caused by *lathi* by the two accused-appellants, a serious doubt is created on fact of participation of the two appellants and in the occurrence. Thus their participation in the occurrence becomes highly improbable. Assuming it to be they were present even then they would have been passive on the spot because there is nothing in the testimony of Bihari P.W.1 and Servesh Kumar Mishra P.W.2 which may attribute any other overt act to the two appellants- Prakash Chandra and Subhash Chandra except the role of causing *lathi* blow to the injured- Bihari.

(38) Now, in so far as the fire wound is concerned, the fire must have been shot from within a distance of 6 feet, whereas the testimony of injured- Bihari in his cross-examination is specific regarding the distance from which the fire was opened and that is 8 to 9 feet. Now, the weapon used is country-made gun is concerned, it is not any specialized weapon and if such a weapon is used from a distance of 9 feet, certainly it would not cause any blackening like the present one caused on Bihari as injury no.1.

In the wake of aforesaid specific testimony and the testimony of the the Doctor I.N. Tiwari C.W.2, obviously the argument floated by the learned counsel for the appellants carry force that it so happened that some altercation took place, as per the version of the prosecution witnesses two to four minutes of altercation preceded the occurrence and it is also there in the FIR that a number of persons arrived on the spot and on alarm being raised by Bihari- the injured, stone pelting took place on the spot between the informant side and the accused side and in that regard perusal of the site plan itself indicates presence of brick pieces/stone pieces at the place of occurrence. Even in the testimony of prosecution witnesses of fact, this factual aspect has been confirmed that a number of brick pieces were also lying at the place of occurrence. That being so, possibility of pelting stones by both the sides cannot be ruled out. It is also contended by the appellants that someone from inside the crowd fire opened which hit the injured- Bihari.

Now, the version of doctor, vis a vis, the injury caused and the version of gunshot wound being caused as given by Bihari show that the shot must have been fired by someone else rather than the present accused- appellant- Ram Bali, because the distance of Ram Bali at that point of time when he opened fire must be within 6 feet reach to the victim, but this reach cannot be extended upto 8 or 9 feet otherwise there would be no blackening around the wound (pertaining to injury no.1). None other than the injured himself says that fire was shot from a distance of 8 to 9 feet.

(39) That way bare perusal of the site plan of this occurrence Exhibit ka-2 as has been discussed herein above appears to relevant for consideration but at the cost of repetition it can be summed up that in the entire map no place shown as the very place where the shot hit (the injured) and from which side it was opened and there is no locations fixed, no specific point shown as to whose either assailant or the victim was standing on a particular place. Even Servesh Kumar Mishra P.W.2 who has specifically stated that he visited the spot with the *daroga ji* around 2.00 P.M. had shown the spot to *daroga ji* and *daroga ji* did not find any blood on the spot, although, the victim says that blood oozed out from his wound.

(40) Now, in so far as the point of recovery of the country-made gun from the accused Ram Bali is concerned, it is stated that this was the country-made gun used for commission of the offence. But there is no forensic report obtained by the Investigating Officer in this case which may confirm and establish fact that this weapon was used in causing injury (no.1) to the victim-Bihari.

Bare perusal of the arrest and recovery memo Exhibit ka-7 indicates that recovery was effectuated from inside the house of Ram Bali, however, the factum of recovery has not been supported by any worthy witness and in that regard no witness confirming to the fact of recovery has been produced by the prosecution, therefore, it is hard to believe the bald statement of the police officials regarding the recovery of country-made gun from inside the house. If the recovery was so made then how and why the weapon which was allegedly used in the occurrence was not sent for forensic examination.

The recovery map is Exhibit ka-8 and in the absence of any corroboration by any witness of fact of recovery it is hard to believe it to be so in reality. This recovery was effectuated on 29.8.1995. Thus in the absence of any witness to support the factum of recovery it would not be in the interest of justice, as under prevailing circumstances to accept the police version that country-made gun was infact recovered from the possession of Ram Bali the accused and it was used in the commission of the offence. The two witnesses Tikori P.W.3 and Doodh Nath P.W.4 have not supported the incident, though, they have been named as the person who arrived on the spot when the alarm was raised by the injured- Bihari. There is no independent corroboration of the fact of occurrence. In view of gross contradiction on material fact as to where the report was written; and the testimony of Servesh Kumar Mishra P.W.2 is silent about any *lathi* blow being caused by the accused- Subhash Chandra and Prakash Chandra, and the nature of injury caused hollowness of the prosecution version is exposed.

(41) These are the vital aspects of this case which escaped attention of the trial Judge. Things have been tried to be explained by way of imagination rather than the evidence on record and the attendant facts and circumstances of this case. It can be added here that the doctor witness has categorically stated that he did not prepare any supplementary report of injury no.1 nor is there any paper before him, nor he came across any X-ray examination plate. That being so, the nature of the injuries caused shall remain be confined to the state of simple in nature. In view of above, injury no.1 becomes doubtful to have been caused infact by Ram Bali in the manner and the style alleged by the prosecution for specific reason that there being blackening around the wound the distance given by the injured does not match the medical report. The distance from which the fire was opened also becomes question mark.

Now, the version of the doctor that injury no.1 could have been fatal cannot be said to be based upon any supporting material or worthy paper and that being so, the statement of the doctor regarding nature of injury no.1 being grievous is brazen and bald one.

(42) It is noticeable that on the bare perusal of the letter dated 28.08.1995 written at the police station Kanpur Dehat, Mirzapur addressed to the M.O. Incharge Sadar Hospital, Mirzapur for medical examination of the injured (Bihari) does not bear any case crime number nor any section of Indian Penal Code and in the wake of aforesaid fact situation specific argument has been made that infact after medical examination there was deliberation with the police the F.I.R. was lodged subsequently.

(43) That being a fact situation has not been properly explained by the prosecution as to why the case crime number was not mentioned on this letter. This letter which appears on the back of the injury report of Bihari- the injured,- is Exhibit Ka-11 and the letter has been renumbered as Exhibit Ka 11-A. That way possibility of the FIR being ante-timed cannot be ruled out. Positively in the face of the testimony of Bihari himself in his cross- examination that

prior to the lodging of the report, the entire incident was narrated to the police at the police station itself and then only the report was dictated to be written at the police station itself, whereas this aspect has been tried to be twisted and avoided by Servesh Kumar Mishra P.W.2 the scribe of Exhibit Ka-1 that he wrote this report at the police station itself.

Therefore, the argument to the ambit that possibility of FIR being ante-timed cannot be ruled out carries weight and the same is sustained.

(44) These are the specific aspects of this case and these specific aspects ought to have been appreciated properly, vis-a-vis, the evidence and circumstances of this case by the trial court which has not been done by it. Obviously, enmity was existing between both the sides and some altercation is stated to have taken place which has been trid to be coloured differently by the prosecution witnesses. Here the specific corroboration of testimony of the two prosecution witnesses of fact is woefully lacking, therefore, the contention raised by the learned counsel for the appellants appear to be substantial and carry weight and there is every reason to accept the same and to record conclusion that in so far as the charge under Section 307 IPC against the accused- appellant- Ram Bali is concerned, it is not sustainable in the eye of law.

Likewise, participation of the other two co- accused- the two sons of Ram Bali- Prakash Chandra and Subhash Chandra- also becomes highly improbable in the occurrence. Consequently, the charges framed against them u/s 307/34 IPC is also not proved.

(45) In view of aforesaid foregoing reasons and discussion, obviously, the finding of conviction recorded by the trial court becomes erroneous and illegal and the judgement and order of conviction dated 25.03.2004 passed by Additional Sessions Judge/FTC No.-3, Mirzapur in Sessions Trial No. 224 of 1998 **(State Vs. Ram Bali and others)**, under Sections 307, 504, 506 IPC and Sessions Trial No.396 of 1999 **(State vs. Ram Bali)**, under Section 25 Arms Act, Police Station- Kotwali Dehat, District- Mirzapur is hereby set aside.

Appeal is **allowed.**

Appellants are on bail, they need not surrender. Their bail bonds are cancelled and their sureties are discharged subject to their complying with Section 437-A Cr.P.C.

Let a copy of this order be certified to the concerned trial court for its intimation and follow up action.

(2021)12ILR A927
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.10.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 1943 of 2016

Amit Kumar **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Sri Dharmendra Singhal, Sri Apul Misra, Sri Dinesh Kumar Yadav, Sri Gulab Chandra, Sri Raghuvansh Misra, Sri Manish Tripathi, Sri Rajiv Lochan Shukla

Counsel for the Respondent:
A.G.A.

Indian Evidence Act, 1872 - Section 113 - mandatory for prosecution to show-decease subjected to cruelty soon before death-prosecution could not prove the

death of deceased to be otherwise than normal circumstances-conviction wrong.

Appeal allowed. (E-9)

List of Cases cited:

1. G.Vs Siddaramesh Vs St. of Karn. (2010) 3 SCC 152

2. Devendra Vs St. of Har. (2010) 10 SCC 763

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred against the judgement and order dated 06.04.2016 (State Vs. Amit Kumar and others) arising out of Case Crime No.655A of 2012, under Sections 498A, 304 B of IPC and Section 4 Dowry Prohibition Act, 1961, Police Station- Khurja Nagar, District- Bulandshahar, by which learned trial court convicted only appellant- Amit and sentenced him for two years under Section 498A IPC with fine of Rs.5,000/-, ten years under Section 304 B and one year imprisonment under Section 4 Dowry Prohibition Act with fine of Rs.2,000/-.

2. Brief facts of this case are that Ravi, the informant, is the brother of the deceased. He moved an application under Section 156(3) Cr.P.C. in the Court of Magistrate with the averment that her sister Pooja was married to Amit s/o Bharat Singh on 24.04.2012, who is resident of village Akbarpur, Police Station- Sasani, District- Hathras and gave the dowry according to their financial capacity. A Pulsar motorcycle was also given in the marriage but her in-laws including Amit, his father Bharat Singh, his mother Sharada, his uncle Charan Singh, his brother Manoj and one Pinki were not happy with the dowry given in the marriage and they also started demand of a car as additional dowry. They used to torture Pooja for not fulfilment of the demand of additional dowry. Pooja used to tell the fact regarding the demand of additional dowry and torture for not fulfilling the demand. Parental family members of Pooja tried to make them understand but of no avail. On 13.08.2012 at about 6:00 pm Pooja made a phone call to her brother Ajay and said that Amit and her in-laws were demanding a car and they took her by force to village Akbarpur from Delhi and any untoward incident might take place. The above mentioned persons in connivance with unknown driver of vehicle No. UP-78 BT 0879 have murdered Pooja at about 10:00 pm on 13.08.2012 and have lodged a fake first information report of accident in PS- Khurja Nagar. On coming to know about this incident, the informant went to PS- Khurja, District- Bulandshahr and tried to give a written report but the police refused to receive the report. It has come to the knowledge of the informant that in the above accident neither Amit has sustained any injury nor his motorcycle was damaged. Therefore, they have all killed Pooja by hatching a conspiracy with unknown truck driver.

3. Peculiar facts of this case are that before lodging the aforesaid FIR through application 156(3) Cr.P.C., initially first information report was lodged by Charan Singh, who is uncle of appellant-Amit, having Case Crime No.655 of 2012, under Section 279, 304A and 427 IPC at Police Station Khurja, District- Bulandshahar against the truck driver of truck No.UP-78 BT 0879 and after investigation, charge sheet was prepared against the aforesaid truck driver Somnath Vishwakarma, under Section 279, 304A and 427 IPC but this charge sheet was cancelled by Senior Superintendent of Police, before submission in court and further another charge sheet was prepared and submitted in the concerned court against Amit, Bharat Singh, Smt. Sharada, Charan Singh, Manoj and Pinki, under Section 498A, 304B IPC and 3/4 Dowry Prohibition Act, 1961. The above charge sheets were merged and taken together by the learned Magistrate.

4. Charges were framed against the aforesaid accused persons, under Sections 498A

and 304B IPC and under Section 3 of Dowry Prohibtion Act, 1961. After completion of trial, learned trial court convicted and sentenced only appellant Amit under Section 498A, 304B IPC and Section 4 of Dowry Prohibition Act and acquitted rest of the accused persons and hence this appeal.

5. Heard Shri Rajiv Lochan Shukla, learned counsel for the appellant and Shri Arun Singh, learned AGA for the State.

6. Learned counsel for the appellant submitted that first information report was lodged by Charan Singh regarding the accident of appellant with truck No.UP 78 BT 0879. It is submitted that after completion of the investigation it was found by the investigating officer that it was a case of accident simpliciter and charge sheet under Section 304A IPC was prepared, which was cancelled by the Senior Supreintendent of Police. Learned counsel for the appellant argued that it was accidental death and it had nothing to do with any demand of dowry and torture for non-fulfillment of demand of additional dowry.

7. Learned counsel for the appellant next submitted that it was a case of prosecution that appellant hatched a conspiracy with the truck driver and got his wife Pooja murdered in connivance thereof. But, truck driver was not prosecuted and no charge sheet was submitted containing offence under Section 120B of IPC. No trial of any accused persons was conducted for the offence of conspiracy. It is also submitted that it is intertesting that learned trial court acquitted all the accused persons except appellant and no cross appeal against acquittal is filed by prosecution, it means that acquittal of accused persons has become final. In such a situation, when there was no trial regarding the offence of conspiracy and except appellant all other accused persons have been acquitted by the trial court then, the prosecution story of conspiracy in connivance with truck driver itself becomes false.

8. Learned counsel for the appellant argued that Dr. Preetam Singh conducted the postmortem of deceased Pooja and prepared postmortem report. He was examined as PW-4. Learned counsel for the appellant submitted that in fact at the place of occurrence, Amit was driving the motorcycle and Pooja was sitting on back seat and a truck coming from opposite side crossed the motorcycle from very thin distance and due to air pressure Pooja fell down and sustained injury on her head. Learned counsel for the appellant argued that this suggestion was put forth before Dr. Preetam Singh (PW4) in his cross-examination and he agreed to this suggestion. Learned counsel submitted that doctor, who is an expert in medical science, has opined that such type of fatal injury can be sustained by a lady if she is sitting on the back seat of the motorcycle while a truck crosses the motorcycle. Since, the doctor has agreed to this suggestion, the appellant has discharged its burden of rebutting the presumption raised against appellant under Section 113B of Indian Evidence Act. Learned counsel for the appellant also submitted that Senior Superintendent of Police, who cancelled the charge sheet of the accident, namely, Gulab Singh is produced by appellant in his defence as DW2. His statement also shows that charge sheet of accident was cancelled by him on the report of investigating officer of Case Crime No.655A of 2012. But, on the fact it is proved that investigating officer of Case Crime No.655 of 2012 found no case of murder or conspiracy in this case.

9. It is also next submitted that cremation of the deceased took place with the consent of her family members and dead body was given in *Surpurdagi* of her family members.

10. It is argued by learned counsel for the appellant that PW1- Ravi and PW2- Ajay both

are brothers of the deceased. PW1 is informant. It is said by both the witnesses that Pooja made a phone call at 6:00 pm to her brother Ajay from Delhi that so-called accused persons were demanding car and beating her and taking her from Delhi to Village Akbarpur with the intention of killing her. But, in cross-examination witnesses have not supported their version of examination-in-chief. It is said by theses witnesses that Pooja told that five other accused persons were coming on two motorcycle behind them. But they also have stated that Pooja made this phone call from her house in Delhi. PW1 and PW2 have made contrary statements. PW1-informant Ravi has said that phone call was made by Pooja on phone of Ajay who had left his phone at home and he informed him in night when he returned to the home. In the meantime, he did nothing. It is also evident that four brothers of Pooja used to reside in Delhi. They were also not informed by PW1-Ravi regarding phone call who could be the nearest persons to Pooja. This conduct of witnesses is quite unnatural.

11. Learned counsel for the appellant next argued that there was no question of demanding car as additional dowry because it is admitted by PW1 and PW2 that the father of the appellant was hawker on a gas agency and appellant-Amit himself used to work on a gas agency for booking and supplying the gas cylinders. It is also in the evidence that appellant used to get Rs.5,000/- per month as salary from the gas agency. Therefore, appellant and his family were not of such a good financial condition that they could even think of demanding the car in additional dowry.

12. Learned counsel for the appellant also submitted that there is no evidence on record that soon before death of the deceased she was subjected to any cruelty or harassment in connection with demand of additional dowry. No call-detail is produced by the prosecution to substantiate the factum of phone call made by Pooja at 6:00 pm on 13.08.2012. It is also pointed out that PW2- Ajay has stated in his statement that he was making statement in court for the very first time, therefore, he has denied his statement under Section 161 Cr.P.C. also PW1 and 2 are wholly unreliable witnesses. Appellant is languishing in jail for the past five years without any evidence on record. Learned trial court has wrongly convicted and sentenced the appellant. Hence, appeal may be allowed.

13. Learned AGA opposed the arguments made on behalf of the appellant and submitted that ante mortem injury in postmortem indicates that such type of injury cannot be sustained by falling from motorcycle only and as far as the first FIR is concerned, it was lodged by co-accused Charan Singh but he was not the eye-witness of so-called accident as alleged by the defence. It is also submitted by learned AGA that it is mentioned in inquest report that inquest proceedings took place in district hospital Khurja. Learned AGA submitted that the death of deceased Pooja cannot be accidental death. PW1 and PW2 have fully supported the prosecution case. When this case was not found of accident, only then the investigating officer of Case Crime No.655A of 2012 sent a report to SSP, Bulandshahr, and after being satisfied with the report of I.O., the S.S.P. cancelled the charge sheet of Case Crime No.655 of 2012. Demand of additional dowry, harassment and torture of Pooja for non-fulfillment of above said demand are fully proved by statements of PW1 and PW2 and since Pooja made a phone call on the same day of her death at about 6:00 pm, therefore, it is also proved that soon before her death, she was subjected to cruelty in connection with demand of additional dowry. Therefore, learned trial court rightly convicted the appellant and sentenced him. Hence, appeal may be dismissed.

14. In this case, two FIRs were lodged. One by Charan Singh, Case Crime No.655 of

2012 pertaining to the fact of accident and second is Case Crime No.655A of 2012 by Ravi, brother of deceased pertaining to accidental murder of Pooja. But, prosecution has finally set up a case as per the first information report lodged by Ravi through application under Section 156(3) Cr.P.C. On the basis this FIR, charge sheet was submitted under Section 498A, 304B IPC and Section 3/4 Dowry Prohibition Act and appellant was put on trial. Trial court convicted and sentenced the appellant as aforesaid under Section 304B IPC, trial court drew the presumption of Section 113B of Indian Evidence Act which is quoted here-in-below for ready reference:-

"Section 113B in The Indian Evidence Act, 1872

113B. Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860)."

15. Hence to draw the legal presumption as envisaged by Section 113 of Indian Evidence Act, it is mandatory for prosecution to show that "soon before death," deceased was subjected to cruelty or harassment for or in connection with demand of dowry.

16. In **G.V. Siddaramesh Vs. State of Karnataka (2010) 3 SCC 152**, it is held by the Hon'ble Apex Court that there must be material to show that soon before the death of woman, such woman was subjected to cruelty or harassment for or in connection with demand of dowry, then only a presumption can be drawn that a person has committed the dowry death of a woman.

17. In **Devendra Vs. State of Haryana (2010) 10 SCC 763** also, the Hon'ble Apex Court has held that Section 113B read with the Act (Indian Evidence Act) would mean that unless and until proved otherwise, the court shall hold that a person has caused dowry death of a woman if it is established before the court that soon before her death such woman has been by such person subjected to cruelty or harassment for or in connection with any demand of dowry.

18. To show that soon before her death, deceased Pooja was subjected to cruelty or harassment for or in connection with demand of dowry, the prosecution has produced PW1- Ravi and PW2- Ajay. Both are brothers of the deceased and it is said by them that on the fateful day, i.e., 13.08.2012 at 6:00 pm, a phone call was made by Pooja on the phone of PW2-Ajay, who had left the phone at home and this phone call was received by informant PW1-Ravi in which Pooja told him that appellant and other co-accused persons were demanding car and beating her and taking her to village Akbarpur from Delhi with intention to kill her. PW1 Ravi has stated in his examination-in-chief that accused persons have killed his sister Pooja with the conspiracy for not meeting out the demand of car as additional dowry and for hiding their crime the murder of Pooja has been shown as an accident. But it is not stated by PW1 how Pooja was killed if it was not an accident. It was burden on prosecution witnesses to show how otherwise the death was caused if accident did not take place because prosecution witnesses PW1 and PW2 have categorically said in their statements that neither the appellant got any injury in accident nor the motorcycle had got any scratch in the accident.

19. In his application under Section 156(3) Cr.P.C. informant Ravi has stated that:-

"प्रार्थी द्वारा उपरोक्त घटना के बारे में जानकारी करने पर पता चला कि उपरोक्त एक्सीडेंट में अभियुक्त को कोई चोट किसी प्रकार की नहीं है और न ही मोटरसाईकिल कहीं से क्षतिग्रस्त हुई है। केवल अमित के पीछे बैठी पूजा की एक्सीडेंट में मृत्यु हुई है। उपरोक्त घटना एक सोची समझी योजना के तहत उपरोक्त मुल्जिमानों ने अज्ञात ट्रक ड्राईवर के साथ मिलकर कारित की है।"

20. In this way at one hand, the prosecution has tried to establish the case that death of Pooja was result of the accident in connivance and conspiracy of appellant with truck driver, but on the other hand, prosecution has also taken the version that in so-called accident neither appellant got sustained any injury nor motorcycle was damaged even a bit. On this basis, prosecution says that it was a murder. In this way, it looks that prosecution caused shadow on the factum of accident how it took place and from which source it has come to know the factum of conspiracy.

21. Prosecution is not firmly standing on its feet. It was a burden on the shoulder of the prosecution witnesses to show how actually otherwise the death of Pooja took place if it was not a case of an accident. The Court can hardly believe on the fact that such type of accident can be caused out of conspiracy in which the person driving the motorcycle did not get any injury and even motorcycle is not damaged even a bit and the lady sitting behind the motorcycle sustained fatal injuries and died on the spot. If prosecution wants to establish that accident was the result of conspiracy with truck driver, then prosecution witnesses were also to show the element of conspiracy.

22. PW1-Ravi has stated in his statement that Pooja made a phone call and said that Amit was taking her on Pulsar motorcycle to the village. Apart from this, two other motorcycles were also there on which other accused persons were coming from behind. It is also specifically stated by this witness that except the phone call of his sister, he found no other evidence by which he could come to know that except Amit, five other persons were also coming on motorcycles, but PW1- Ravi has not stated this fact to the investigating officer in his statement under Section 161 Cr.P.C. Thus, it is proved that this statement by PW1 is made for the very first time in the trial court. PW2- Ajay has also stated in his statement that on 13.08.2012, at about 6:00 pm, deceased Pooja made a phone call on his phone stating that all the accused persons, out of conspiracy, were taking her to village Akbarpur with intention to kill her and soon thereafter the appellant along with other accused persons started journey on motorcycle by taking his sister on motorcycle and killed her at Nehrupur Chungi.

23. Therefore, the above statements of both the witnesses PW1 and PW2 show that they have categorically said that appellant and deceased Pooja were on one motorcycle and other co-accused persons were on two other motorcycles. PW1 and PW2 could only get this information if phone would have been made by the deceased Pooja while she was on the way on the motorcycle driven by the appellant, but PW1 Ravi has specifically stated in his cross-examination that Pooja had made a phone call before departure from Delhi. PW2 also has stated in his cross-examination that:-

"पूजा ने अपने ससुराल के घर से फोन किया था। पूजा ने बताया था कि सब लोग नीचे हैं। मैं ऊपर कमरे से बोल रही हूं। मैंने अपने बड़े भाई रवि को रात के 11-11.30 बजे जब घर आए तब मैंने उनको यह बात बतायी थी कि पूजा का शाम 6 बजे टेलीफोन आया।"

24. Hence, both the PW1 and PW2 have established that phone call was made by the deceased from the house in Delhi before her

departure, then how could Pooja tell them that other co-accused were also coming behind on two other motorcycles. Although, the co-accused persons were acquitted by the trial court but there is question of credibility of evidence of PW1 and PW2. Such type of above statements of these witnesses put a big question mark on their credibility. Moreover, no call-detail report was produced by the prosecution regarding phone call of deceased Pooja at 6:00 pm to her brother Ajay. In his statement Ajay has given his mobile number and also of the deceased Pooja mobile number, but the prosecution has not produced any call-details of these two mobile numbers. It is also very strange and unnatural on behalf of PW1- Ravi, that he did not disclose regarding the version of phone call made by Pooja to her four brothers, who were residing in Delhi. These brothers were very near to Pooja and the witnesses have very lightly stated that they could not think of it.

25. With the above discussion, this Court reaches to the conclusions that statements of PW1 and PW2, the only witnesses of fact, have not at all any reliability regarding the phone call made by Pooja. It is not at all proved by their statements that any such phone call was made by Pooja to her brother at 6:00 pm on 13.08.2012 as said by the prosecution because in this regard the prosecution evidence is wholly unreliable and when the above said phone call is not proved, then it is also not proved that appellant was taking Pooja from Delhi to village Akbarpur in District Bulandshahr in order to kill her because the above said alleged phone call, which is not proved as discussed above, was the only source of information to PW1 and PW2.

26. Learned trial court has drawn presumption under Section 113B of Indian Evidence Act only against the appellant and not against all other accused persons on the same evidence of alleged phone call. Trial court has not mentioned how it reached to the conclusion of drawing presumption of Section 113B of Evidence Act only against the appellant and not against other co-accused persons. It means that the trial court has relied on a portion of the phone call and disbelieved the remaining portion of the same phone call. Trial court has only said that PW1 Ravi and PW2 Ajay have not stated regarding any specific role of other co-accused persons except appellant Amit and on the basis of which it is opined by trial court that presumption under Section 113B Indian Evidence Act is drawn against accused Amit and it is not drawn against other co-accused persons. Trial court has not mentioned even a single word what other evidence was found against the husband which was not found against other co-accused persons.

27. Application under Section 156(3) Cr.P.C. was moved by informant Ravi after a long delay of 14 days of the occurrence. If phone call was there, the fact as to why the application was not moved forthwith by the informant, is not explained any where.

28. Hence, in the opinion of this Court evidence of PW1 and PW2 is not at all reliable regarding the phone call made by Pooja at 6:00 pm on 13.08.2012 to her brother. And as except this alleged phone call, there was no other source of information to informant Ravi or his brother Ajay and hence, PW1 and PW2 were not in a position to state that Pooja was subjected to cruelty or harassment soon before her death in connection with demand of additional dowry. It is very interesting to note that as per the prosecution case in application under Section 156(3) Cr.P.C., on the basis of which FIR was lodged, prosecution itself states that accident took place in conspiracy with truck driver. Truck number is also mentioned in the first information report. Inquest report also states that Pooja died due to sustaining injuries in accident and trial court confused on this issue because at one place trial court opined that if it would have been an

accident then accused Amit also should have sustained injuries and motorcycle would have been damaged and on the other hand, trial court has drawn presumption against the appellant under Section 113B of Indian Evidence Act on believing the evidence of PW1 and PW2 regarding the alleged killing of Pooja by accident in connivance with the truck driver.

29. Further for the sake of argument, for a while, if it is presumed that presumption of Section 113B of Indian Evidence Act is rightly drawn by the trial court then also the appellant has rebutted this presumption. Accused has three stages during trial to rebut the presumption of Section 113B Indian Evidence Act. First stage is to give suggestion to prosecution witness and put his case before him; second stage is that accused will take his defence when evidence against him will be put under provision of Section 313 Cr.P.C., although, statement under Section 313 Cr.P.C. is not substantive piece of evidence and third stage is to produce defence witnesses. In the case in hand, suggestion was given to PW4 Dr. Preetam Singh, who conducted the postmortem of the deceased, that if a lady is sitting on the motorcycle and truck passes by due to which motorcycle falls then in such type of accident the lady can sustain such injuries, which were sustained by the deceased. Dr. Pretaam Singh PW4 answered in affirmative and opined that in such a situation, the deceased could sustain ante mortem injuries. Suggestions were also given to PW1 Ravi and PW2 Ajay regarding death of deceased in accident. It was stated before PW1 that one Rakesh s/o Raj Pal, who was cousin of appellant Amit Kumar, he was seriously ill on 13.08.2012 and died on 14.08.2012. It is specifically suggested to PW1 that appellant and his wife were going to see Rakesh on 13.08.2012. To this suggestion PW1 showed ignorance but it is said by him that later on he got to know that Rakesh, cousin brother of appellant, was seriously ill on 13.08.2012 and died on 14.08.2012. This factum also co-relates with the situation where accident could happen and in which deceased sustained fatal injuries. It is very much relevant that it is also the prosecution case that deceased Pooja died at near Nehrupur Chungi within the jurisdiction of Police Station Khurja District Bulandshahr. This fact gives strength to the defence taken by the appellant that Pooja died due to simpliciter road accident. Apart from this, it is important that prosecution itself has set up a case of the accident as stated by the complainant Ravi in application under Section 156(3) Cr.P.C. in which even truck No. UP78 BT 0879 is given. The version of FIR is that appellant hatched conspiracy with above truck driver and got Pooja murdered but the truck driver was not prosecuted. No charge sheet was filed against truck driver for the offence of criminal conspiracy. Charge sheet against truck driver under Section 279, 304A and 427 IPC in Case Crime No.655 of 2012 was cancelled by Senior Superintendent of Police. Even the appellant or any other accused persons were not charged with the offence of criminal conspiracy. Therefore, prosecution story of murder itself gets falsified and the trial court did not give any finding as to how the deceased was died. Learned trial court has opined that appellant in his statement under Section 313 Cr.P.C. has stated that he was bringing his wife from Delhi to village Akbarpur and all of a sudden he met with an accident with the truck due to which Pooja fell down and died, but no evidence is produced regarding this fact. Learned trial court failed to consider the fact that charge sheet was prepared against the said truck driver pursuant to the FIR of the accident. Nothing more could be shown by the appellant to rebut the presumption when investigating officer of Case Crime No.655 of 2012 reached to the conclusion of accidental death and prepared the charge sheet. DW2 Gulab Singh, who is retired DIG, who had cancelled the charge sheet prepared by the investigating officer in Case Crime No.655 of 2012, has stated in his statement that C.O. was investigating the Case

Crime No.655 of 2012 which was registered under Section 304B, 498A IPC. On the basis of his case diary charge sheet was cancelled. Learned trial court has opined regarding the evidence of DW2 that he has only given the evidence regarding cancellation of charge sheet of Case Crime No.655 of 2012. This fact was overlooked by trial court that firstly charge sheet was prepared under Section 304A, 279 and 427 IPC after completion of investigation, although it was cancelled before submission in concerned court.

30. On the basis of above discussion, this Court has reached to the conclusion that prosecution has miserably failed to prove the phone call made by the deceased Pooja at 6:00 pm on 13.08.2012 to her brother as discussed above and in the absence of that phone call there remains no evidence on record to show that the deceased was subjected to cruelty or harassment soon before her death for or in connection with demand of dowry, meaning thereby prosecution has not brought forward any evidence to show that soon before her death deceased was subjected to cruelty. Therefore, trial court erred in drawing the presumption of Section 113B of Indian Evidence Act and in the absence of above presumption, no onus can be shifted on the shoulders of appellant/accused to rebut the presumption. Therefore, the death of deceased Pooja does not fall within the purview of "Dowry Death". Section 304B IPC reads as under :-

"Section 304B in The Indian Penal Code

1. Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

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

31. It is provided under Section 304B of IPC that the death of a woman should occur otherwise than under normal circumstances. Prosecution could not prove the death of deceased Pooja "otherwise than normal circumstances". Moreover, as discussed above, prosecution could not prove that soon before her death, deceased Pooja was subjected to cruelty or harassment for or in connection with demand of dowry.

32. With the aforesaid discussion, this Court is of considered opinion that learned trial court has not appreciated the evidence on record in right perspective and wrongly drew the presumption under Section 113B of Indian Evidence Act against the appellant. Prosecution has also failed to prove the death of deceased Pooja as dowry death. Learned trial court has wrongly convicted the appellant for the offences under Section 498A, 304B of IPC and under Section 4 Dowry Prohibition Act, 1961. Hence, appeal is liable to be allowed.

33. This appeal is accordingly, **allowed.**

34. Conviction of appellant under Sections 498A, 304B IPC and under Section 4 Dowry Prohibition Act, 1961 is hereby set aside and he is acquitted of all charges framed against him. The appellant be released forthwith if not wanted in any other case.

35. Let a copy of this order be sent to concerned court and jail authorities for ensuring necessary compliance.

(2021)12ILR A936
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.12.2021

BEFORE

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

Criminal Appeal No. 1944 of 2014

Ram Prakash @ Pappu Yadav ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Shyam Lal, Ms. Abhilasha Singh, Sri Lav Srivastava, Sri Ashutosh Yadav, Sri Chandra Shekhar Garg, Sri V.P. Srivastava

Counsel for the Respondent:
A.G.A.

Appellant languishing in jail-last more than 9 years-criminal jurisprudence is reformative and corrective-no accused incapable of being reformed-all measure to give opportunity to reform-conviction upheld-punishment modified.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Mohd. Giasuddin Vs St. of A.P., reported in AIR 1977 SC 1926

2. Deo Narain Mandal Vs St. of U.P. reported in (2004) 7 SCC 257

3. Jameel Vs St. of U.P. [(2010) 12 SCC 532

4. Guru Basavraj Vs St. of Karn. [(2012) 8 SCC 734

5. Sumer Singh Vs Surajbhan Singh, [(2014) 7 SCC 323,

6. St. of Pun.Vs Bawa Singh, (2015) 3 SCC 441

7. Raj Bala Vs St. of Har., [(2016) 1 SCC 463

8. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

9. Manoj Mishra @ Chhotkau Vs St. of U.P., Criminal Appeal No. 1167 of 2021, decided on 8.10.2021

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This appeal has been preferred against the judgment and order dated 26.3.2013 passed by the court of Special Judge (D.A.A), Banda in Session Trial No.63 of 2012, State Vs. Ram Prakash @ Pappu Yadav arising out of Case Crime no. 73 of 2012, under Sections 452 read with Section 376 IPC, P.S. Bisanda, District Banda, whereby the accused-appellant was convicted under Section 452 IPC and sentenced to five years rigorous imprisonment with a fine of Rs.5000/- and on a default, sentence of three months further imprisonment and under Section 376 IPC and sentenced to imprisonment for life with fine of Rs.10,000/- and in case of default of payment of fine, to undergo six months further imprisonment for one year. Both the sentences to be run concurrently.

2. Brief facts of the case are that the FIR was registered on 22.02.2012 on the basis of the application moved by the complainant on the same date, in which it has been alleged that the complainant's daughter, namely, Chunbadi on the date of the occurrence of the offence, i.e, 21.12.2012 was alone in her house, as the complainant as well as his wife being the mother of the victim had gone to the field for doing agricultural activity. In the absence of the complainant and his wife, being the mother of the victim, the victim was all alone in the house and at 4:00 P.M, the unlucky day, being 21.2.2012, one Sri Ram Prakash @ Pappu @ Baura Aheer (Yadav) came to the house of the complainant and when he found that the daughter of the complainant being Ms. Chunbadi

was all alone, then he committed bad act of rape on account whereof, the blood started oozing out from her private part. When the complainant along with his wife came back after finishing their agricultural activity at 7:00 P.M, then the daughter of the complainant (victim), narrated this entire event. As at that point of time, it was too late and there was no transportation available, so complainant could not rush to the concerned police station for lodging of complaint. Consequently, in the next morning, i.e, on 22.2.2012, the complainant along with his daughter being Ms. Chunbadi (victim) proceeded to the conerned Police Station for the purposes of lodging of the FIR and in the midway, the complainant met SDM, Baberu and the complainant along with his daughter, and wife gave oral information to the Deputy S.P., Baberu. Thereafter, the complaint was lodged on 22.2.2012 by the informant, whch culminated into registration of the FIR on 22.2.2012 alleging commission of offence by the appellant under Section 452 and 376 IPC, being Case Crime no.73 of 2012.

3. One Sri Likhi Ram Singh was nominated to conduct the investigation, who visited the spot prepared the site-plan and also recorded the statement of prosecutrix and witnesses and after completing investigation, submitted charge sheet against the appellant under Sections 452/376 IPC on 13.3.2012. The matter being triable by the court of Sessions, was committed to the Sessions Court.

4. The learned Trial Court framed charges under Sections 452 and 376 IPC, which was read over to the accused. The accused denied the charges and claimed to be tried.

5. Prosecution examined the following witnesses:

1.	Ram Bhawan	P.W.1
2.	Victim	P.W.2
3.	Bittan	P.W.3
4.	Dr. Bhawna Sharma	P.W.4
5.	Dr. P.S. Sagar	P.W.5
6.	Constable Pramod Kumar	P.W.-6
7.	S.I. Likhi Ram	P.W.-7

6. Apart from the aforesaid witnesses, prosecution submitted documentary evidence, which was proved by leading evidence:

1.	Written report	Ext. Ka-1
2.	Recovery Memo of Blood Stained Salwar and Sari Ext.	Ext. Ka-2
3.	Statement under Section 164 of CrPC	Ext. Ka-3
4.	Medical Report prepared by Doctor of District Woman Hospital, Banda	Ext. Ka-4
5.	Supplementary medical report of District Hospital	Ext. Ka-5
6.	X-ray report prepared by the doctor at District Hospital	Ext. Ka-6
7.	G.D. Entry no.12	Ext. Ka-7
8.	FIR	Ext. Ka-8
9.	Letter for medical examination of victim prepared by the Moharrir	Ext. Ka-9
10.	Siteplan	Ext. Ka-10
11.	Charge Sheet	Ext. Ka-11
12.	Forensic Report	Ext. Ka-12

7. Heard Shri Shyam Lal, learned counsel, assisted by Ms. Abhilasha Singh, learned counsel for the appellant, the learned AGA for the State and also perused the record.

8. Perusal of record shows that occurrence took place on 21.2.2012 and the victim was medically examined on 22.2.2012 in the District Women Hospital, Banda. In the medical examination, no mark of injury was found on the body of the victim including private-parts.

Hymen was red and tender and bleeding was slightly present and a perennial lier was present at 6 o'clock position. The supplementary medical report also observed that Vaginal smear examination and vaginal saline shows no spermatozoa, accordingly no definite opinion regarding rape can be given by the doctor.

9. Further perusal of the supplementary report shows that spermatozoa was not present, the age of the victim was found above 8 years and hence in the supplementary report also, it was stated by the doctor that no definite opinion regarding rape can be given.

10. The victim was examined by prosecution as PW-2. In her statement, the victim stated that accused had committed bad-act with her, as she was all alone on the date of occurrence. She further deposed that the accused came at 4:00 P.M, when the informant being her father as well as her mother had gone to the field for agricultural activity and when he found the victim to be all alone, then he committed rape and the said fact was narrated to her parents, when they returned at 7:00 P.M, on the said evening. Record shows that the victim went to P.S. concerned for the purposes of lodging of the FIR with the blood stained salwar and sari. The victim was cross-examined by the defence, in which she has corroborated and narrated the facts, which found place in the FIR alleging that the appellant (accused) had committed bad-act with her and has raped her on 21.2.2012 itself. The statements of PW-1(father) and PW-3 (mother) also supported the case of the victim. PW-4, being Dr. Bhawna Sharma of the District Women Hospital also deposed in her statement that on the basis of the medical report, there was no mark of injury, but the hymen was torn and it was in red colour and there pain was sustained by the victim. So much so, PW-5 being the Dr. P.S. Sagar in his statement deposed on the basis of the x-ray report that there is no fusion in the bones and the age of victim was 8-14 years. Thereafter, the learned Trial Court after considering the arguments as well as the documentary evidence available on record, concluded that the appellant is to be sentenced under Section 452 and 376 of IPC. Learned trial court accords conviction to the accused-appellant under Section 452 IPC and sentenced him with five years rigorous imprisonment with a fine of Rs.5000/- and on default, sentence of three months further imprisonment and further under Section 376 IPC sentenced him for imprisonment for life with fine of Rs.10,000/- and in case of default of payment of fine, to undergo six months further imprisonment for one year.

11. After some arguments, learned counsel for the appellant submitted that he is not pressing this appeal on merits, but he prays for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for the past more than 9 and ½ (since 28.2.2012) years.

12. This case pertains to the offence of 'rape', defined under Section 375 IPC, which is quoted as under:

[375. Rape.- *A man is said to commit "rape" if he-*

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the

vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions :-

***First.-** Against her will.*

***Secondly.-** Without her consent.*

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

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

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

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

***Seventhly.-** When she is unable to communicate consent.*

***Explanation 1.-** For the purposes of this section, "vagina" shall also include labia majora.*

***Explnation 2.-** Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.*

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

***Exception 1.-** A medical procedure or intervention shall not constitute rape.*

***Excpetion 2.-** Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]*

13. Once, the appellant is not pressing the appeal on merits and rather accepting the factum of commission of the offence under Section 452 read with Section 376 of IPC, then the scope of the present appeal gets narrowed down to the question of the quantum of punishment. The Hon'ble Supreme Court in the case of ***Mohd. Giasuddin Vs. State of Andhra Pradesh, reported in*** AIR 1977 SC 1926 had in paragraphs-16, 17, 18, 19 and 20 has observed as under: -

"16. The new Criminal Procedure Code, 1973 incorporates some of these ideas and gives an opportunity in s. 248(2) to both parties to bring to the notice of the court facts and circumstances which win help personalize the sentence from a reformative angle. This Court, in Santa Singh (1976) 4 SCC 190, has emphasized how fundamental it is to put such provision to dynamic judicial use, while dealing with the analogous provisions in s. 235(2) "This new provision in s. 235(2) is in consonance with the modern trends in penology and sentencing procedures. There was no such provision in the old Code,. It 'was realised that sentencing is an important stage in the process of administration of criminal justice- as important as the adjudication of guilt-and it should not be con-signed to a Subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the Court. (p. 194.).

Modern penology regards crime and criminal as equally material when the right sentence has to be picked out. It turns the focus not only on the crime, but also on the criminal and seeks to personalise the punishment so that the reformist component is as much operative as

the deterrent element. It is necessary for this purpose that facts of a social and personal nature, sometimes altogether irrelevant if not injurious, at the stage of fixing the guilt, may have to be brought to the notice of the court when the actual sen- tence is determined. (p. 195).

A proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances extenuating or aggravating-of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These factors have to be taken into account by the Court in deciding upon the appropriate sentence. (p.

195).

The hearing contemplated by section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the ac- cused to place before the court facts and material relating to various factors' bearing on the question of sentence and if they are contested by other side, then to produce evidence for the purpose of establishing the same. Of course, care would have to be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings." (p. 196).

17. It will thus be seen that there is a great discretion vested in the Judge, especially when pluralistic factors , enter his calculations Even so, the judge must exercise this discretionary power, drawing his inspiration from the humanitarian spirit of the law, and living down the traditional precedents which have winked at the personality of the crime doer and been swept away by the features of the crime. What is dated has to be discarded. What is current has to, be incorporated. Therefore innovation, in all conscience, is in the field of judicial discretion.

18. Unfortunately, the Indian Penal Code still lingers in the somewhat compartmentalised system of punishment viz. imprisonment simple or rigorous, fine and, of course, capital sentence. There is a wide range of choice and flexible treatment which must be available with the judge if he is to fulfil his tryst with cruing the criminal in a hospital setting. Maybe in an appropriate case actual hospital treatment may have to be prescribed as part of the sentence. In another case, liberal parole may have to be suggested and, yet in a third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of the sentencing prescription. The perspective having changed, the legal strategies and judicial resources, in their variety, also have to change. Rule of thumb sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing judge. Release on probation, conditional sentences, visits to healing centres, are all on the cards. We do not wish to be exhaustive. Indeed, we cannot be.

19. Sentencing justice is a facet of social justice, even as redemption of a crime-doer is an aspect of restoration of a whole personality. Till the new Code recognised statutorily that punishment required considerations beyond the nature of the crime and circumstances surrounding the crime and

provided a second stage for bringing in such additional materials, the Indian courts had, by and large, assigned an obsolescent backseat to the sophisticated judgment on sentencing. Now this judicial skill has to come of age.

20. The sentencing stance of the court has been outlined by us and the next question is what 'hospitalization' techniques will best serve and sentencee, having due regard to his just deserts, blending a feeling for a man behind the crime, defence of society by a deterrent component and a scientific therapeutic attitude at once correctional and realistic. The available resources for achieving these ends within the prison campus also has to be considered in this context. Noticing the scant regard paid by the courts below to the soul of S. 248 (2) of the Code and compelled to gather information having sentencing relevancy, we permitted counsel on both sides in the present appeal to file affidavits and other materials to help the Court make a judicious choice of the appropriate 'penal' treatment. Both sides have filed affidavits which disclose some facts pertinent to the project. "

14. In the case of ***Deo Narain Mandal vs. State of UP*** *reported in (2004) 7 SCC 257*, in paragraphs-11 and 12, the Hon'ble Apex Court has held as under: -

"11. To find out whether the period already undergone by the appellant would be sufficient for reducing the sentence we had called upon the learned counsel appearing for the State to give us the necessary information and from the list of dates provided by the State, we notice that the appellant was arrested on 12th of January, 1983 and was granted bail on 14th of January, 1983 by the Trial Court which shows he was in custody for two days that too as an under trial prisoner. Trial Court sentenced the appellant on 31st of May, 1988 and the High Court released the appellant on the 8th of July, 1988. It is not clear from the list of date when exactly the appellant surrendered to his bail after the judgment of the Trial Court. Presuming the fact in favour of the appellant that he was taken into custody on the date of the judgment i.e. 31st of May, 1988 itself. Since he was released on bail by the High Court of 8th of July, 1988, he would have been custody as a convict for 38 days which together with the two days spent as an under trial, would take the period of custody to 40 days. On facts and circumstances of this case, we must hold that sentence of 40 days for an offence punishable under Section 365/511 read with Section 149 is wholly inadequate and disproportionate.

12. For the reasons stated above, we are of the opinion that the judgment of the High Court, so far as it pertains to the reduction of sentence awarded by the Trial Court will have to be set aside."

15. In the case of ***Jameel vs State of UP*** [(2010) 12 SCC 532, the Hon'ble Supreme Court in paragraphs- 14, 15 and 16 held as under:

"14. The general policy which the courts have followed with regard to sentencing is that the punishment must be appropriate and proportional to the gravity of the offence committed. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime.

15. In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending

circumstances are relevant facts which would enter into the area of consideration.

16. It was the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

16. In the case of ***Guru Basavraj vs State of Karnatak,*** [(2012) 8 SCC 734, the Hon'ble Apex Court observed in paragraphs- 30 to 34 has held as under: -

"30. From the aforesaid authorities, it is luminous that this Court has expressed its concern on imposition of adequate sentence in respect of commission of offences regard being had to the nature of the offence and demand of the conscience of the society. That apart, the concern has been to impose adequate sentence for the offence punishable under Section 304-A of the IPC. It is worthy to note that in certain circumstances, the mitigating factors have been taken into consideration but the said aspect is dependent on the facts of each case. As the trend of authorities would show, the proficiency in professional driving is emphasized upon and deviation therefrom that results in rash and negligent driving and causes accident has been condemned. In a motor accident, when a number of people sustain injuries and a death occurs, it creates a stir in the society; sense of fear prevails all around. The negligence of one shatters the tranquility of the collective. When such an accident occurs, it has the effect potentiality of making victims in many a layer and creating a concavity in the social fabric. The agony and anguish of the affected persons, both direct and vicarious, can have nightmarish effect. It has its impact on the society and the impact is felt more when accidents take place quite often because of rash driving by drunken, negligent or, for that matter, adventurous drivers who have, in a way, no concern for others. Be it noted, grant of compensation under the provisions of the Motor Vehicles Act, 1988 is in a different sphere altogether. Grant of compensation under Section 357(3) with a direction that the same should be paid to the person who has suffered any loss or injury by reason of the act for which the accused has been sentenced has a different contour and the same is not to be regarded as a substitute in all circumstances for adequate sentence.

31. Recently, this Court in Rattiram & Ors. v. State of M.P. Through Inspector of Police, (2012) 4 SCC 516 , though in a different context, has stated that:

"64. ... The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the view point of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries... It is the duty of the court to see that the victim's right is protected."

32. We may note with profit that an appropriate punishment works as an eye-opener for the persons who are not careful while driving vehicles on the road and exhibit a careless attitude possibly harbouring the notion that they would be shown indulgence or lives of others are like "flies to the wanton boys". They totally forget that the lives of many are in their hands, and the sublimity of safety of a human being is given an indecent burial by their rash and negligent act.

33. There can hardly be any cavil that there has to be a proportion between the crime and the punishment. It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order. The cry of the collective for justice which includes adequate

punishment cannot be lightly ignored. In Siriya alias Shri Lal v. State of M.P. (2008) 8 SCC 72, it has been held as follows: (SCC pp.75-76, para 13)

"13. "7. ... Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be.' * "

34. In view of the aforesaid, we have to weigh whether the submission advanced by the learned counsel for the appellant as regards the mitigating factors deserves acceptance. Compassion is being sought on the ground of young age and mercy is being invoked on the foundation of solemnization of marriage. The date of occurrence is in the month of March, 2006. The scars on the collective cannot be said to have been forgotten. Weighing the individual difficulty as against the social order, collective conscience and the duty of the Court, we are disposed to think that the substantive sentence affirmed by the High Court does not warrant any interference and, accordingly, we concur with the same."

17. The Hon'ble Supreme Court, in the case of ***Sumer Singh vs Surajbhan Singh,*** [(2014) 7 SCC 323, in paragraphs- 36 and 37 held as under:-

" 36. Having discussed about the discretion, presently we shall advert to the duty of the court in the exercise of power while imposing sentence for an offence. It is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the Court's accountability to remind itself about its role and the reverence for rule of law. It must evince the rationalized judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. The old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society. Therefore, striking the balance we are disposed to think that the cause of justice would be best subserved if the respondent is sentenced to undergo rigorous imprisonment of two years apart from the fine that has been imposed by the learned trial judge.

37. Before parting with the case we are obliged, nay, painfully constrained to state

that it has come to the notice of this Court that in certain heinous crimes or crimes committed in a brutal manner the High Courts in exercise of the appellate jurisdiction have imposed extremely lenient sentences which shock the conscience. It should not be so. It should be borne in mind what Cicero had said centuries ago: -

"it can truly be said that the magistrate is a speaking law, and the law a silent magistrate."

18. Further in the case of ***State of Punjab vs Bawa Singh,*** (2015) 3 SCC 441, the Hon'ble Apex Court in paragraphs-16 to 18 had observed as under: -

"16. We again reiterate in this case that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter-productive in the long run and against the interest of the society.

17. Recently, in the cases of State of Madhya Pradesh vs. Bablu, (2014) 9 SCC 281 and State of Madhya Pradesh vs. Surendra Singh, 2014 (12) SCALE 672, after considering and following the earlier decisions, this Court reiterated the settled proposition of law that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which commensurate with gravity, nature of crime and the manner in which the offence is committed. One should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, solemn duty of the court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers.

18. Perusal of the impugned order passed by the High Court would show that while reducing the sentence to the period already undergone, the High Court has not considered the law time and again laid down by this Court. Hence the impugned order passed by the High Court is set aside and the matter is remanded back to the High Court to pass a fresh order in the revision petition taking into consideration the law discussed hereinabove after giving an opportunity of hearing to the parties. The appeal is accordingly allowed with the aforesaid direction."

19. In the case of ***Raj Bala vs State of Haryana, [(2016) 1 SCC 463,*** the Hon'ble Apex Court in paragraph-16 held as under:-

"A Court, while imposing sentence, has a duty to respond to the collective cry of the society. The legislature in its wisdom has conferred discretion on the Court but the duty of the court in such a situation becomes more difficult and complex. It has to exercise the discretion on reasonable and rational parameters. The discretion cannot be allowed to yield to fancy or notion. A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One

cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked. It is the duty of the court not to exercise the discretion in such a manner as a consequence of which the expectation inherent in patience, which is the "finest part of fortitude" is destroyed. A Judge should never feel that the individuals who constitute the society as a whole is imperceptible to the exercise of discretion. He should always bear in mind that erroneous and fallacious exercise of discretion is perceived by a visible collective."

20. Following the consistent view of the Hon'ble Apex Court with regard to proportionality of a punishment in ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, it was held as under: -

"15. In Shyam Narain v. State (NCT of Delhi) (2013) 7 SCC77: (AIR 2013 SC 2209), it has been ruled that primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. The Court further observed that on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. It has to be borne in mind that while carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

16. In State of Madhya Pradesh v. Najab Khan and others, (2013) 9 SCC 509: (AIR 2013 SC 2997), the High Court of Madhya Pradesh, while maintaining the conviction under Section 326 IPC read with Section 34 IPC, had reduced the sentence to the period already undergone, i.e., 14 days. The two-Judge Bench referred to the authorities in Shailesh Jasvantbhai v. State of Gujarat, (2006) 2 SCC 359: (2006 AIR SCW 436), Ahmed Hussain Vali Mohammed Saiyed v. State of Gujarat, *(2009) 7 SCC 254: (AIR 2010 SC (Supp) 846),* Jameel v. State of Uttar Pradesh*(2010)* 12 SCC 532: (AIR 2010 SC (Supp) 303), and Guru *Basavaraj v. State of Karnataka, (2012) 8 SCC 734 :* (2012 AIR SCW 4822) *and held thus:- "In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of the victim of the crime but also the society at large while considering the*

imposition of appropriate punishment." In the said case, the Court ultimately set aside the sentence imposed by the High Court and restored that of the trial Judge, whereby he had convicted the accused to suffer rigorous imprisonment for three years.

17. In Sumer Singh v. Surajbhan Singh & others, (2014) 7 SCC 323: (AIR 2014 SC 2840), *while elaborating on the duty of the Court while imposing sentence for an offence, it has been ruled that it is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the court's accountability to remind itself about its role and the reverence for the rule of law. It must evince the rationalised judicial discretion and not an individual perception or a moral propensity. The Court further held that if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined and law does not tolerate it; society does not withstand it; and sanctity of conscience abhors it. It was observed that the old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. The conception of mercy has its own space but it cannot occupy the whole accommodation. While dealing with grant of further compensation in lieu of sentence, the Court ruled:-*

"We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society."

18. In State of Punjab v. Bawa Singh, (2015) 3 SCC 441: *(AIR 2015 SC (Supp) 731), t*his Court, after referring to the decisions in State of Madhya *Pradesh v. Bablu, (2014) 9 SCC 281 :* (AIR 2015 SC 102) *and* State of Madhya Pradesh *v. Surendra Singh, (2015) 1 SCC 222: (AIR 2015 SC 298), reiterated the settled proposition of law that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which is commensurate with the nature of crime regard being had to the manner in which the offence is committed. It has been further held that one should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it would shock the conscience of the society. Emphasis was laid on the solemn duty of the court to strike a proper balance while awarding the sentence as imposition of lesser sentence encourages a criminal and resultantly the society suffers.*

19. Recently, in Raj Bala v. State of Haryana and others, (2016) 1 SCC 463: (AIR 2015 SC 3142), on reduction of sentence by the High Court to the period already undergone, the Court ruled thus:-

"Despite authorities existing and governing the field, it has come to the notice of this Court that sometimes the court of first instance as well as the appellate court which includes the High Court, either on individual notion or misplaced sympathy or personal perception seems to have been carried away by passion of mercy, being totally oblivious of lawful obligation to the collective as mandated by law and forgetting the oft quoted saying of Justice Benjamin N. Cardozo, "Justice, though due to the accused, is due to the accuser too"

and follow an extremely liberal sentencing policy which has neither legal permissibility nor social acceptability." And again:-

"A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked."

20. Though we have referred to the decisions covering a period of almost three decades, it does not necessarily convey that there had been no deliberation much prior to that. There had been. In B.G. Goswami v. Delhi Administration, (1974) 3 SCC 85: (AIR 1973 SC 1457), *the Court while delving into the issue of punishment had observed that punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining the question of awarding appropriate sentence.*

21. The purpose of referring to the aforesaid precedents is that they are to be kept in mind and adequately weighed while exercising the discretion pertaining to awarding of sentence. Protection of society on the one hand and the reformation of an individual are the facets to be kept in view. In Shanti Lal Meena v. State (NCT of Delhi), (2015) 6 SCC 185: AIR 2015 SC 2678), *the Court has held that as far as punishment for offence under the Prevention of Corruption Act, 1988 is concerned, there is no serious scope for reforming the convicted public servant. Therefore, it shall depend upon the nature of crime, the manner in which it is committed, the propensity shown and the brutality reflected. The case at hand is an example of uncivilized and heartless crime committed by the respondent No. 2. It is completely unacceptable that concept of leniency can be conceived of in such a crime. A crime of this nature does not deserve any kind of clemency. It is individually as well as collectively intolerable. The respondent No. 2 might have felt that his ego had been hurt by such a denial to the proposal or he might have suffered a sense of hollowness to his exaggerated sense of honour or might have been guided by the idea that revenge is the sweetest thing that one can be wedded to when there is no response to the unrequited love but, whatever may be the situation, the criminal act, by no stretch of imagination, deserves any leniency or mercy. The respondent No. 2 might not have suffered emotional distress by the denial, yet the said feeling could not to be converted into vengeance to have the licence to act in a manner like he has done."*

21. Recently in the matter of **Manoj Mishra @ Chhotkau vs. State of Uttar Pradesh, Criminal Appeal No. 1167 of 2021, decided on 8.10.2021**, the Hon'ble Apex Court in paragraphs- 16 and 17 has held as under: -

"16. On arriving at the conclusion that the appellant is liable to be convicted under Section 376 IPC and not under Section 376 D IPC, the appropriate sentence to be imposed needs consideration. The incident in question is based on the complaint dated 09.08.2013. In this circumstance, though it is noted that Section 376 has been amended w.e.f. 21.04.2018 providing for the minimum sentence

of 10 years, the case on hand is of 2013 and the conviction of the appellant was on 20.05.2015. The incident having occurred prior to amendment, the preamended provision will have to be taken note. The same provides that a person committed of rape shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine. In the instant case, taking into consideration all facts including that no material is available on record to indicate that the appellant has any criminal antecedents and that he is also a father of five children and the eldest son is more than 18 years, it appears that there is no reason to apprehend that the appellant would indulgence similar acts in future. In that circumstance, we deem it appropriate that the sentence of 7 years would have been sufficient deterrent to serve the ends of justice. From the custody certificate dated 05.12.2017 issued by the Jail Superintendent, District Jail, Bahraich, it is noticed that the appellant has been in custody from 20.09.2013. If that be the position, he has been in custody and served the sentence for more than 8 years which shall be his period of sentence. As such he has served the sentence imposed by us except payment of fine. The fine and default sentence as imposed by the trial court is maintained.

17. In the result we make the following order:

(i) The conviction and sentence under Section 363, 366, and Section 4 of POCSO Act is confirmed.

The conviction under Section 506 IPC is set aside.

(ii) The conviction order made by the trial court and confirmed by the High Court under Section 376 D IPC is modified. The appellant is instead convicted under Section 376 IPC and is sentenced, for the period undergone. The fine and default sentence as imposed by the trial court shall remain unaltered.

(iii) Since the custody certificate dated 20.09.2013 indicates that the appellant has undergone sentence for more than 8 years, the appellant is ordered to be released on payment of fine as all the sentences have run concurrently and if he is not required to be detained in any other case.

(iv) The appeal is accordingly allowed in part.

(v) Pending application, if any, shall stand disposed of."

22. In view of the legal proposition, so culled out from the aforesaid judgments, the facts and the given circumstances of each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. Needless to point out that it is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The Apex Court has gone even to the extent that the courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. Moreover, the judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers.

23. Generally speaking, law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under

serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

24. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

25. Since the learned counsel for the appellant has not pressed the appeal on its merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

26. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

27. Learned AGA also admitted the fact that appellant is languishing in jail for the last more than 9 years and 9 months. Since, the appellant has already served about 9 years and 9 months in jail, ends of justice will be met if sentence is reduced to the period already undergone.

28. Hence, the sentence awarded to the appellant by the learned trial-court is modified as period already undergone and the fine of Rs.5,000/- and Rs.10,000/- imposed upon the appellant is reduced to Rs.500/- and Rs.1000/- respectively. In case of default of fine, the appellant shall undergo additional simple imprisonment of one month.

29. Accordingly, the appeal is **partly allowed** with the modification of the sentence, as above.

(2021)12ILR A949
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.10.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 1988 of 2019

Akhalesh Pal **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Sri Yogesh Kumar Srivastava, Sri Jai Singh Parihar, Sri Noor Muhammad

Counsel for the Respondent:
A.G.A.

Criminal Law – Indian Penal Code, 1860 – Sections 498A & 304 B - Dowry Death-Prosecution proved death within 7 years of marriage-Postmortem-hanging-no conclusion –no evidence-for subjected to cruelty soon before death-no presumption u/s 113-B of Evidence Act could be raised—death cannot be considered as dowry death-perverse finding by court below-offence u/s 498-A IPC proved-Offence u/s 304-B IPC not proved.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Baljinder Kaur Vs St. of Pun., [2015 (1) JIC 71 (SC)]

2. Kamesh Panjiyar @ Kamlesh Panjiyar Vs St. of Bihar [(2015) 2 SCC 388]

3. Baldev Singh Vs St. of Pun. [2009 (1) JIC 120 (SC)]

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred by the appellant-Akhalesh Pal against the judgment and order passed by Additional Sessions Judge, Court No. 6, Jhansi, dated 30.10.2018 in S.T. No. 65 of 2016 *(State v. Akhilesh Pal and others)* arising out of Case Crime No.272/2015 under Section 498-A, 304-B, 302 IPC and under Section 3/4 Dowry Prohibition Act, 1961 (herein after referred to as 'DP Act, 1961') Police Station-Garotha, District-Jhansi, by which the appellant was convicted under Section 498-A, 304-B IPC and Section 4 of DP Act, 1961, and sentenced only under Section 304-B IPC for 7 years and under Section 4 of DP Act, 1961, for 6 months along with fine of Rs.1,000/-

2. Brief facts of the case are that the complainant-Thakur Das Pal submitted a report in Kotwali Garotha on 11.12.2015 with the averments that his daughter-Kaushal was married to Akhilesh Pal S/o Kallu Pal R/o Village-Khadaura, PS-Garotha, before 4 years. He had given dowry worth Rs.2 lakhs in the marriage, but his daughter's husband, namely, Akhilesh Pal (appellant), Father-in-law-Kallu Pal, Mother-in-law - Smt Valku and *Nanad* -Smt Urmila were not satisfied. They started demanding Rs.1,00,000/- as additional dowry and started torturing and beating her for non-fulfillment of above demand. In the morning of 11.12.2015, complainant came to know that all above mentioned persons have killed his daughter for non-fulfillment of demand of additional dowry.

3. On this report the Case Crime No. 272 of 2015 was registered against the aforesaid persons and after investigation, charge-sheet was submitted against Akhilesh Pal, Kallu and Smt. Balku under Section 498-A, 304-B and Section ¾ DP Act, 1961. After completion of trial, learned trial court acquitted Kallu and Smt. Balku of all charges levelled against them and convicted Akhilesh Pal and sentenced him as aforesaid. Hence, this Appeal.

4. Heard Sri Jai Singh Parihar, learned counsel for the appellant and learned AGA for the State.

5. Learned counsel for the appellant, first of all, submitted that prosecution could not prove when the marriage of deceased took place because no date of marriage is given in First Information Report and prosecution witnesses also did not tell the date of marriage. It is written in the FIR that marriage was solemnized before 4 years but no date is given. It is also submitted that no marriage invitation card is produced by complainant rather a 'letter of thanks' was submitted which is only a photostat copy and not the original. Hence, photostat copy is not permissible in evidence. It is next submitted by learned counsel that as per the FIR, one Pappu had informed the first informant regarding the death of his daughter-Kaushal. The complainant (PW1) has said that Pappu, resident of his village, told him that his daughter has been hanged. PW 3 is mother of the deceased. She has also stated in his statement that Pappu Mishra has informed them regarding the death of the deceased, but this Pappu is not at all produced by the prosecution in evidence.

6. Learned counsel for the appellant argued emphatically that prosecution has not produced any evidence regarding the fact that 'soon before her death' she was subjected to cruelty or harassment in connection with demand of dowry. PW1 is the father of the deceased and

PW3 is the mother of the deceased. Only these two witnesses of fact are produced, but none of them has uttered even a single word regarding the fact that soon before her death, the deceased was subjected to cruelty.

7. Learned counsel for the appellant argued that it was a case of hanging. The deceased committed suicide by hanging herself. The reason behind the suicide was that deceased was having ailment regarding 'periods', and she was 'issue-less'. Appellant, the husband of the deceased, undertook the treatment of deceased. She was treated by Dr.Manju and Dr.Manju has been produced by defence as DW1. She has stated in her statement that deceased was issue-less and she had treated her. Deceased used to come with her husband-Akhalesh Pal for her treatment. The doctor in her statement has proved the medical papers of treatment. Hence, the appellant has proved the fact that deceased was issue-less and appellant kept her under treatment. Learned counsel also submitted that Beni (DW2) is produced by defence. She has stated in her statement that at the time of occurrence, the door of the room in which the deceased committed suicide, was locked from inside and people, gathered there, had broken the door. Dr.Udal Srivas conducted the postmortem of the deceased. He has also stated in his statement that there was no antemortem injury on the body of the deceased and it was possible that she had hanged herself. Learned counsel argued that there is ample evidence on record that the deceased committed suicide for being issue-less and appellant is not at all responsible for her death. It is also submitted that first information report of this case was registered by the police on mounting pressure created by Smt.Uma Bharti (the then Member of Parliament). This fact is admitted by complainant (PW1) in his statement before learned trial court. Hence, appellant is wrongly convicted and appeal be allowed.

8. Learned AGA, *per contra*, argued that this fact is not disputed that deceased died within seven years of her marriage. In the FIR itself, the complainant, who is father of the deceased has clearly stated that the marriage of his daughter-Kaushal was solemnized before four years. Learned AGA submitted that it is not necessary to show the exact date of marriage. It is sufficient if the complainant is stating that marriage was solemnized before four years because complainant is the father of the deceased and he is the best person to tell this fact. Apart from it, letter of thanks, which is given after marriage, is produced before trial court and is proved as Ex.ka2. Date of marriage is written in that letter as 30.4.2012.

9. Learned AGA also aruged that there was consistent demand of Rs.1 lakh as additional dowry from deceased and her parents and prosecution witnesses (PW1 and PW3), both have stated in their statements that appellant and his family members used to demand Rs.1 lakh as additional dowry and for not meeting out the demand, the deceased was tortured and harassed by them. Learned AGA also submitted that in postmortem report, there is antemortem injury on the 'index-finger' of the deceased. Therefore, learned trial court has rightly convicted and sentenced the appellant. Hence, appeal be dismissed.

10. First of all, appellant has disputed the fact that the death of the deceased took place within or beyond seven years of her marriage. In this regard, appellant has submitted that no date of marriage is mentioned in the FIR nor any 'invitation-card' of marriage is produced. Yet, I am not convinced with this argument of counsel for the appellant because in FIR itself, the complainant, who is the father of the deceased has specifically stated that the marriage of his daughter was solemnized with appellant before four years from the date of lodging the FIR. Complainant is produced as

PW1 before trial court approximately after one and half years of lodging the FIR and in his statement, he has stated that marriage was solemnized before five years. It also coincides with the fact that the marriage took place before four years of lodging the FIR. It is pertinent to mention that the appellant was the husband of the deceased and if he is disputing the fact of date of marriage, he could tell some date of marriage in rebuttal, but no date or year of the marriage is told by appellant because the factum of marriage was also in the knowledge of the appellant and if marriage was not solemnized within seven years of death of the deceased, it was incumbent upon the appellant to show any other date of marriage, but nothing is done, therefore, considering the evidence on this point in its entirety, prosecution has proved that deceased died within seven years of her marriage. As far as the question of non-production of Pappu, who informed the complainant about the death of his daughter is concerned, it does not make any difference because it is not important, who informed the complainant and informer is not produced in evidence because charge-sheet was submitted by the Investigating Officer after investigation and trial court after considering the evidence on record, convicted him. It is the case of demand of dowry and harassment in pursuance thereof. Pappu was not the person to prove the demand of additional dowry and harassment, so if he is not produced in evidence, it does not affect the prosecution case adversely.

11. Learned AGA has submitted that in postmortem report, there was antemortem injury on the 'index-finger' of the deceased, but this injury is only an abrasion for which the doctor, while conducting the postmortem, has opined that this injury could not inflicted in taking the body on the floor. From postmortem report and the statement of the doctor (PW5), it is proved that it was a case of hanging.

12. Learned counsel for the appellant pressed the argument that there is no evidence on the point that soon before her death, the deceased was subjected to cruelty or harassment in connection with demand of dowry and in absence of this evidence, the death of the deceased cannot be deemed as dowry-death and no presumption in this regard can be raised by the court. This argument of appellant is legally correct. It is relevant to quote the provisions of Section 304-B IPC, which reads as under:

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

Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

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

13. Section 113-B of the Indian Evidence Act is also relevant for the case in hand, which reads as under:

"Section 113B in The Indian Evidence Act, 1872-*Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume*

that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860)."

14. The essential ingredients which need to be proved in order to attract the offence of dowry-death are as follows:

i) death is caused in unnatural circumstances

ii) death must have been occurred within seven years of the marriage of the deceased

iii) it needs to be shown that soon before her death, the deceased was subjected to cruelty or harassment by her husband or any relative of her husband for or in connection with any demand for dowry.

Coming to the first ingredient, the postmortem report suggests that the body of the deceased was bearing the mark of hanging. There was ligature mark on the neck of the deceased measuring 25 cm. x 1.2 cm. Hence, there is no doubt that the death was an unnatural death. The second ingredient is also proved as discussed above that the death of the deceased took place within seven years of her marriage. To prove the third ingredient, this Court needs to peruse the testimony of the witnesses. In this regard, the prosecution has produced father and mother of the deceased as PW1 and PW3 respectively. There is not even a single word in the testimony of PW1 and PW3 as to when soon before her death, the deceased was subjected to cruelty or harassment for or in connection with demand of dowry. There is no iota of evidence on this point in the statements of PW1 and PW3. Rather PW3, the mother of the deceased, has stated in her examination-in-chief that her daughter remained in her parental home for about one year. After that she had gone to her matrimonial home with her husband-Akhalesh Pal and Raju and after that she remained in her matrimonial home for nine months, but PW1 has not stated at all that during that period of nine months, deceased was ever subjected to cruelty or harassment regarding demand of dowry. So, both the relevant witnesses, namely, PW1 and PW3 have not uttered even a single word regarding third ingredient of harassment or cruelty soon before her death in connection with demand of dowry.

15. Section 113-B of the Indian Evidence Act raises a presumption against accused regarding the death. A perusal of Section 113-B of the Act shows that there must be material to show that soon before her death of a woman, she was subjected to cruelty or harassment for or in connection with demand of dowry, then only a presumption can be drawn that a person has committed the dowry-death of a women. It is then up to the appellant to discharge this presumption.

16. Learned trial court has not considered the ingredient regarding cruelty or harassment of the deceased soon before her death. Learned trial court has observed that on the basis of evidence on record, it is told by witnesses that it was marriage in the year 2012 and Rs.1 lakh as additional dowry was demanded. If evidence is considered believable to this extent then the offence is proved only against the appellant-husband and the appellant held guilty by the trial court. Trial court has reached to the conclusion of committing dowry-death of the deceased by her husband-Akhalesh Pal without having any evidence on record as to when she was soon before her death subjected to cruelty or harassment in connection with demand of dowry. The evidence on this point is absolutely silent. Hence, no presumption of Section 113-B of the Indian Evidence Act could be raised nor the death of the deceased could be considered as dowry-death as provided under Section 304-B IPC. Learned trial court wrongly appreciated the evidence in this regard.

17. Hon'ble Apex Court in ***Baljinder Kaur vs. State of Punjab,*** [2015 (1) JIC 71 (SC)] has held that there must be proximate and live link between the effect of cruelty based on demand of dowry and the death of the victim. It is also said by the Hon'ble Apex Court that "soon before death" is a relative term and no straight jacket formula can be laid down fixing any time limit. The determination of the period, which can come within the term "soon before death" is left to be determined by the courts depending upon the facts and circumstances of each case.

18. The same view was expressed by Hon'ble Supreme Court in ***Kamesh Panjiyar @ Kamlesh Panjiyar vs. State of Bihar*** [(2015) 2 SCC 388] and ***Baldev Singh vs. State of Punjab*** [2009 (1) JIC 120 (SC)].

19. In the present case, it is most relevant to highlight that the trial court did not give any finding on the point of "soon before death" as discussed above. Not even a single word is found in evidence of PW1 and PW3 in this regard and not even a single word is written by the trial court on above point yet trial court reached to the conclusion that appellant has committed dowry-death. No reason is disclosed by trial court as to how it framed its opinion regarding dowry-death more especially when the factum of cruelty or harassment to the deceased soon before her death is not established at all and evidence in this regard is absolutely missing.

20. Hence, trial court has not appreciated the evidence on right perspective and has given perverse finding.

21. With above discussion, I am of the considered view that offence under Section 304-B IPC is not proved against the appellant, but on the basis of evidence on record, the offences under Section 498-A IPC and Section 4 of the DP Act, 1961, are proved. Learned trial court has not passed any sentence under Section 498-A IPC due to the reason given by the trial court that no separate sentence will be passed under Section 498-A IPC when sentence is being passed under Section 304-B IPC. But, now since appellant is not found guilty for the offence under Section 304-B IPC, it is necessary to pass sentence for the offence under Section 498-A IPC. Consequently, the appellant is awarded sentence under Section 498-A IPC for three years and Rs.5,000/- as fine. The appellant shall undergo three months imprisonment in default of fine. The sentence passed by trial court under Section 4 of DP Act, 1961, needs no interference.

22. The conviction and sentence of appellant under Section 304-B IPC is hereby set aside and appeal is liable to be partly allowed.

23. The appeal is **partly allowed** in aforesaid terms.

24. The copy of this judgment and lower court record be transmitted to trial court for ensuring compliance. If the appellant has already undergone the modified sentence and is not wanted in any other case, he shall be released, forthwith.

(2021)12ILR A954
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.12.2021

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE MANISH KUMAR, J.

Criminal Appeal No. 2104 of 2007
And
Criminal Appeal No. 2078 of 2007

Ashwani Kumar **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Rana Mritunjay Singh, Rajendra Prasad Mishra, Rishad Murtaza, Udai Pratap Singh

Counsel for the Respondent:
G.A., R.N.S. Chauhan

Criminal Law – Indian Penal Code, 1860 – Section 300 - First fire was open by deceased-being life threatening- heat of passion multiplied-in retaliation-Appellant resorted to use fire arms and caused fatal injury to the deceased-provocation for sudden fight and quarrel was triggered by the deceased-case within exception-IV to section 300 IPC-benefit of section 304 part-I becomes applicable-view that common intention exist for murder is overreaching-conviction modifies.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Aher Raja Ladha Vs The St. of Guj., 1970 SCC (Crl) 541

2. Reg. Vs Govinda reported in (1877) ILR 1 Bombay 342

3. Virsa Singh Vs St. of Pun. reported in AIR 1958 SC 465

(Delivered by Hon'ble Attau Rahman Masoodi, J.
&
Hon'ble Manish Kumar, J.)

A. Subject Matter

1. Under challenge in the present appeals is the judgment and order dated 22.08.2007 passed by learned Additional District and Session Judge in Sessions Trial No.216 of 1999 arising out of case crime no. 50 of 1999 under Sections 148, 302, 149, 404 IPC at Police Station Bangarmau District Unnao and Sessions Trial No. 217 of 1999 arising out of case crime no.51 of 1999 under Section 3 r/w 25 Arms Act at Police Station Bangarmau district Unnao whereby the appellants were convicted under Section 302 read with Section 34 Indian Penal Code, 1860 and were sentenced to imprisonment for life and fine of Rs.5000/- only with default stipulation of additional imprisonment of six months. Appellant Ashwani Kumar was further convicted under Section 404 IPC and was sentenced to undergo rigorous imprisonment for a term of one year and fine of Rs.1000/- with default stipulation of additional imprisonment of three months. Moreover, he was convicted under Section 3 r/w Section 25 of Arms Act and sentenced to undergo rigorous imprisonment for a term of two years and fine of Rs.1000/- with default stipulation of additional imprisonment of three months.

B. Facts and Evidence

2. The case of the prosecution, as unfolds from the FIR dated 17.02.1999 arising out of Case Crime No. 50/99 under Sections 302, 307, 396 IPC, P.S. Bangarmau District Unnao, is that the informant Anand Mohan son of Ram Shanker Gaur gave an application in the Police Station Bangarmau on 17.02.1999 that his uncle Ram Naresh Gaur son of Sri Pal and uncle's son Anil Kumar son of Ram Naresh were killed by the appellants and Sanad Kumar son of Ram Swaroop, Avnish Kumar son of Ram Avatar and Parsu son of Pohkar Pasi. On 16.02.1999 appellant Ashwani Kumar and his brothers had intentionally taken their tractor full of potatoes through the fields of informant breaking its Khahee in consequence of which a verbal exchange had taken place between them. On 17.02.1999, while the informant, his father, his uncle Ram Naresh, uncle's son Anil Kumar and daughter Vasundhara Devi were digging potatoes in the field of Ram Naresh, the armed accused tried to repeat the act to which he objected. Ashwini Kumar fired a shot at Ram Naresh which he missed. Ram Naresh also made an air shot with his licensee gun in exercise of right of private defense. The second shot by Ashwani hit Ram Naresh and he fell. Anil Kumar who tried to pick the gun of his father

was immediately shot by Rajesh Kumar, Mithlesh Kumar and Atul Kumar. He died on the spot. The accused then attacked the informant and his other family members present, but they fled to save their lives. Ashwani Kumar took away the licensee gun of Ram Naresh with him.

Injured Ram Naresh, informant and Vasundhrara Devi went to police station to lodge an FIR. Ram Naresh died on the way to hospital from ante-mortem injuries.

3. On 18.02.1999 the police arrested the accused persons from Hanuman Mandir before village Vasiyat Kheda. Upon search, a single barrel gun, factory made, gun no.6382 and four live cartridges(12 bore red colour), out of which three were of No.1 and one was of No.2, in the leash kept on shoulder were recovered from the possession of appellant Ashwani Kumar. In furtherance of this recovery, the FIR dated 18.02.1999 arising out of Case Crime No. 51/99 under Section 25 Arms Act, P.S. Bangarmau, District Unnao was registered.

4. The Charge-sheet was filed against the accused under Sections 302,307 and 396 IPC and Section 3/25 Arms Act, 1959. The case was committed to the Session Court, Unnao for trial. The trial court framed charges under Sections 148 and 302/149 against all the 8 accused namely Ram Lakhan, Ashwani Kumar, Mithlesh Kumar, Atul kumar, Sanad Kumar, Awanish Kumar, Rajesh Kumar and Parshuram and under Section 404 IPC against Ashwani Kumar in Sessions Trial No. 216/99 and also under Section 25 Arms Act, 1959 in Sessions Trial No. 217/99.

5. In order to prove its case the prosecution had testified P.W.-1 the informant, P.W-2 Vasundhara Devi, daughter of deceased Ram Naresh and eye witness of the incident, P.W-3 Aakil Husain, Head Constable who prepared the chik and proved Ext.2 FIR, Ext. 3 general diary Ext.4 G.D report no.31, injury report/medical report/majroobi chitthi as Ext.5 and Ext.6 i.e. special report, P.W-4 Jai Singh constable who was posted at police station Bangarmau on the relevant date and took the body of the deceased Anil Kumar for postmortem,P.W-5 S.I Shiv Narain Upadhyaya who proved Ext.7 i.e. panchnama of deceased Anil Kumar, Ext.8 and 11 i.e. cover letter to CMO and letter R.I photographs of dead body, Ext.12 i.e. inspection report of site Ext. 13 i.e. soil samples-plain and blood stained, Ext.14 i.e. blood stained tehmat and Ext.15 i.e. recovered shrapnels(chharre), P.W.6 Dr. Dinesh Kumar who proved the postmortem report of deceased Ram Naresh and Anil Kumar i.e. Ext.16 and 18 respectively, P.W-7 S.I. Chandra Bhan Singh who proved the site plan of case crime no.51 of 1999 i.e. Ext.19, prosecution sanction i.e Ext.20 and charge-sheet under Section 3 r/w 25 of Arms Act i.e. Ext 21, P.W-8 Vishwanath Sonkar, Head Moharrir who proved the recovery of licensee gun and the cartridges i.e. Ext.22 and 1 to 5, the FIR and G.D report of case crime no.51 of 1999 as Ext.23 and 24 respectively, P.W.9 Awadhesh Kumar who proved on oath that he took seal bound dead body of Ram Naresh Gaur for postmortem, P.W.10 Avinash Kumar Dixit who is the first Investigating Officer of the case and proved the panchnama of deceased Ram Naresh and documents relating thereto as Ext. Nos.25 to 29 and P.W.11 Inspector Omraj Singh who is the chief Investigating Officer of the case and proved Ext.22 as above, Ext 30 i.e. charge-sheet dated 30.04.1999 against accused persons and the Exts 31 and 32 i.e. forensic reports of the recoveries.

6. In his examination under Section 313 Cr.P.C, the appellant Ashwani Kumar had denied the charges against him and alleged that he is being falsely implicated due to political animosity. Other appellants Rajesh Kumar, Atul Kumar, Mithlesh Kumar and co-accused

Parshuram, Ram Lakhan and Sanad Kumar took the same instance. Co-accused Avnish Kumar,in his examination under Section 313 Cr.P.C, took a plea of alibi that he was, at the time of incident, studying at Subhash Inter College Bangarmau where he was admitted in Class XI as Avnindra Kumar.

7. Informant Anand Mohan who was examined as P.W.1 reiterated the version of FIR in the Examination- in-Chief. He further stated that his father Ram Shanker, sister (cousin) Vasundhara, Shrawan Kumar, Mashook Ali and others were eyewitnesses to the incident. After the incident he came running to his village and took a tractor to take Ram Naresh to Bangarmau. He identified the Ext.1 as the application written by him on the way upon which the FIR was registered when he reached the police station at 15.00/ 15.15 hrs. He missed the name of Ram Lakhan in haste and anxiety. Injured Ram Naresh was sent to hospital from police stationa. Later, he got to know that his uncle died on the way to Unnao hospital. He also admitted that accused Ashwani Kumar had, about 8 years ago, prosecuted him, his father Ram Shanker and witness Shrawan Kumar (not examined) for an offence under Section 307 IPC, in which accused Ashwani Kumar and Parshuram had given evidence against him.

In the cross examination, P.W.1 denied having any political animosity with the appellants. However he changed his statement to the extent that the appellants had taken their tractor through the orchard (Bagh) of Ram Naresh and not potato field, a day before and the incident also took place in the said orchard and not potato field. He clarified that he had mistakenly understood the orchard as a potato field. On the date of incident , the deceased Ram Naresh and Anil Kumar left for the field after taking their meals. After 10 to 15 minutes, the informant, his father Ram Shanker and P.W.2 left for the fields and reached around 10.15 hrs. About a sack of potatoes were dug out and not collected before the incident took place. Upon first sight, the tractor was 10-15 steps away from the south Khahee of the orchard. Ram Naresh protested against the tractor being driven through the orchard, having a gun in his hand then. Departing from his examination in chief, he admitted that when appellants did not pay any heed to his protest, fire was first made by the deceased Ram Naresh in the air towards west, while Ashwani was on his tractor. After this Ashwani Kumar fired at Ram Naresh, but it did not hit him. At this, he moved 8-10 steps ahead and not towards the field out of fear. Ram Naresh fell after getting injured by Ashwani's second shot. He was 2-3 arms away from the place Potatoes were being dug out. He fell after moving a little west. His gun fell as well. Rajesh, Atul and Mithlesh who were standing three steps apart from each other, fired from north of the orchard, aiming at Anil Kumar who was trying to pick the gun of Ram Naresh. The accused took the gun and left, leaving their tractor behind. Shrawan Kumar whose field is in towards the west of the place of occurrence had witnessed the incident himself and came running from his field thereafter. The witness admitted that the tractor through which he went to the police station was being driven by the son of Har Govind Mishra (Ex. Pradhan), Pramod and he was hence accompanied by Pramod, Ram Naresh, Vasundhara and Ramesh Kumar who also belong to the family of Har Govind Mishra. He did not accompany Ram Naresh to hospital and came back to the village with police. According to him, the body of Anil Kumar which they left at the orchard was found by him in-front of Mashook Ali's home and was covered with a tehmat (Mashook Ali is a batai-gir who accompanied the informant at the field). The dugout potatoes which they left in the field were not present when they reached back. His statement was recorded by the police at the place where Anil Kumar's body was found around 17.30 hrs., the same day.

8. P.W-2 Vasundhara Devi is the daughter of deceased Ram Naresh and claims to be eye-witness of the incident. In her examination-in-chief, she affirmed that her father Ram Naresh and brother Anil Kumar were killed by Ashwani Kumar and other accused on 17.02.1999. She stated that the first fire was made by Ashwani Kumar aiming at Ram Naresh which he missed. Ram Naresh had a licensee gun from which he air-fired in the exercise of right of private defense. Ashwani Kumar, then fired again at Ram Naresh and he fell. Ashwani Kumar then dared other accused to kill others and fulfill the purpose they were brought for. Thereafter, Rajesh, Atul and Mithlesh fired at Anil with their gun and *addhis* respectively. Other accused had *addhis* as well. All four accused fired at them but they saved their lives by running away. She supported the version of P.W.1 in the later part as well, adding that she came back from the police station by the same tractor they went there. Ram Shanker, brother of Ram Naresh accompanied him to the hospital by Jeep after the first aid at Bangarmau.

Upon being cross examined by the defense counsel, the witness had refuted the plea of alibi taken by accused Avanish Kumar. Moreover, the description of the place of occurrence given by P.W-2 is identical to the one given by P.W.1 to a large extent. She deposed that accused Ashwani Kumar did not make the first fire from the tractor, but came down for it. At this point, Ram Naresh had his gun in his hand but not loaded. He loaded his gun thereafter and made an air fire in the exercise of right of private defense, facing east. The second fire made by Ashwani hit Ram Naresh, when he had stepped 2-3 steps ahead from his position.

Differing from her examination by police under Section 161 Cr.P.C, she stated that when Ram Naresh fell, Anil was standing near him and not on the 'Medha' near her. She added, when Anil picked the gun of Ram Naresh, it was not loaded. After the incident, she reached the police station at 15.20 hrs., her statement was not recorded there. According to her, Ram Naresh was sent to hospital within 10-15 minutes. She left for the village around 17.30 hrs. Anand Mohan had already gone to the village with police. She reached the village at 18.00 hrs. Her maternal uncle Sripal and maternal cousins Kamlesh and Rakesh reached by 19.00 hrs. Police remained at the place of occurrence till 18.45 hrs. Body of Anil (deceased) was sent for examination at 18.45 hrs.

9. In his examination, PW3., who was posted as head Moharir at the P.S. Bangarmau on the said date, has certified the chik FIR prepared by him at 15.20 hrs. [Exhibit 2], the Majrubi Chitthi with which injured Ram Naresh was sent to community health centre, Bangarmau with constable Avadhesh Kumar Singh (CP525) and attached thereto, the referral letter of Doctor to Sadar Hospital, Unnao (Exhibit 5) and the special report prepared by him (Exhibit 6) which was sent to authority by Constable Ramakant Tiwari (CP 579).

In the cross-examination, the witness admitted that the copy of the chik FIR with special Report was sent to C.O. Safipur on 18.02.99.

10. CP 571, Jai Singh, who was also posted as constable at P.S. Bangarmau and was testified as PW 4, affirmed on oath that he accompanied the investigating officer to the spot at village Belkheda, Majra Ranipur on the date of occurrence and that he took the body of Anil Kumar, after Panchnama, and documentation to the Mortuary and presented it before doctor on 18.02.99 duly sealed and accompanied with all documents, for postmortem.

11. PW 5, Shiv Narayan Singh was then posted as SSI at PS Bangarmau. He certified

before the trial court his signature on FIR, Panchayatnama and the letter to Chief Medical Officer, letter R.I. photograph of dead body, and the challan of the dead body. He admits to have recorded the statement of P.W. 1 and thereafter he proceeded to the spot with a police party. He carried out the panchayatnama of deceased Anil Kumar. At the instance of the informant, he inspected the spot and prepared the site plan, which is in accordance with the revenue map. He also affirmed to have recorded the soil samples, blood stained tahmat and 11 cartridges, 1 bullet, 3 tiklis and two corks and prepared memo thereof in his writing and signature. Further, he recorded the statement of P.W. 2 the same day. The investigation was then taken up by SHO Omraj Singh on the same day at 22.00 hrs.

In the cross examination, the witness affirmed to have left for the spot at 15.30 hrs. with the informant on his bike. Regarding the Sections mentioned and then crossed in panchnama, he clarified that he wrote Sections 147/148/149 on the basis of the number of accused involved but crossed them after tallying with the F.I.R. But the witness vehemently denied the F.I.R. and other documents being ante timed. He admitted that the body of the deceased Anil Kumar was recovered about half a k.m. away from the said place of occurrence, while the tahmat was recovered from spot E indicated in the site plan.

12. Dr. Dinesh Kumar examined as P.W. 6 had conducted the postmortem of deceased Ram Naresh and deceased Anil Kumar and had proved the report before the trial court. In respect of the postmortem of Ram Naresh he stated that the body had four injuries of the description given. In the internal examination, two metal shrapnels were recovered. In his opinion, the death might have occurred between 16.00-17.00 hrs a day before examination due to antemortem firearm injuries. In respect of the deceased Anil Kumar's medical examination, he stated that the deceased died of blood loss and shock around 13.00 hrs. on 17.2.1999.

In the cross examination he further stated that Ram Naresh had suffered three firearm shots. The third injury was caused from behind. The injury which had blackness and burns (injury-1) was caused from one hand distance.

13. P.W. 7 Chandra Bhan Singh deposed that he investigated the case crime no. 51/1999 under Section 3/25 Arms Act on 19.2.1999. He deposed to have recorded the statement of informant Omraj Singh, scribe of the F.I.R. Vishwanath Sonkar and accused Ashwani Kumar. The witness certified the site plan (exhibit 19) prosecution sanction obtained dated 12.5.1999 (exhibit 20) and the charge-sheet prepared after completion of the investigation(exhibit 21) by him.

The cross examination of the witness revealed that the case diary prepared by him did not mention the time of beginning of the investigation on 19.2.1999 but reiterated that the site plan and the investigation were not fabricated.

14. P.W. 8 Vishwanath Sonkar the scribe of the F.I.R. in case crime no. 51/99 dated 18.2.1999 deposed in his examination-in-chief that he accompanied investigating officer P.W. 11 to the spot on 18.2.1999. He affirmed the recovery of a single barrel gun and four live cartridges from accused Ashwani Kumar and others at 20.00 hrs. near Hanuman temple. He identified exhibit 1, 2 3, 4 and 5 (the recovered gun and cartridges), exhibit 23 (F.I.R. written in his handwriting and signature and exhibit 22 (the recovery memo).

The cross examination of the witness revealed several gaps in the prosecution story.

The witness failed to tell the time he reached the spot, whether P.w. 1 was present there or not, whether the police team visited any other house in the village, the dimensions of the platform of the temple on which the accused were sitting at the time of arrest, the distance from which accused were spotted first, or whether any warning was given by the police team to the accused. He deposed that the police team was divided into three parts. His team consisted of constable Mahesh Pratap Verma and Inspector S.N. Upadhyaya but he could not recollect the composition of other teams or their position/direction. There is no witness of the arrest on record other than the police party and five accused themselves. No lantern or any other thing was called for to prepare the memo of recovery. The police party was stated to have been carrying the torch.

15. P.W. 9 525 CP Awadhesh Kumar Singh deposed on oath that he received the body of the deceased Ram Naresh Gaur for postmortem and kept it untouched until the postmortem took place.

16. P.w. 10 Avinash Kumar Dixit stated in his examination in chief that he carried out the inquest of the death of Ram Naresh Gaur after receiving information from P.W. 9 and reported as report no. 31. He proved the exhibit 25-panchayatnama of Ram Naresh Gaur, exhibit 26-photograph of dead body, exhibit 27 dead body challan, exhibit 28 R.I. letter and exhibit 29 letter to C.M.O.

In the cross examination the witness affirmed that the deceased was sent to PHC and then hospital by same tractor and after he died it was brought back and sent for postmortem after panchanama by the same tractor.

17. Om Raj Singh, who was then posted as Officer in charge at police station Bangaurmau and was the Chief Investigating officer of the matter was examined as P.W. 11. He affirmed the statement of P.W. 5 that the investigation of case crime no. 50/1999 was taken up by him in the intervening night of 17.2.1999/18.2.1999 and duly received all documents and the recovery memos prepared so far. He also registered the F.I.R. under Section 3/25 of Arms Act in case crime no. 51/1999 at 22.15 hrs. 18.2.1999 recorded the statements of witnesses Ram Shankar, Ram dulari and inquest witnesses and submitted a charge sheet(exhibit 30) prepared in his handwriting under his signature.

Further in the cross examination it was revealed by the witness that he went to the village of Judai Khera for investigation with P.W. 5 at 21.00 hours and remained there till 03.30 hrs. (18.2.1999). They also made searches at the residence and other probable stations of the accused but they were not present there. The witness reiterated that all the witnesses were arrested together about 100 yards towards east from abadi of village pasiyan khera. The villagers refused to give evidence of the arrest out of fear.

18. On behalf of the defence, two witnesses were examined in support of their case.

19. D.W. 1 Baijnath Tiwari supported the plea of alibi taken by accused Avanish Kumar. D.W. 1 was posted as Lecturer and class teacher of class 11 (science) at Subhash Inter College Bangarmau at the relevant time.

20. D.W. 2 Ram Bahadur Singh who was Principal of Gram Awasiya Vidyalaya, Takiya produced the attendance register of teachers of school and deposed that Shrawan Kumar Gaur whom P.W. 1 and P.W. 2 claimed to have witnessed the incident of 17.2.1999, was present in school between 09:45 to 16.00 hrs. The distance between the school and village Ashayas is 10-11 km. The witness remained consistent in his cross examination.

21. After the completion of the evidence from both the sides the trial court, taking into consideration the oral and documentary evidence and considering the arguments of prosecution as well as defence and duly examining all the papers convicted the appellant as above. Accused Sanad Kumar, Awanish Kumar and Ram Lakhan were given Benefit of doubt and acquitted. Accused Parshuram died during the trial.

C. The case framed by prosecution and defence:

22. The appellants have been convicted and sentenced to life imprisonment. There is no appeal of the State against the acquittal of co-accused viz. Awanish Kumar, Sanad Kumar and Ram Lakhan. Parshuram yet another co-accused died during the course of trial.

23. The sum and substance of the case framed by the prosecution is that on 16.2.1999 the appellants took their tractor through the land/orchard belonging to the deceased while they were digging out potatoes in their field and some altercation took place. Next day on 17.2.1999 the appellants again made an attempt to repeat the same and on the protest of Ram Naresh, they opened fire and caused the death of Anil Kumar and Ram Naresh both by using lethal weapons i.e. fire arms and the occurrence was witnessed by as many as five eye witnesses viz. Anand Mohan (complainant) PW-1, Vasundhara Devi PW-2, Ram Shankar, Mashook Ali and Shrawan Kumar. Out of five eye witnesses the prosecution produced Anand Mohan (PW-1) who was the nephew of Ram Naresh (deceased) and the cousin of Anil Kumar (deceased) whereas the other witness Vasundhara (PW-2) was the daughter of Ram Naresh (deceased) and the real sister of Anil Kumar (deceased).

24. The post mortem reports support the case of prosecution which were proved. The cause of death is the loss blood on account of fire arm injuries insofar as Anil Kumar is concerned, whereas Ram Naresh died of ante mortem injuries received from a fire arm. Site plan was also prepared by the investigation officer as per revenue map and the inquest reports were also drawn in respect of both the persons who succumbed to the fire arm injuries. Initially Shiv Narain PW-5 stepped into the investigation which was later taken over by Chandra Bhan Singh PW-7. The recovery of the licenced fire arm belonging to Ram Naresh looted in the occurrence was also made by the investigating officer. No one except the two deceased persons received any injury.

25. The appellants were charged of committing the offences under Section 148, 302/149, 404 IPC. Ashwini Kumar was also charged of the offence under Section 25 of the Arms Act. At the stage of Section 313 Cr.P.C. the appellants denied of being guilty and it was submitted that they have falsely been implicated in the occurrence. For non-compliance of the procedure under Section 313 Cr.P.C. there is no grievance except that the applicants stated that they have been implicated falsely. The trial court went through the evidence in detail and conclusions were accordingly drawn against the appellants for holding them guilty. The plea of lack of intention and sudden provocation attracting Section 300 Exception IV IPC was not raised during the course of trial.

26. The most significant contradiction in the ocular testimony of PW-1 noticeable in the case is that the said witness in the cross examination has clearly stated that the first fire on the date of occurrence was shot in the air towards west by Ram Naresh using his licenced gun whereas the PW-2 in her oral testimony being an eye witness has said that the first fire was made by Ashwani Kumar. According to PW-2 the first fire was shot by Ashwini Kumar on which the deceased Ram Naresh objected the

assailants from entering into the orchard/potato field belonging to the deceased who in private defence fired in the air.. It was the second shot fired by Ashwini Kumar that hit Ram Naresh and he fell down and his licenced gun fell too. The other victim Anil Kumar who bent for picking up the gun was then fired at by other assailants and having received fire arm injuries died on the spot. This inconsistency between the ocular evidence of PW-1 and PW-2 according to the appellants is a material contradiction that goes to belie the case of the prosecution, as such, they are entitled to the benefit of doubt at par with the other co-accused who have been acquitted.

27. The second contradiction in the oral testimony of eye witness PW-2 is noticed when her version that Ram Naresh after reaching to the police station was taken to the hospital by Jeep is compared to the version of PW-10 (Awinash Kumar Dixit) who in his cross examination has deposed that Ram Naresh (deceased) was taken to the hospital by the same tractor he was brought to the police station. The contradictions certainly shake the credibility of evidence.

28. Apart from the contradictions mentioned above, the appellants have pointed out the ambiguity in the site plan that it was prepared as per the guidance of complainant which the investigating officer has acknowledged in his cross examination, therefore, the evidence of PW-1 being the informant is the genesis of the case. The dead body of the deceased Anil Kumar was recovered at a distance of half a kilometer from the alleged fields i.e. in front of the home of Mashook Ali. It was argued that the tractor of the appellants as per site plan had not entered into potato field of the deceased Ram Naresh at all, yet in the first instance he fired in the air so as to intimidate the appellants of causing grievous injury. It is argued on behalf of appellants that reaching out to their potato field on 17.2.1999 through any objectionable route is not evident from the statement of any witness or FIR, therefore, the protection of private defence asserted by PW-2 on behalf of Ram Naresh was clearly pointless. The first fire made by the deceased (Ram Naresh) rather gave rise to the right of self defence to the appellants who were intimidated excessively and threatened of life to use the chak road passing through the field of deceased. The site plan does not show Mashook Ali or dug out potatoes lying on the field besides the alleged tractor full of potatoes which the accused left behind. The position of other witnesses is also not shown in the site plan.

29. The evidence on record also reflects some overwriting on the inquest report of Anil Kumar (deceased) but same was explained by the investigating officer to the satisfaction of trial court.

30. This Court has taken note of the contradictions mentioned above but all these lapses on the part of investigating officer according to the trial court, would not discredit the ocular testimony of PW-1 and PW-2 who are eye witnesses and their testimony merely on the basis of being close relatives to the deceased, cannot be discredited.

31. The plea of innocence notwithstanding the contradictions and the discrepancies pointed out failed, however, the appellants without formally taking the ground, at this stage, have taken the plea that it was a case of culpable homicide within the scope of Section 300 Exception IV IPC for which the sentence of life imprisonment being maximum is disproportionate. It is submitted that the evidence available on record sufficiently discloses it to be a case of culpable homicide not amounting to murder. Section 300 Exception IV IPC for ready reference is reproduced hereunder:

"300- Murder : *Except in the cases hereinafter excepted, culpable homicide is*

murder, if the act by which the death is caused is done with the intention of causing death, or--

2ndly.--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

3rdly.--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

4thly.--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1.--When culpable homicide is not murder.

Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:--

First.--That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.--That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.--That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.--Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z.

This is murder, inasmuch as the provocation was giving by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.--Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.--Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.--It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.--Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration

A, by instigation, voluntarily causes Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder."

32. The question as to whether the plea of self defence or an exception, when it was not asserted during the course of trial, remains open or not. In this regard reference may be made to a decision of the apex court reported in ***1970 SCC (Crl) 541 (Aher Raja Ladha v. The State of Gujarat)*** wherein the plea though advanced at the stage of committal was not pursued in trial, yet the apex court held that the trial court and the High Court were wrong in refusing to examine the plea of self defence taken. This Court may observe that the plea of self defence on an exception appended to Section-300 IPC on the strength of evidence available on record is open to be raised at the appellate stage for it is the duty of the trial court and the appellate court

both not to ignore any relevant aspect of the case that has a bearing upon his being held guilty.

33. The Court would thus proceed to examine the plea of exception-IV appended to Section 300 IPC for which the evidence of PW-1 is more reliable than PW-2. The distinction is drawn looking to the fact that PW-2 has made mismatched statement more than once as noticed above. Therefore, the credibility of her evidence does not lead to the discovery of truth. The overriding evidence of PW-1 who helped the investigating officer draw the site place, therefore, becomes highly relevant. According to the ocular evidence of PW-1 it is clear that the first fire was opened by Ram Naresh (deceased) which, by no stretch of imagination, could be viewed less than life threatening by the appellants, who in retaliation resorted to use the fire arms and caused a fatal injury to him. The threat to life was equally imminent to the appellants, when Anil Kumar bent to pick up the gun which fell down from the hands of Ram Naresh on receiving injury. The provocation for sudden fight and quarrel was triggerd by the deceased who protested by advancing towards the accused and the heat of passion multiplied on his opening the first fire and this position is well established on a prudent reading of the testimony of PW-1 (Anand Mohan).

34. It would not be prudent to import the element of common intention in a situation of sudden fight or quarrel saddled by provocation or aggression as in the case at hand, therefore, the evidence on record clearly brings the case within the field of Exception-IV appended to Section 300 IPC and the benefit of Section 304 Part-I becomes applicable. The view taken by the trial court that there existed a common intention for murder in the total act of accused persons, in our humble consideration, is overreaching the essence of evidence of which the material contradictions were wrongly ignored and attached no significance.

35. This Court may observe that the element of common intention in the commission of an offence is more a rule of procedure lack of which may not severe the culpability but it mitigates the punishment. This Court may note that the distinction drawn between culpable homicide and murder in the case of ***Reg. vs. Govinda reported in (1877) ILR 1 Bombay 342 and Virsa Singh v. State of Punjab reported in AIR 1958 SC 465*** does not lead us to any doubt that in the present case the appellants did have knowledge of the fatality of the fire arm injury but the sudden provocation and aggression suppressed the element of intention much less than common intention, therefore, benefit of Section 304 Part-II or at least lesser punishment by advancing the benefit under Part-I of Section 304 ought to have been accorded by the trial court.

36. The appellants have already served the sentence for more than 17 years which the State has not disputed besides the fact that one of the appellants (Parshuram Pasi) has died during the pendency of appellate proceedings while incarceration. The Court would equally note that the evidence of the site plan is completely silent on the objectionable course/route that was adopted by the appellants one day before nor has it been shown on the day of occurrence that would give any reason to the deceased to approach towards appellants to hurl abuses or opening first fire which gave rise to sudden provocation.

37. The investigation, evidence or site plan offers no explanation of the tractor loaded with potatoes that was attempted to be brought and driven through the land of deceased and the independent witnesses were neither produced nor their position shown in the site plan unlike appellants. The absence of Shrawan Kumar despite defence evidence having been led to prove his absence was wrongly disbelieved. Above all the body of Anil Kumar (deceased)

was recovered half a kilometer away from the place of occurrence and as per medical opinion he died of loss of blood (hemorrhage). For want of adequate justification, the State has not argued that there was any pre-meditation or the appellants had acted in any cruel or unusual manner.

38. The Court may note that the prosecution as a matter of routine does not lay emphasis on the production of independent witnesses during the course of trial or fails to record their statements during investigation. Such a lapse on the part of investigating agency must be viewed seriously by the courts of law and time is not far when the courts may have to invoke the *suo motu* powers to summon such witnesses for which there ought to exist a witness protection law.

39. For the reasons recorded above, the conviction of the appellants under Section 302 IPC is modified as conviction under Section 304 Part-I IPC and the substantive sentence of life imprisonment is reduced to the period of sentence already undergone by them and the two appeals preferred by the appellants separately as noted above, are partly allowed. Let a copy of the judgement be kept on the record of Criminal Appeal no. 2078 of 2007 as well.

40. All the accused-appellants be set at liberty forthwith if not wanted in any other case.

(2021)12ILR A966
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.11.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 2114 of 1993

Ravindra **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Sri K.D. Tripathi, Ms. Seema Pandey, A.C.

Counsel for the Respondent:
A.G.A.

Human tendency to run away from the scene of crime-particularly heinous crime-and when victim is not a close associate or relative-dying declaration indicts co-accused –it is inconclusive in respect of appealant-entitled for benefit of doubt.

Appeal allowed. (E-9)

List of Cases cited:

1. Shivaji Sahabrao Bobade & anr. Vs St. of Mah. (1973) 2 SCC 793

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Sameer Jain, J.)

1. Heard Ms. Seema Pandey (Amicus Curiae) for the appellant; Sri Amit Sinha, learned AGA and have perused the record.

2. This appeal is against the judgment and order of conviction and punishment dated 09.11.1993 and 16.11.1993, respectively, passed by III Additional Sessions Judge, Ghaziabad in Sessions Trial No.166 of 1990 whereby the appellant (Ravindra) has been convicted under Section 302 read with Section 34 IPC and awarded life imprisonment whereas co-accused Smt. Rajni who was tried for the charge of criminal conspiracy for murder has been acquitted.

Introductory Facts

3. (i) The prosecution case, in brief, is that in the morning of 24.10.1988, at about 7.30 a.m., while Devendra Singh (Informant - PW1), a

police constable, was going to attend nature's call, he was informed by one Ram Mehar (PW-2) that, on the road side, in a sewer pit (manhole), a person is lying injured and is groaning. On receipt of the information, PW-1 went to the spot and with the help of PW-2, Sri Chand Chowkidar (not examined) and Prakash Yadav (PW-5) pulled out the person injured from the manhole (sewer pit) and discovered that he was badly injured and his intestine had come out. On being queried, that person disclosed his name (Shiv Kumar Pathak - the deceased), parentage and place of residence. That injured person also stated that *"he* (the injured), Munna (absconding accused) *son of not known, resident of village Tesuwa, police station Faridpur, district Bareilly and Ravindra* (the appellant) *son of Siya Ram, resident of village Tesuwa, police station Faridpur, district Bareilly, today, in the morning, at about 5.00 a.m., were going to village Barauk to purchase vegetables;* Munna (co-accused) *owed Rs.500/- to him* (the deceased)*; he (the deceased) had been requesting* Munna *to return the money, and when, on way, he* (the deceased) *made a demand for the money,* Munna*, all of a sudden, inflicted him* (the deceased) *a knife blow on his* (deceased's) *abdomen and Ravindra* (the appellant) *held him; thereafter, he* (deceased) *fell unconscious and, later, when he regained consciousness he is feeling the pain"* after stating as above, the injured pointed towards his injury. Narrating the aforesaid incident and the statement of the person injured (the deceased) recited above in vernacular, PW1 lodged a written report (Ex. Ka1) at police station Dadri, district Ghaziabad at 7.30 am on 24.10.1988, which was registered as first information report (FIR) (Ex. Ka-2).

(ii) The injured was rushed to the All India Institute of Medical Sciences, New Delhi (AIIMS). He was admitted there at 10.00 am. There he died at 11.20 am on 24.10.1988 itself. The summary of his admission and death provided by Department of Forensic Medicine, AIIMS is there on record as Paper No. Ex. Ka-3. Prior to his death, an effort was made to record his statement but the doctor noted *"unfit for statement"*, paper with regard thereto is on record as Ex. Ka-8. On 25.10.1988, the body was identified by deceased's wife Rajni (co-accused) and Rajni's brother (Avnish Kumar), papers with regard thereto, are on record as Ex. Ka-5 and Ex. Ka-4, respectively . Autopsy was conducted on 25.10.1988 at about 4.30 pm, the autopsy report was admitted under section 294 CrPC. Autopsy report stated that death could be about 28 hours before. The Autopsy report recorded following ante-mortem injuries:

1. Incised wound present in left lumbar area size 8 cm x 6 cm going deep and intestine coming out, 18 cm below left nipple and 6 cm left axillary line. On exploration small intestine and transverse colon cut, peritoneal cavity contained about 2500 cc blood.

2. Incised wound 6 cm x 2 cm x 0.5 cm in mid-umbilical area just 2 cm lateral to the right of injury no.1 and 18 cm below left nipple.

3. Three small lacerated wound size 1 cm x 1 cm x 0.2 cm, 0.5 cm x 0.5 cm and 1 cm x 1 cm just lateral to injury no.2 to the right.

(iii) During investigation the police lifted blood stained and plain earth from the spot, collected *chappals* (slippers) and prepared memorandums thereof on 24.10.1988, which were marked Ex. Ka10 and Ex. Ka 9 respectively. On 04.11.1988, a shirt of the deceased from the manhole of the sewer from where the injured was taken out; and a knife from the bushes around, was recovered allegedly on the pointing out of the appellant, while in police custody. A memo of that recovery (Ex. Ka-9) was made, which was witnessed by Rajendra Prasad (PW-6) and another.

4. After investigation, on the strength of material collected during investigation, the police sent three persons for trial, namely, Ravindra (the appellant); Munna (the person

who inflicted the knife injury); and Smt. Rajni (wife of the deceased). Notably, Munna was challaned as an absconder. After taking cognizance on the police report, the case was committed to the Court of Session. Through out the trial Munna remained absconding therefore evidence was recorded against him as under section 299 CrPC.

Evidence

5. During the course of trial following prosecution witnesses were examined: Constable Devendra Singh (PW-1), the person who lodged the first information report and before whom the deceased had allegedly made statement as noted above; Ram Mehar (PW-2), the person who first noticed the deceased lying in the manhole and on whose information the deceased was taken out from the manhole; Ram Pal Singh (PW-3), who was examined by the prosecution to demonstrate that all the three accused were residing at his premises as his tenant, and that the male accused persons had developed illicit relations with co-accused Rajni (the wife of the deceased), however, this witness completely resiled from the prosecution story and was declared hostile; Inder Singh (PW-4), a police personnel, posted at Defence Colony police station, New Delhi, who proved: the admission of the injured (i.e. the deceased) at AIIMS on 24.10.1988, his death, shortly thereafter, identification of his body by co-accused Rajni (deceased's wife) and Avnish Kumar (Rajni's brother), inquest and handing over of body for autopsy as also papers connected therewith; Prakash (PW-5), the person who helped PW-1 and others to take out the injured from the manhole; Rajendra Prasad (PW-6), the person in whose presence the knife was recovered - he proved the recovery memo (Ex. Ka-9); and Sub Inspector Bahadur Singh (PW-7), the Investigating Officer, who started the investigation. It be noted that post mortem report as well as charge sheet and forensic reports were admitted under section 294 CrPC therefore formal proof requirement was dispensed with.

6. After the prosecution evidence was led, the incriminating circumstances appearing in the prosecution case were put to the appellant who denied his involvement in the crime and claimed that he has been falsely implicated.

Findings of the Trial Court

7. The trial court found that - (a) there was no occasion to doubt the version narrated in the FIR as the police witnesses had no reason to make false allegation; (b) during investigation the investigating officer (PW-7) found that the deceased, his wife (Rajni); Munna and Ravindra (appellant) resided in one room let out by PW-3; (c) PW-4 proved that the deceased in an injured condition was admitted in AIIMS were he expired shortly after admission and his statement could not be recorded as the doctor did not allow him to do so; (d) autopsy report established that the deceased was inflicted knife blows which resulted in his death and the estimated time of death also correlated with the prosecution story; (e) PW-6 established recovery of knife at the instance of the appellant; (f) blood stained shirt was also recovered from the manhole at the instance of the appellant; (g) the chemical examiner report established the presence of human blood on knife, clothes, soil etc therefore, the place of occurrence and the weapon used was proved; (h) the statement of the deceased made before his death is admissible under section 32 of the Evidence Act which clearly establishes that the appellant caught hold the deceased whereas Munna inflicted knife blows resulting in injuries and ultimately his death, the appellant therefore, is liable to be convicted for the offence punishable under Section 302 read with Section 34 IPC. The trial court however found no evidence of conspiracy to nail co-accused Rajni.

Submissions

8. Assailing the judgment and order of the trial court, learned counsel for the appellant contended : (a) that the prosecution failed to prove any motive against the appellant; (b) that the motive was exclusively with Munna; (c) the story in the FIR reciting the manner of incident suggests that it was the individual act of Munna; (d) the statement of the deceased as recited in the FIR is inconclusive as against the appellant; (e) that admittedly the doctor did not certify the condition of the deceased as fit to record statement hence no reliance can be placed on his (deceased's) statement; (f) that recovery of incriminating articles is from an open place already discovered hence it is inconsequential; and (g) that there is no ocular account or any other evidence that the deceased was in the company of the appellant or any body else on or about the time of the incident. It was argued that this is a case where there is virtually no evidence, ocular or circumstantial, to complete the chain of incriminating circumstances to rule out all other hypothesis than the guilt of the appellant. Hence, it is a fit case where the appellant be acquitted of the charges for which he has been tried.

9. Per contra, Sri Amit Sinha, learned AGA, submits that this is a case where the presence of the appellant with the deceased and the other co-accused at the time when the deceased was inflicted injury is substantiated from the statement made by the deceased to PW-1; and the recovery of knife on the pointing out of the appellant corroborates that statement of the deceased therefore, the burden was on the appellant to explain the circumstances in which the deceased had suffered injuries and in absence whereof, the conviction of the appellant would be justified under section 302 IPC with the aid of section 34 IPC.

Analysis

10. We have considered the rival submissions and have perused the record carefully. Admittedly, there is no ocular version of the incident therefore, the case would have to be decided on the basis of proven circumstances. Before we proceed to analyse the prosecution evidence, we may notice that the explanation of the appellant in his statement, under section 313 CrPC, is nothing except that he denies the incriminating circumstances. He does not dispute his identity or the identity of the deceased. He also does not claim that he does not know anything about the deceased. In that light, we will have to analyse the prosecution evidence. The prosecution evidence against the appellant can be divided into two parts. One is the statement of the deceased made to PW-1 and other persons who pulled him out of the manhole, admissible under section 32 of the Evidence Act, and the other is the circumstantial evidence of recovery of shirt of the deceased from the manhole, and the knife from the bushes around, on the information provided by the appellant. In so far as recovery is concerned, that was made on 4.11.1988, that is ten days later, from the same spot which is accessible to all and from where the deceased was taken out in an injured condition. Hence, in our view, the recovery is inconsequential and appears to have been developed to fortify an otherwise weak prosecution case. Even assuming that it is a genuine recovery, it, at best, would be reflective of the knowledge of the appellant where the knife was thrown, suggestive of appellant's presence at the scene of crime. But not that the appellant participated in the act of infliction of injuries on the body of the deceased with the other co-accused Munna.

11. In so far as the statement of the deceased made to the witnesses is concerned, we may observe that it is not a formal dying declaration which a Magistrate records after being satisfied with regard to the condition of its maker. Importantly, it has come on record that at AIIMS when an effort was made to record the statement of the deceased, the doctor did not

permit as the person was not fit to give his statement. This was just within three to four hours after the deceased was pulled out of the manhole. Even in the FIR, wherein the statement of the deceased is recited, the deceased, while he was alive, stated that after infliction of injury he had turned unconscious and has now regained consciousness. Bearing all these circumstances in mind we have to very carefully analyse as to what the deceased actually stated and whether from his statement could it be said with certitude that the deceased was caught hold by the appellant to enable co-accused Munna to inflict injuries with knife.

12. In this case, the statement of the deceased made to PW-1 at the time when the deceased, in an injured condition, was taken out from the manhole, is recorded in the FIR, lodged by PW-1, and nowhere else. Meaning thereby that there is no record to suggest that the statement of the deceased was recorded by way of his statement made to the investigating officer under section 161 CrPC. Thus, the recital in the FIR with regard to what the deceased stated is the last record of his statement. In this statement, the deceased had specifically stated that the co-accused Munna had borrowed Rs.500/- from the deceased and when the deceased raised a demand upon him (Munna) for return of the money, while they were moving together in the company of the appellant to purchase vegetables, Munna all of a sudden inflicted him with knife blow on his (deceased's) abdomen and the appellant held him. In this statement of the deceased, there is no specific allegation that the appellant exhorted Munna to inflict knife blows or that the appellant first caught hold the deceased and then knife blows were inflicted. This statement of the deceased therefore, is not conclusive as regards the role of the appellant. Rather, it leaves us guessing whether the appellant held the deceased, to support him, after he was inflicted knife injury by Munna, or to enable Munna to inflict knife injuries. This riddle could have been solved had the prosecution been able to prove a motive for the crime against the appellant. Here, the prosecution set out to prove twin motive for the crime. One, which could not be proved, was that the co-accused Munna and the appellant both had an affair with co-accused Rajni, the wife of the deceased, and, therefore, they were interested in finishing off the deceased; and the other, which stood proved from the statement of deceased, was that Munna was annoyed with the pestering demand of the deceased to return his money. Thus, the proven motive for the crime was with Munna alone. Further, the statement of the deceased made to PW-1 also attributes infliction of knife injury to Munna alone, that too, as a sudden response to the demand for return of the money. In our view, therefore, to convict the appellant for the charge of murder with the aid of section 34 IPC would not be safe even though the evidence led may cast suspicion on the conduct of the appellant. But suspicion alone is no substitute for legal proof. No doubt, had it been a case where there was no statement of the deceased in respect of infliction of injury by Munna and circumstantial evidence had proved the presence of the appellant with the deceased at the time of occurrence, by virtue of section 106 of the Evidence Act, burden would have been on the appellant to explain the circumstances in which the deceased suffered injuries and, in absence of proper explanation, he could have been held guilty. But, here, the statement of the deceased conclusively indicts co-accused Munna and, in respect of the appellant it is inconclusive, therefore, taking the aid of section 106 of the Evidence Act, when the mode and manner of infliction of injury is proved by the statement of the deceased, would not be appropriate.

13. At this stage, we may notice that in the statement of PW-1 and PW-2 made during trial there is some improvement than what is stated in the FIR with regard to what the injured (the

deceased) stated when he was taken out from the manhole. In their statement in court the witnesses stated that the deceased had informed them that the appellant held his hand and Munna inflicted knife blow. Importantly, in their testimony in court, the sudden infliction of knife blow by Munna is also not disclosed though, in the FIR, according to what the deceased had told, there was sudden infliction of knife blow by Munna. Further, the sequence of such infliction i.e. that the appellant first held deceased's hands and then knife blow was inflicted, was not there. This improvement goes a step further in the testimony of PW-5 when he states that the deceased on being pulled out of the manhole stated that both Kalua @ Ravindra (the appellant) and Munna had inflicted him knife injuries. In our view, the statements made during trial in so far as they are at variance with the one put on record, that is the FIR in this case, would have to be eyed with extreme suspicion because here we are dealing with hearsay evidence. No doubt, a dying declaration is an exception to the rule against hearsay evidence but where the contents of a statement, which is to read as a dying declaration, are put on record, parole evidence different to that what is codified must not ordinarily be accepted unless there are very strong reasons to do so, because the accused gets no right to cross-examine its maker. We are therefore of the firm view that the so called statement of the deceased is not conclusive as regards the role of the appellant and therefore, by relying upon the same, it would be unsafe to hold the appellant guilty with the aid of section 34 IPC.

14. Now, a question may arise as to why an inference with regard to the guilt of the appellant be not drawn from the conduct which he exhibited. One may say that if the appellant's presence with the deceased had been proved, had he not been guilty, common human courtesy would have been to help out the deceased and not run away by putting him in a manhole. In this regard, we may observe that, firstly, there is no reliable evidence that the appellant had, with the help of co-accused, put the deceased in a manhole. The oral narration of the witnesses in that regard as to what the deceased had told them is not acceptable for two reasons: (a) it is at variance with what the deceased told, as recited in the FIR; and (b) from the recital in the FIR the deceased had stated that he had turned unconscious after infliction of injuries, if that was so, how would he get opportunity to notice as to who put him in the manhole. Secondly, there is no charge framed against the appellant for an offence punishable under section 201 IPC; and, thirdly, different persons react differently. It is a natural human tendency to run away from the scene of crime, particularly, when it is of a heinous nature. Such a conduct is more pronounced when the victim is not a close associate or relative of the person whose conduct is in question. In this case, noticeably, the prosecution failed to prove close relationship between the deceased and the accused persons. PW-3, the witness, set up to do that, turned hostile. Conspiracy allegation also could not be proved. Thus, even if a question may arise as to why the appellant did not help the deceased if he held no guilt, that, by itself, is not a proof of his guilt.

15. The upshot of the foregoing discussion is that though the proven circumstances may create a strong suspicion with regard to the conduct of the appellant but they are not conclusive to enable us to hold with certitude the appellant guilty. At this stage, we may remind ourselves of the observations made by Supreme Court in its judgment in ***Shivaji Sahabrao Bobade and another v. State of Maharashtra, (1973) 2 SCC 793*** where it was observed: *"Certainly, it is a 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." The aforesaid legal principle is time-tested and is the bedrock of criminal jurisprudence.

16. In view of the discussion above, we are of the considered view that the prosecution has failed to prove the case against the appellant beyond the pale of doubt. The appellant is therefore entitled to the benefit of doubt. Consequently, the judgment and order of the court below in so far as it relates to the appellant is liable to be set aside. The appeal is therefore allowed. The judgment and order of conviction and sentence passed by the trial court as against the appellant is set aside. If the appellant is on bail, he need not surrender subject to compliance of the provisions of Section 437-A CrPC to the satisfaction of the trial court below.

17. Before parting, we record our appreciation for the labour put in by Ms. Seema Pandey, who assisted the Court as an Amicus with commendable preparation. We, accordingly, direct that she be paid Rs.10,000/- (ten thousand only) by the High Court Legal Aid Services Committee for her efforts.

18. Let a copy of this order be sent to the court below for information and compliance.

(2021)12ILR A972
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.11.2021

BEFORE

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

Criminal Appeal No. 2978 of 2010

Mohsin & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri S.K. Dubey, Sri Deepak Kumar Pandey, Sri Pankaj Kushwaha, Sri Pankaj Kumar Kushwaha, Sri Rajiv Lochan Shukla, Sri S.C. Kushwaha, Sri Vinod Tripathi, Sri Uma Dutt Tripathi

Counsel for the Respondent:
A.G.A.

It is necessary to avoid undue leniency in imposing sentence-criminal jurisprudence is reformative and corrective-undue harshness to be avoided-Appeal not pressed on merit-conviction upheld-doctrine of proportionality-life imprisonment is very harsh sentence converted from life imprisonment to 10 years and fine of Rs. 5000/.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Mohd. Giasuddin Vs St. of A.P., [AIR 1977 SC 1926]

2 Deo Narain Mandal Vs St. of U.P. [(2004) 7 SCC 257]

3. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

4. Jameel Vs St. of U.P. [(2010) 12 SCC 532]

5. Guru Basavraj Vs St. of Karn., [(2012) 8 SCC 734]

6. Sumer Singh Vs Surajbhan Singh, [(2014) 7 SCC 323],

7. St. of Punjab Vs Bawa Singh, [(2015) 3 SCC 441],

8. Raj Bala Vs St. of Har., [(2016) 1 SCC 463]

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

1. By way of this appeal, the appellants have challenged the Judgment and order 20.4.2010 passed by court of Additional District and Sessions Judge/FTC, Court No.2, Ghaziabad in Session Trial No.393 of 2009 arising out of Case Crime No.1310 of 2008 under Sections 354, 376 Indian Penal Code, Police Station-

Sahibabad, District-Ghaziabad whereby the accused-appellants were convicted under Section 376 IPC and sentenced to imprisonment for life with fine of Rs.25,000/- each and Section 354 of IPC convicted for two years rigorous imprisonment and fine of Rs.3000/-.

2. The brief facts of this case are that complainant Munni Devi, mother of the prosecutrix, submitted a written report at Police Station Sahibabad, District Ghaziabad, Ex.Ka-2 stating that her daughter (prosecutrix) was going to Happy Public School, Rajendra Nagar for bringing her cousin sister on 23.8.2008 at about 1.30 p.m. On the way Arshad, Mohsin and Mansad resident of village Pasaunda met and they all started molesting her, Arshad tried to drag her to the Budha Park, she raised alarm and some of people gathered there. Then they all ran away from there. On this report, a first information report was lodged at Police Station Sahibabad under Section 354 I.P.C. After lodging the FIR, investigation was started.

3. Investigating Officer recorded the statements of prosecutrix and other witnesses, prepared site plan. Medical examination of prosecutrix was conducted. After completing the evidence, charge sheet was submitted. The case being trialbe exclusively by the court of session, it was committeed to the sessions Court by the competent Magistrate.

4. Learned Judge framed charges against the accused- Mohsin and Mansad under Sections 354 and 376 IPC which were read over to the accused persons. Accused persons denied charges and claimed to be tried. Accused-Arshad was declared juvenile and his trial was separated. The prosecution so as to bring home the charges, examined six witnesses, who are as under:-

1.	Prosecution	P.W.1
2.	Munni Devi	P.W.2
3.	Dr. Sunita	P.W.3
4.	Rajendra Singh Chauhan	P.W.4
5.	Bharat Singh	P.W.5
6.	Sahab Singh	P.W.6

5. After completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C. in which he denied evidence against him, two witnesses, namely, D.W.-1 Mohd. Sirajuddin and D.W.-2 Mohd. Waseem were examined by the accused in defence.

6. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka-5
2.	Written report	Ext. Ka-2
3.	*Statement of prosecutrix (Mala)*	Ext. Ka-1
4.	Injury Report	Ext. Ka-3
5.	Site Plan with Index	Ext. Ka-4

7. Heard Shri Rajiv Lochan, learned counsel for the appellants, learned AGA for the State and also perused the record.

8. Perusal of record shows that occurrence took place at about 1.30 p.m. it means that it was day-light incident. Although in the beginning, the mother of the prosecutrix lodged the FIR only with the averments leading to the offence to the extent of Section 354 IPC only, but in her statement under Section 164 Cr.P.C, the prosecutrix narrated the incident in detail in which she made accusation against the accused-appellants and stated that they committed rape with her one by one after tying her mouth and hands.

9. The story narrated by the prosecutrix under Section 164 Cr.P.C. was repeated by her before learned trial Court as P.W.-1.

10. Learned counsel for the appellants attracted our attention towards some contradictions in the evidence of prosecutrix and in her statement under Section 164 Cr.P.C., but these contradictions do not go to the root of the case.

11. Medical examination of prosecutrix was conducted and medical report was prepared. The evidence of prosecutrix stands on the same footing of injured witness. Prosecutrix was examined at length by the defence but in her cross examination also she had stated that she was raped by the accused persons. PW-2, Munni Devi is mother of the prosecutrix, who submitted written report in Police Station on the basis of which first information report was lodged. In her statement she has formaly proved the above written report. Doctor, who conducted medical examination of the prosecutrix, is also produced by the prosecution as PW-3. The learned trial court convicted and sentenced the appellants for the offence under Sections 376 and 354 IPC.

12. After some arguments, learned counsel for the appellant submitted that he is not pressing this appeal on its merit, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for the past more than 11 years.

13. This case pertains to the offence of 'rape', defined under Section 375 IPC, which is quoted as under:

[375. Rape.- *A man is said to commit "rape" if he-*

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions :-

First.- *Against her will.*

Secondly.- *Without her consent.*

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

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

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

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

Seventhly.- *When she is unable to communicate consent.*

Explanation 1.- *For the purposes of this section, "vagina" shall also include labia majora.*

Explnation 2.- *Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates*

willingness to participate in the specific sexual act.

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- *A medical procedure or intervention shall not constitute rape.*

Excpetion 2.- *Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]*

14. In ***Mohd. Giasuddin Vs. State of AP,*** [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

15. The term 'Proper Sentence' was explained in ***Deo Narain Mandal vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

16. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak,*** [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh***, [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh,*** [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana***, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges

confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

17. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

18. Since the learned counsel for the appellant has not pressed the appeal on its merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

19. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

20. Learned AGA also admitted the fact which is cited by learned counsel for the appellants that appellants are languishing in jail for the last 11 years. Keeping in view the facts and evidence of this case, we are of considered opinion that ends of justice would be met if sentence for the offence under Section 376 IPC is converted from life

21. Hence, the sentence awarded to the appellants by the learned trial-court is modified and converted from life imprisonment to period of 10 years rigorous imprisonment and fine of Rs.5,000/-. Accused persons shall undergo additional one year simple imprisonment in case of default of fine. Sentence under Section 354 of IPC shall remain intact. All the sentences shall run concurrently as directed by learned trial court.

22. Accordingly, the appeal is **partly allowed** with the modification of the sentence, as above.

(2021)12ILR A976
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ A No. 55436 of 2017

Head Const. Ravindra Mishra (P No. 810630129) ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Satya Prakash Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law – Compulsory retirement – Constitution of India - Article 226, 311 - The order of compulsory retirement is neither punitive nor stigmatic. It is based on subjective

satisfaction of the employer and a very limited scope of judicial review is available in such cases. Interference is permissible only on the ground of non-application of mind, mala fide, perverse, or arbitrary or if there is non-compliance with statutory duty by the statutory authority. Power to retire compulsorily the government servant in terms of service rule is absolute, provided the authority concerned forms a bona fide opinion that compulsory retirement is in public interest. (Para 15, 20)

In the case in hand, the record reflects that the petitioner has been awarded several punishments during the entire tenure of service. Though, they have not been categorically denied by the petitioner, but he has tried to explain that those punishment or adverse entries are not sufficient material based on which the committee could form an opinion that his continuance in service is not in the public interest. (Para 17, 18)

B. Adverse entries and un-communicated entries in the confidential record shall be taken into consideration in forming an opinion as to whether service of the petitioner is required and continuance of petitioner is for the benefit of the department and is in the public interest. (Para 25)

It is true that **authority** while considering as to whether petitioner is deadwood and his continuance in the department is not in the public interest **should give due weightage to the record of the last 10 years, but it does not mean that authorities are precluded from looking into the entire service record of the petitioner in forming the opinion.**

In the present case, even the service record of the last 10 years of the petitioner is not clean and this fact has not specifically been denied by the petitioner. However, the petitioner had tried to demonstrate that punishment awarded to him has been condoned on the ground that he had been granted time pay scale, grade pay, and A.C.P. which could be extended to him only when the authorities are satisfied that his past service had been satisfactory. (Para 19, 22, 23, 24)

Principles governing the grant of certain benefits i.e. pay scales and other benefits are different than the assessment of service record of the petitioner to assess his suitability for continuance in the department, therefore, grant of the promotional pay scale, etc. may be one factor which may be in favour of the petitioner, but it does not mean that authority while assessing the suitability of the petitioner is under obligation to ignore other factors. (Para 26)

In the instant case, right from the joining of service by the petitioner, it is evident that the petitioner has been awarded adverse entries or punishment. The committee is competent to broadly look into the entire service record of the petitioner to form an opinion. (Para 27)

Writ petition dismissed. (E-4)

Precedent followed:

1. Dinesh Chandra Vs St. of U.P. & anr., Writ-A No. 52623 of 2017 (Para 14)

2. Shiv Charan Vs St. of U.P. & ors., Writ-A No. 11828 of 2018 (Para 14)

3. Rajesh Kumar Gupta Vs St. of Jammu & Kashmir & ors., (2013) 3 SCC 514 (Para 15)

4. St. of Guj.Vs Umedbhai M. Patel, (2001) 3 SCC 314 (Para 16)

Precedent distinguished:

1. St. of Guj. & anr. Vs Suryakant Chunilal Shah, (1999) 1 SCC 529 (Para 13)

2. Madhya Pradesh State Cooperative Dairy Federation Ltd. & anr. Vs Rajnesh Kumar Jamindar & ors., (2009) 15 SCC 221 (Para 13)

3. Avinash Chandra Tripathi Vs St.of U.P. & anr., 2018 (7) ADJ 582 (DB) (Para 13)

Present petition assails orders dated 31.07.2017 and 10.11.2017, passed by Commandant, 12th Bn. P.A.C., District-Fatehpur.

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Satya Prakash Pandey, learned counsel for the petitioner and Dr. Amar Nath

Singh, learned Standing Counsel for the respondents.

2. The petitioner by means of the present writ petition has assailed the orders dated 31.07.2017 and 10.11.2017 passed by respondent no.2 by which the petitioner has been compulsorily retired from service.

3. The petitioner was appointed as Constable in P.A.C. on 15.08.1981 and was promoted as Head Constable in the year 1992. The date of birth of the petitioner is 25.06.1962 and the date of retirement is 30.06.2022.

4. It appears that a decision was taken by the Government to assess the suitability of about 203 Constables belonging to Class-III employees and 36 employees of Class-IV working in the P.A.C. Department for continuing in service.

5. Pursuant to the said decision, a Committee was constituted to assess the suitability of employees. Accordingly, the committee constituted for such purpose, assessed the suitability of employees. The Committee on the assessment of service record of the petitioner found that in the last 10 years the service of the petitioner was not satisfactory, and accordingly, his services are no longer required in the public interest. Consequently, the committee recommended the compulsory retirement of the petitioner by order dated 31.07.2017.

6. The case of the petitioner is that the service record of the petitioner has not been properly assessed by the committee, yet he has been recommended for compulsory retirement.

7. A counter affidavit has been filed by the respondent-state stating that the petitioner was awarded five minor punishments in the years 1984, 1989, 1998, 2001, and 2015. It was further stated that the petitioner was awarded three censure entries in the years 2002, 2007, and 2010 and adverse annual remarks in the years 2002, 2010, 2013, and 2015. Thus, the service of the petitioner is not satisfactory. The respondents also enclosed a chart based on the service book of the petitioner demonstrating the punishment awarded to the petitioner. The chart enclosed as Annexure 4 to the counter affidavit is being extracted herein-below:-

"उद्धरण चिरत्र पंजिक मुख्य आरक्षी पीएन० ओ नं० 810630129 रवीन्द्र मिश्रा

दण्ड का प्रकार		दण्ड की संख्या	दण्ड प्रदान किये जाने का वर्ष	चरित्र पंजिका का पेज संख्या
छुद्र दण्ड		01	1984	पेज सं०- 82 पर अंकित है।
		01	1989	पेज सं०- 82 पर अंकित है।
		01	1998	पेज सं०- 82 पर अंकित है।
		01	2001	पेज सं०- 82 पर अंकित है।
		01	2015	पेज सं०- 83 पर अंकित है।
परिनिन्दा प्रविष्टि		02	2002	पेज सं०- 77,78 पर अंकित है।
		01	2007	पेज सं०- 79 पर अंकित है।
		01	2010	पेज सं०- 80 पर अंकित है।
प्रतिकूल मन्तव्य		01	2002	पेज सं०-51 पर अंकित है।
		01	2010	पेज सं०- 55 पर अंकित है।
		01	2013	पेज सं०- 56-57 पर अंकित है।
		01	2014	पेज सं०- 57 पर अंकित है।

8. The further averment in the counter affidavit is that the screening committee after scrutinizing the service record of the petitioner found that five minor punishments, three censure entries, and four annual remarks had been awarded to the petitioner, accordingly, it recommended for compulsory retirement of the petitioner as the continuance of the petitioner in service would not be in the public interest.

9. To meet the averments made in the counter affidavit, a second supplementary affidavit has been filed by the petitioner stating therein that petitioner on completing 8 years of satisfactory service as Head Constable was given the benefit of selection grade w.e.f 09.07.2000, and on completing 14 years of service, he was granted super selection grade on 09.07.2006. It is further stated that vide Hindi Order Book (HOB) No.408 dated 15.07.2014, the petitioner was granted Grade Pay of Rs.4600/- under Assured Career Progression (ACP) Scheme by providing two increments w.e.f 30.03.2013. The arrears of salary was also paid to the petitioner. It is further stated that none of the adverse entries awarded to the petitioner in the last 10 years have been communicated to the petitioner, particularly entries of the years 2010, 2013 & 2014 were never communicated to the petitioner. The integrity of the petitioner was always certified by the concerned officer.

10. Respondent no.2 filed a supplementary counter affidavit wherein he did not deny the fact of granting time pay scale to the petitioner on 07.09.2000, but it was pleaded that petitioner was placed under suspension on being engaged in a scuffle with one Indrapal during the Parade at 42nd Battalion P.A.C., Allahabad. It is further pleaded that from the service record, it is also evident that the petitioner was awarded adverse entries in the years 2013 & 2014, however, it is not clear from the record as to whether these entries were communicated to the petitioner or not. The petitioner was punished in the year 2015 at Orderly Room and was awarded adverse entry by order dated 08.01.2018. The petitioner was punished with a penalty of Rs.500 by order dated 30.03.2010.

11. In the rejoinder affidavit filed to the counter affidavit petitioner did not deny the fact of various punishments awarded to the petitioner but has tried to explain in paragraph 5 of the rejoinder affidavit why they are not relevant while assessing and scrutinizing the past service record of the petitioner for consideration to recommend the petitioner for compulsory retirement.

12. The petitioner filed a supplementary rejoinder affidavit to the supplementary counter affidavit wherein the averments made in the supplementary counter affidavit have not been specifically denied. However, in paragraph 5 of the rejoinder affidavit, he has stated that the date 08.01.2018 has been wrongly mentioned whereas the correct date is 08.01.2008, but he did not deny the fact that he was awarded adverse entry by the said order.

13. Challenging the order of compulsory retirement, learned counsel for the petitioner has submitted that the order of compulsory retirement has been passed without correctly assessing and scrutinizing the service record of the petitioner. He submits that there was no material or evidence against the petitioner before the committee based on which the committee could form an opinion that continuance of petitioner in service is not in the public interest. He further submits the fact that the petitioner has been extended the benefit of the time pay scale and benefit of ACP by granting two increments w.e.f 30.03.2013 implies that whatever adverse entries or order of punishment are recorded in the service record of the petitioner have been condoned as the benefit of the time pay scale and ACP are granted on the basis of satisfaction

of past service of an employee, and thus, it proves that recommendation of the committee recommending the petitioner to compulsory retirement is not based upon proper appreciation of record of past service of the petitioner. It is further submitted that since the recommendation for compulsory retirement has been made without application of mind, therefore, order of compulsory retirement is not sustainable in law and deserves to be set aside. In support of his aforesaid submissions, he has placed reliance upon the following judgments:-

i. State of Gujarat and Another Vs. Suryakant Chunilal Shah (1999) 1 SCC 529;

ii. Madhya Pradesh State Cooperative Dairy Federation Limited and Another Vs. Rajnesh Kumar Jamindar and Others (2009) 15 SCC 221;

iii. Avinash Chandra Tripathi Vs. State of U.P. and Another 2018 (7) ADJ 582 (DB).

14. Per contra, learned counsel for the respondents has submitted that specific case of the respondents in the counter affidavit is that petitioner has been awarded punishment and adverse entry several times in the entire service, and the committee after scrutinizing the service record of the petitioner rightly formed opinion that continuance of petitioner is not in the public interest and accordingly, the committee has rightly recommended the petitioner for compulsory retirement. He submits that the Court under Article 226 of Constitution of India may not interfere with the order of compulsory retirement except where the order has been passed malafidely, capriciously, and based upon extraneous consideration and as none of the conditions in which this Court can interfere with the order of compulsory retirement are present, the writ petition being devoid of merit deserves to be dismissed. In support of his aforesaid contention, he has placed reliance upon the judgment of this Court in Writ-A No.52623 of 2017 (***Dinesh Chandra Vs. State of U.P. & Another***) & Writ-A No.11828 of 2018 (***Shiv Charan Vs. State of U.P. And 3 Others***).

15. Before proceeding to appreciate the argument of learned counsel for the petitioner, it would be apposite to refer to the judgment of Apex Court in the case of ***Rajesh Kumar Gupta Vs. State of Jammu & Kashmir and Others (2013) 3 SCC 514*** wherein Apex Court has succinctly explained the law on compulsory retirement. Paragraphs 20 & 21 of the said judgment are being extracted herein below:-

"20. The principles on which a government servant can be ordered to be compulsorily retired were authoritatively laid down by this Court in Baikuntha Nath Das Vs. District Medical Officer (1992) 2 SCC 299. In para 34, the principles have been summed up as follows:-

"34. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the Government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary -- in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter -- of course

attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v). An order of compulsory retirement is not liable to be quashed by a court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

21. The aforesaid principles have been re-examined and reiterated by this Court in Nand Kumar Verma Vs. State of Jharkhand (2012) 3 SCC 580. The principles have been restated as follows:-

"34. It is also well settled that the formation of opinion for compulsory retirement is based on the subjective satisfaction of the authority concerned but such satisfaction must be based on a valid material. It is permissible for the courts to ascertain whether a valid material exists or otherwise, on which the subjective satisfaction of the administrative authority is based. In the present matter, what we see is that the High Court, while holding that the track record and service record of the appellant was unsatisfactory, has selectively taken into consideration the service record for certain years only while making extracts of those contents of the ACRs. There appears to be some discrepancy. We say so for the reason that the appellant has produced the copies of the ACRs which were obtained by him from the High Court under the Right to Information Act, 2005 and a comparison of these two would positively indicate that the High Court has not faithfully extracted the contents of the ACRs.

36. The material on which the decision of the compulsory retirement was based, as extracted by the High Court in the impugned judgment, and material furnished by the appellant would reflect that totality of relevant materials were not considered or completely ignored by the High Court. This leads to only one conclusion that the subjective satisfaction of the High Court was not based on the sufficient or relevant material. In this view of the matter, we cannot say that the service record of the appellant was unsatisfactory which would warrant premature retirement from service. Therefore, there was no justification to retire the appellant compulsorily from service."

16. In the case of ***State of Gujarat Vs. Umedbhai M. Patel (2001) 3 SCC 314*** the Apex Court has broadly summarised the principles relating to compulsory retirement. Paragraph 11 of the said judgment is being extracted herein below:-

"11. The law relating to compulsory retirement has now crystallised into definite principles, which could be broadly summarised thus:

(i) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure."

17. In the light of parameters laid down by the Apex Court in the aforesaid two judgments, the Court proceeds to analyse the challenge to the order of compulsory retirement. In the case in hand, the record reflects that the petitioner has been awarded several punishments during the entire tenure of service which has been detailed in the earlier part of the judgment.

18. The fact that the petitioner has been awarded so many adverse entries and punishment as stated in the counter affidavit, which has been detailed above, has not been categorically denied by the petitioner. Though, the petitioner has tried to explain in rejoinder affidavit that those punishment or adverse entries are not sufficient material based on which the committee could form an opinion that continuance of petitioner in service is not in the public interest.

19. It is also urged by the learned counsel for the petitioner that whatever adverse entry or punishment has been awarded in the past are condoned by the respondents for the reasons that petitioner has been awarded time pay scale and grade pay etc. and had been granted ACP which can be granted only when in the opinion of the department, service of the petitioner had been satisfactory.

20. At this point, it would be worth notice the judgment of this Court in the case of ***Dinesh Chandra (supra)*** wherein order of compulsory retirement has been assailed on the ground that it was based upon annual confidential remarks for the years 2011-12 and 2013-14, and an 'Excellent' entry awarded by the Tehsildar for the year 2016-17 was ignored, thus, order of compulsory retirement is illegal; while repelling the said contention, this Court held that the order of compulsory retirement is based upon subjective satisfaction of the employer and a very limited scope of judicial review is available in such cases. It is further held that the order of compulsory retirement is neither punitive nor stigmatic. Paragraph 8 of the said judgment is being extracted herein below:-

"8. Constitution Bench of Supreme Court in Shyamlal v. State of U.P., AIR 1954 SC 369, held that the two requirements for compulsory retirement are that the officer has completed twenty-five years service and that it is in the public interest to dispense with his further services. It is true that this power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be the real cause for taking the action but what is important to note is that the directions in the last sentence in Note 1 to Article 465-A make it abundantly clear that an imputation or charge is not in terms made a condition for the exercise of the power. In other words, a compulsory retirement has no stigma or implication of misbehaviour or incapacity. A compulsory retirement does not amount to dismissal or removal and, therefore, does not attract the provisions of Article 311 of the Constitution. In Rajasthan SRTC v. Babu Lal Jangir, (2013) 10 SCC 551, held that it hardly needs to be emphasised that the order of compulsory retirement is neither punitive nor

stigmatic. It is based on subjective satisfaction of the employer and a very limited scope of judicial review is available in such cases. Interference is permissible only on the ground of non-application of mind, mala fide, perverse, or arbitrary or if there is non-compliance with statutory duty by the statutory authority. Power to retire compulsorily the government servant in terms of service rule is absolute, provided the authority concerned forms a bona fide opinion that compulsory retirement is in public interest."

21. Similar view has been taken by this Court in the case of ***Shiv Charan (supra)*** wherein the order of compulsory retirement was challenged on the ground that the order is stigmatic and has been passed in violation of Article 311(2) of the Constitution of India.

22. Applying the parameters elucidated by the Apex Court in considering the challenge to the order of compulsory retirement, this Court finds that recommendation of the committee to compulsorily retire the petitioner is based upon consideration of the entire service record of the petitioner.

23. It is true that authority while considering as to whether petitioner is deadwood and his continuance in the department is not in the public interest should give due weightage to the record of the last 10 years, but it does not mean that authorities are precluded from looking into the entire service record of the petitioner in forming the opinion that an employee is deadwood and his continuance in the department is not in the public interest.

24. In the present case, even the service record of the last 10 years of the petitioner is not clean which is evident from the chart given in the counter affidavit, extracted above, and this fact has not specifically been denied by the petitioner. However, the petitioner had tried to demonstrate that punishment awarded to him has been condoned on the ground that he had been granted time pay scale, grade pay, and A.C.P. which could be extended to him only when the authorities are satisfied that his past service had been satisfactory.

25. It is true that in the case of ***Umedebhai M. Patel (supra)*** the Apex Court has held that if the officer was given a promotion despite adverse entries in his confidential record, that is a fact in his favour, but at the same time, Apex Court has also held that adverse entries and uncommunicated entries in the confidential record shall be taken into consideration in forming an opinion as to whether service of the petitioner is required and continuance of petitioner is for the benefit of the department and is in the public interest.

26. At this point, it is worth noticing that principles governing the grant of certain benefits i.e. pay scales and other benefits are different than the assessment of service record of the petitioner to assess the suitability of the petitioner whether his continuance in the department is for the public good or not, therefore, grant of the promotional pay scale, etc. may be one factor which may be in favour of the petitioner, but it does not mean that authority while assessing the suitability of the petitioner is under obligation to ignore other factors to consider whether the continuance of petitioner in the department is in the public interest or not.

27. In the instant case, right from the joining of service by the petitioner, it is evident that the petitioner has been awarded adverse entries or punishment. The committee is competent to broadly look into the entire service record of the petitioner to form an opinion as to whether the employee should be recommended for compulsory retirement as the object of the compulsory retirement is to weed out the deadwood and making a healthy working

environment in the department for the public good.

28. So far as the judgment of this Court in the case of ***Avinash Chandra Tripathi (supra)*** relied upon by the learned counsel for the petitioner is concerned, it was a case where the service record of the petitioner did not reflect any adverse entry against him and one adverse entry, which was awarded to him, was set aside and upon consideration of entire service record, this Court found that opinion formed by the committee for recommending the case of the petitioner for compulsory retirement was not based upon material on record, and accordingly, this Court interfered with the order of compulsory retirement.

29. In the case of ***Suryakant Chunilal Shah (supra)***, the order of compulsory retirement was based upon the involvement of the employee in two criminal cases, and the department based on the involvement of the employee in two criminal cases formed an opinion that the continuance of the employee in the department was not in the public interest. The apex court set aside the order of compulsory retirement holding that involvement of an employee in a criminal case does not imply that he is guilty. Paragraph 27 of the said judgment is being extracted herein-below:-

"27. The whole exercise described above would, therefore, indicate that although there was no material on the basis of which a reasonable opinion could be formed that the respondent had outlived his utility as a government servant or that he had lost his efficiency and had become a dead wood, he was compulsorily retired merely because of his involvement in two criminal cases pertaining to the grant of permits in favour of fake and bogus institutions. The involvement of a person in a criminal case does not mean that he is guilty. He is still to be tried in a court of law and the truth has to be found out ultimately by the court where the prosecution is ultimately conducted. But before that stage is reached, it would be highly improper to deprive a person of his livelihood merely on the basis of his involvement. We may, however, hasten to add that mere involvement in a criminal case would constitute relevant material for compulsory retirement or not would depend upon the circumstances of each case and the nature of offence allegedly committed by the employee."

30. As the judgment of ***Suryakant Chunilal Shah (supra)*** has been rendered in a different fact situation, therefore, this judgment does not come in aid to the petitioner.

31. In the case of ***Madhya Pradesh State Cooperative Dairy Federation Limited (supra)***, Apex Court affirmed the order of High Court quashing the order of compulsory retirement as no consideration has been given to the performance of the employee for the last five years and order of compulsory retirement had been passed ignoring the rules and circulars made by the Federation to assess the suitability of an employee whether he is dead wood for the department and should be compulsory retired. Paragraphs 41 & 42 of the judgment are being extracted herein-below:-

"41. We have noticed hereinbefore that although criteria adopted by the State were required to be considered for the purpose of determining the suitability or otherwise of the employees to continue in service, the necessity to give special consideration to the performance of the employees for the last five years before the order was passed had been given a complete go-by. The learned Single Judge as also the Division Bench, as noticed hereinbefore, clearly held that for the purpose of weeding out the dead wood, it was absolutely necessary to take into consideration the performance of each of the employees at least for the last two years.

Each case, thus, was required to be considered on its merit.

42. The broad criteria, which are not only applicable generally for the aforementioned purpose, were required to be followed but there cannot be any doubt or dispute that the criteria laid down by the State was imperative in character. Thus, the Federation adopted the rules and circulars made or issued by the State Government. The Federation itself having formulated the criteria required to be applied for passing orders of compulsory retirement was, thus, bound thereby."

32. This judgment is also of no help to the petitioner as the facts in which order of compulsory retirement was quashed by the High Court and affirmed by the Apex Court are entirely different and not akin to the facts in the present case.

33. Thus, for the reasons given above, the writ petition lacks merit and is accordingly, ***dismissed*** with no order as to costs.

(2021)12ILR A985
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 5817 of 2020

Kaushal Kishore Chaubey & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Syed Wajid Ali

Counsel for the Respondents:
C.S.C.

A. Service Law – Pension/Retiral Benefits - U.P. Civil Service Regulations - Regulation - 368 & 370 - Uttar Pradesh Retirement Benefits (Amendment) Rules, 2005 - U.P. Retirement Benefit Rules, 1961 - The services rendered by an employee either as work charged employee or Seasonal Collection Amin are to be counted for granting the pensionary benefit to them, and the nomenclature of their appointment, be a daily wager, temporary or whatever, is not material to consider their claim for grant of pensionary and retiral benefits. (Para 22)

The pensionary provisions must be given a liberal construction being a social welfare measure; it does not mean that something can be given contrary to rules, but the purpose of grant of such pension must be kept in mind while interpreting pensionary provision. The grant of pension is to facilitate a retired Government employee to live with dignity in his winter of life, therefore, such benefit should not be denied to an employee unreasonably on mere technicalities. (Para 16 to 20)

In the instant case is that the petitioners have been engaged as Seasonal Collection Amin between the year 1976 to 1990 and their services have been regularized between the years 2011 to 2016 and they have been extended all the benefits like the revision of pay with the approval of the competent authority as paid to the regular Collection Amin. The duties which have been discharged by the petitioners while working as Seasonal Collection Amin was similar to the duties discharged by regular Collection Amin, and on continuance and satisfactory services rendered by them as Seasonal Collection Amin, they have been regularized in service as per Rules. Thus, **it is evident that though the nomenclature and nature of appointment to the petitioners were Seasonal Collection Amin, but as a matter of fact, they meet all the requirements to be treated as temporary employees.** (Para 21)

The services rendered by the petitioners as Seasonal Collection Amin cannot be ignored for extending the benefits of pension and other retiral benefits to them on the pretext that their appointment is to be treated from the date of regularization and not from the date of their engagement as work charged employee. (Para 24)

Constitution of India: Article 14 - Petitioners have worked for decades as Seasonal Collection Amin discharging the same duty which has been discharged by the regular Collection Amin and have been extended same benefits which have been extended to the regular Collection Amin, therefore, denying them the benefit of pension and other benefits which have been extended to Regular Collection Amin would not only be arbitrary but against the concept of the right to equality as enshrined in Art. 14 of the Constitution of India. (Para 23)

Writ petition allowed. (E-4)

Precedent followed:

1. Board of Revenue through its Chairman: The District Magistrate & Up-Zila Adhikari Vs Prasidh Narain Upadhyay, 2006 (5) AWC 5194 (DB) (Para 11)

2. Gulaichi Devi Vs St. of U.P. & ors., 2019 12 ADJ 547 (Para 11)

3. St.of U.P. & ors. Vs Ram Sunder Ram, 2016 34 LCD 2804 (DB) (Para 11)

4. Babu Lal Tewari Vs St. of U.P. & ors., 2019 (3) ADJ 501 (Para 11)

5. V. Sukumaran Vs St.of Kerala & anr., 2020 4 SCC 509 (Para 11)

6. A.P. Srivastava Vs U.O.I. & ors., (1995) 3 UPLBEC 1842 (Suplement) (Para 21)

7. Ram Pratap Vs St. of U.P., 2006 (4) ADJ 709 (Para 21)

8. Babu Singh Vs St. of U.P., 2006 (8) ADJ 371 (Para 21)

9. Kedar Ra-1 Vs St. of U.P., 2008 ILR (All) 659, (Para 21)

10. Ram Sajiwan Maurya Vs St. of U.P. & ors., Writ Petition No. 3031 (S/S) of 2044, decided on 12 August 2009 (Para 21)

11. Kanti Devi Vs St. of U.P., 2009 (10) ADJ 18 (Para 21)

12. Kishan Singh Vs St. of U.P., 2009 (9) ADJ 516 (Para 21)

13. Awadh Bihari Shukla Vs St. of U.P., 2015 (6) ADJ 186 (Para 21)

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Syed Wajid Ali, learned counsel for the petitioner, and Ms. Monika Arya, learned Additional Chief Standing Counsel appearing for the respondents.

2. The petitioners, through the present writ petition, have prayed for a writ of mandamus commanding the respondents to grant pension and other retiral benefits to them .

3. The petitioners, who are five in numbers, were engaged as Seasonal Collection Amin on different dates in Tehsil Sadar, District Maharajganj. Their services were regularized and all of them have retired. The details of all the petitioners in respect of their date of engagement, regularization, and retirement are given in the table below:-

Sl No.	Name of Petitioners	Date of Engagement	Date of Regularization	Date of Retirement
1.	Kaushal Kishore Chaubey	05.07.1976	31.05.2012	31.05.2018
2.	Nar Singh	20.03.1984	23.12.2011	31.01.2018
3.	Ravindra Kumar Dubey	29.08.1989	25.10.2016	20.09.2019
4.	Madan Prasad	03.02.1990	24.12.2011	31.01.2020
5.	Ramesh Chandra Pandey	10.03.1987	09.09.2012	31.07.2016

4. It is stated in the writ petition that the petitioners had worked as Seasonal Collection Amin continuously except with some artificial break before they were regularized on the post of Collection Amin. The petitioners were granted the pay scale applicable to the regular Collection Amin and their salary was revised from time to time with the approval of the competent authority, therefore, the working of the petitioners cannot be treated as Seasonal Collection Amin rather they were temporary employees, hence, after retirement, they are entitled to retiral benefits including the pension because of Regulation 368 & 370 of the U.P. Civil Service Regulations.

5. As the petitioners are entitled to all the retiral benefits including pension, accordingly, they submitted a representation to respondent no.2-District Magistrate/Collector, Maharajganj to grant them all the retiral benefits including pension, but the competent authority informed them that since they had discharged their duties as Seasonal Collection Amin before their regularization, therefore, they are not entitled to the pension and other retiral benefits.

6. Further, the case of the petitioners is that the petitioners have served as Collection Amin for more than three decades, therefore, the respondent authority has acted arbitrarily and malafidely in not extending the benefit of pension to the petitioners.

7. In the counter affidavit of the respondent nos. 2 and 3, the assertions made by the petitioners in respect of their engagement as Seasonal Collection Amin and their regularization have not been denied. However, in paragraphs nos.10 & 11 of the counter affidavit, it is averred that the petitioners are not entitled to the pensionary benefits in view of Government Orders dated 15.09.2011, 19.05.2016, and 15.05.2009 and further in view of Uttar Pradesh Retirement Benefits (Amendment) Rules, 2005 which clarified that the persons appointed on or after 01.04.2005 are not covered by Pension Rules. It is further stated that whatever post-retiral benefits were due to the petitioners, they have been paid.

8. Strangely, a separate counter affidavit has been filed by respondent no.1 stating therein that the services rendered by the petitioners as Seasonal Collection Amin before regularization is liable to be counted for the qualifying period of 10 years service for the purpose of giving pension and other retiral benefits. Paragraph no.2 of the counter affidavit of respondent no.1 is being extracted here-in-below:-

" 2. That in the present petition, the petitioners continued to work on the post of seasonal collection Amin and their scales were also being revised and subsequently, their services were regularized and they have retired from their posts therefore, the services rendered by the petitioners as seasonal collection Amin before their regularization is liable to be counted for the qualifying period of 10 years for the purpose of giving pension and other retiral benefits."

9. Learned counsel for the petitioners contended that the action of the respondent authorities in not extending the benefit of pension and other retiral dues to the petitioners on the pretext that the claim of the petitioners relating to their post retiral benefits are governed by the various Government Orders, referred above, and Rule 2005, hence, the petitioners are not entitled to the benefits of U.P. Retirement Benefits Rules, 1961 is incorrect and not sustainable in law. He further contends that since, undisputedly the petitioners have been engaged as Seasonal Collection Amin between the year 1976 to 1990 and they have been extended all the benefits, like the revision of pay scale, etc. as applicable to regular Collection Amin, therefore, the nature of appointment of

the petitioners is temporary and as the Fundamental Rules 56 applies to them, therefore, it is wrong to contend that they are not entitled to pension and other retiral benefits having been appointed after 01.04.2005.

10. It is submitted that the petitioners have been appointed on various dates between the year 1976 to 1990 and because of their continuance in service, their services have been regularized, therefore, it is wrong to assume that the date of appointment of the petitioners is the date of their regularization and not the date on which they have been engaged as Seasonal Collection Amin.

11. In support of his contention, learned counsel for the petitioners has placed reliance upon the judgments of this Court in the case of **Board of Revenue through its Chairman: The District Magistrate and Up--Zila Adhikari Vs. Prasidh Narain Upadhyay**, reported in **2006 (5) AWC 5194 (DB); Gulaichi Devi Vs. State of U.P. and Ors**., reported in **2019 12 ADJ 547; State of U.P. and others Vs. Ram Sunder Ram,** reported in **2016 34 LCD 2804 (DB); Babu Lal Tewari Vs. State of U.P. and others** reported in **2019 (3) ADJ 501** and also the judgment of the Apex Court in the case of **V. Sukumaran Vs. state of Kerala and another, reported in 2020 4 Supreme(SC) 509.**

12. Per-contra, learned Additional Chief Standing Counsel would contend that the petitioners are not entitled to the pensionary benefits and other retiral benefits in view of the Government Orders dated 15.09.2011, 19.05.2016, and 15.05.2009 and Uttar Pradesh Retirement Benefits (Sansodhan) Rules, 2005.

13. She further contends that the date of regularization of the petitioners shall be taken to be the date of their substantive appointment, and since all the petitioners have been regularized after 01.04.2005, therefore, they are not entitled to the pension and other retiral benefits, and whatever benefit was due to them, that had already been paid to them, as such the writ petition lacks merit and deserves to be dismissed.

14. I have considered the rival submissions advanced by learned counsel for the parties and perused the record.

15. Before dealing with the submissions of learned counsel for the parties, it would be appropriate to have a glance at various pronouncements of Apex Court as well as of this Court dealing with the questions as to whether the services rendered as daily wager or work charged employee, etc. are to be counted for pension or not.

16. In the case of ***V. Sukumaran (supra)***, the Apex Court has emphasized that the pensionary provisions must be given a liberal construction being a social welfare measure; it does not mean that something can be given contrary to rules, but the purpose of grant of such pension must be kept in mind while interpreting pensionary provision. It emphasized that the grant of pension is to facilitate a retired Government employee to live with dignity in his winter of life, therefore, such benefit should not be denied to an employee unreasonably on mere technicalities.

17. In the case of ***State of U.P. and others(supra),*** the Division Bench of this Court repelled the contention of the counsel for the State of U.P. that the respondent in the appeal is not entitled to the pension and other pensionary benefits as he did not hold any regular post and worked on the non-pensionable establishment on the availability of work and fund. The relevant paragraph nos. 10, 12, 13 & 14 of the judgment are being reproduced here-in-below:-

"10. Dr. Hari Shankar Ashopa v. State of U.P. and Ors. 1989 ACJ 337 after referring to the Fundamental Rule 56 and various provisions contained in Civil Service Regulations, this

Court observed that Clause (e) of Rule 56 unequivocally recognizes, declares and guarantees retiring pension to every Government servant who retires on attaining the age of superannuation, or who is prematurely retired or who retires voluntarily. To be precise, every Government servant (whether permanent or temporary) who retires under Clause (a) or Clause (b) or who is required to retire, or who is allowed to retire under Clause (c) of Rule 56, becomes entitled for a retiring pension, of course, the first and third conditions stipulated in Article 361 of the Regulations are satisfied.

12. We have occasion to peruse the entire record in question and find that the petitioner-respondent was initially appointed on the post of Temporary Seasonal Collection Peon in agriculture department on 27.5.1970 and subsequently on 31.9.1975 his services were retrenched. Taking shelter of the Government order dated 6.3.1977, which provided that the retrenched employee was to be absorbed in revenue department on the basis of seniority, the petitioner was again appointed on the post of Temporary Collection Peon on 4.2.1981 on substantive post and he worked continuously without any break upto 1.1.1990. Thereafter the petitioner's services were regularized on the post of Collection Peon w.e.f. 1.1.1990. The petitioner has retired on attaining the age of superannuation on 30.6.2004. The petitioner filed the writ petition in question in the year 2007 for counting his temporary services on the post of Temporary Collection Peon from 4.2.1981 to 1.1.1990. Learned Single Judge has proceeded to dispose of the writ petition in question on 16.3.2009 with the following observations:-

"Thus in view of the mater, the contention of the respondents that the service rendered by the petitioner as Temporary Collection Peon is not liable to be taken into consideration for the purpose of computing petitioner's pension is clearly misconceived and is rejected. Respondents are liable to consider the temporary continuous service rendered by the petitioner on the post of Collection Peon from 4.2.1981 to 1.1.1990 for the purpose of computing his pension.

For the aforesaid reasons, the writ petition is finally disposed of with a direction to the petitioner to file a fresh comprehensive representation for revision of his pension on the grounds raised in the present writ petition alongwith the certified copy of this order before the respondent no.2 within two weeks from today and in case any such representation is preferred by the petitioner as directed above, the same shall be considered and decided by the respondent no.2 strictly in accordance with law by a reasoned and speaking order after taking into consideration the service rendered by the petitioner on the post of Temporary Collection Peon from 4.2.1981 to 1.1.1990 as expeditiously as possible preferably within a period of two months from the date of receipt of the petitioner's representation."

13. The service record of the petitioner, which is appended alongwith supplementary affidavit filed by the State on 22.12.2015, clearly reveals that no doubt the petitioner was initially inducted in the agriculture department as Seasonal Collection Peon on temporary basis in the year 1976 but he had been accorded regular pay scale and the increment was also given by the department concerned on 1.2.1986 and thereafter he was paid regular pay scales. The engagement of the petitioner was made against substantive post and this is admitted case that he has been accorded pay scales and regular increments and at no point of time the said document had been disputed by the appellants.

14. In the case of Dukh Haran Singh (supra) the Court has taken a view that the petitioner does not qualify for grant of pension as in terms of Regulations 361 and 370 of the Regulations, the services rendered prior to that are neither substantive, permanent nor temporary. The same would not be applicable in the present case as the relief, which has been

accorded by learned Single Judge is in consonance with the Regulations wherein the petitioner had been accorded pay scale and other benefits against substantive post and as such, his claim cannot be negated on the ground that his nomenclature was as seasonal. The same would not help to the appellants-respondents."

18. In the case of **the Board of Revenue (supra**), the Division Bench repelled an argument that the respondent was a Seasonal Collection Amin, therefore, he was not entitled to pensionary benefits. The Court after noting the ingredients of 'qualifying service' defined in Section 1 Chapter XVI of Article 361 of the Civil Service Regulations held that the Conditions (B) of Article 361 of Civil Service Regulations is inconsistent with Fundamental Rule 56, and thus, is inoperative. The Court also observed that the continuous working of the respondent for more than 37 years cannot be ignored on the basis of a vague and unsubstantiated plea. Relevant paragraph nos.12, 13 & 16 of the judgment are being extracted here-in-below:-

"12. The term "qualifying service" is 'defined in Section 1 Chapter XVI of Article 361 of the Civil Service Regulations, which provides that the service of an officer does not qualify for pension unless it conforms to the following three conditions:-

(A) The service must be under Government.

(B) The employment must be substantive and permanent.

(C) The service must be paid by government.

13. In the present case, so far as the condition Nos.A and C are concerned, they are satisfied and the dispute is only with respect to condition No. B, i.e., lack of permanent character of service. However, in our view, the aforesaid provisions stand obliterated after the amendment of Fundamental Rule 56 by U.P. Act, No.24 of 1975 which allows retirement of a temporary employees also and provides in Clause (e) that a retiring pension is payable and other retiral benefits, if any, shall be available to every Government servant who retires or is required or allowed to retire under this Rule. Since the aforesaid amendment Rule 56 was made by an Act of Legislature, the provisions contained otherwise under Civil Service Regulations, which are pre-constitutional, would have to give way to the provisions of Fundamental Rule 56. In other words the provisions of Fundamental Rule 56 shall prevail over the Civil Service Regulations, if they are inconsistent. Conditions (supra) of Article 361 of Civil Service Regulations are clearly inconsistent with Fundamental Rule 56 and thus is inoperative.

16. Learned counsel for the appellants further submitted that since in the service book, the petitioner-respondent was also shown as Seasonal Collection Peon and, therefore, the mention of word "temporary" as his initial appointment will not make any difference. We do not agree. The contention of the appellants that the petitioner-respondent was a Seasonal Collection Peon and his engagement and post was extended from time to time by the Commissioner is totally unsubstantiated, as nothing has been brought on record to substantiate this plea. Even otherwise the continuous working of the petitioner-respondent for more than 37 years cannot be ignored on the basis of a vague and unsubstantiated plea sought to be raised by the appellants. The statutory right of the petitioner-respondent following by rendering service for such a long service, cannot be brushed aside lightly."

19. In the case of Babu Lal Tewari (supra), the Court has considered the definition of "qualifying service' defined in Section 1 Chapter XVI of Article 361 of the Civil Service Regulations, and held that Condition (B) of

Article 361 of Civil Service Regulations being inconsistent with Fundamental Rule 56 is inoperative. The Court repelled the argument of the respondent-State that as the petitioner has not completed 10 years service as regular employee since prior to that he was appointed as temporary employee as Peon, therefore, he is not entitled to pensionary benefits. Relevant extract of paragraph no. 11 is being reproduced here-in-below:

"11. Even otherwise, I find that Fundamental Rule, 56, as operative in Uttar Pradesh made by provincial legislation, clearly provides that any person who retires under Fundamental Rule 56 would be entitled for retiring pension. Fundamental Rule 56 since it is provincial enactment would prevail over Civil Service Regulations, which are pre-constitutional provision. This aspect was considered by a Division Bench of this Court in Prasidh Narain Upadhyay (supra), and the Court held:

"12. The term "qualifying service" is defined in Section 1 Chapter 16 of Article 361 of the Civil Service Regulations which provides that the service of an officer does not qualify for pension unless it conforms to the following three conditions:

(A)The service must be under Government.

(B)The employment must be substantive and permanent.

(C)The service must be paid by Government.

13. In the present case, so far as the condition Nos. A and C are concerned, they are satisfied and the dispute is only with respect to condition No. B, i.e. lack of permanent character of service. However, in our view, the aforesaid provisions stand obliterated after the amendment of Fundamental Rule 56 by U.P. Act No. 24 of 1975 which allows retirement of a temporary employee also and provides in Clause (e) that a retiring pension is payable and other retiral benefits, if any, shall be available to every Government servant who retires or is required or allowed to retire under this Rule. Since the aforesaid amendment Rule 56 was Service Regulations, which are pre-constitutional would have to give way to the provisions of Fundamental Rule 56. In other words, the provisions of Fundamental Rule 56 shall prevail over the Civil Service Regulations, if they are inconsistent. Condition B (supra) of Article 361 of Civil Service Regulations are clearly inconsistent with Fundamental Rule 56 and thus, is inoperative.

14. A similar controversy came up for consideration earlier before this court in the case of Dr. Hari Shanker Ashopa Vs State of U.P. and others, 1989 ACJ 337. After referring to the Fundamental Rule 56 and various provisions contained in Civil Service Regulations, this Court observed as under:

"Clause (e) of Rule 56 unequivocally recognizes, declares and guarantees retiring pension to every Government servant who retires on attaining the age of superannuation, or who is prematurely retired or who retires voluntarily. To be precise, every Government servant (whether permanent or temporary) who retires under Clause (a) of Clause (b), or who is required to retire, or who is allowed to retire under Clause (C) of Rule 56, becomes entitled for a retiring pension, of course, the first and third conditions stipulated in Article 361 of the Regulations are satisfied."

20. In the case of **Gulaichi Devi (supra),** after analyzing the various pronouncements, the Court has held that a temporary employee appointed on the various establishment of the Government is entitled to the pension under Fundamental Rules, 1956.

21. Undisputedly, the fact in the instant case is that the petitioners have been engaged as Seasonal Collection Amin between the year 1976 to 1990 and their services have been regularized between the years 2011 to 2016 and they have

been extended all the benefits like the revision of pay with the approval of the competent authority as paid to the regular Collection Amin. The duties which have been discharged by the petitioners while working as Seasonal Collection Amin was similar to the duties discharged by regular Collection Amin, and on continuance and satisfactory services rendered by them as Seasonal Collection Amin , they have been regularized in service as per Rules. Thus, from the facts narrated above, it is evident that though the nomenclature and nature of appointment to the petitioners were Seasonal Collection Amin , but as a matter of fact, they meet all the requirements to be treated as temporary employees as held by the Apex Court in the case of ***A.P. Srivastava Vs. Union of India and others, (1995) 3 UPLBEC 1842 (Supplement), [See also Ram Pratap Vs. State of U.P., 2006 (4) ADJ 709, Babu Singh Vs. State of U.P., 2006 (8) ADJ 371, Kedar Ra-I Vs. State of U.P., 2008 ILR (All) 659, Ram Sajiwan Maurya Vs. State of U.P. and others, Writ Petition No.3031 (S/S) of 2004 (decided on 12 August 2009), Kanti Devi Vs. State of U.P., 2009 (10) AJD 18, Kishan Singh Vs. State of U.P., 2009 (9) ADJ 516 & Awadh Bihari Shukla Vs. State of U.P., 2015 (6) ADJ 186].***

22. From the judgments referred above, it is clear that the Courts has consistently held that the services rendered by an employee either as work charged employee or Seasonal Collection Amin are to be counted for granting the pensionary benefit to them, and the nomenclature of their appointment, be a daily wager, temporary or whatever, is not material to consider their claim for grant of pensionary and retiral benefits.

23. Further, it is also pertinent to mention that the petitioners have worked for decades as Seasonal Collection Amin discharging the same duty which has been discharged by the regular Collection Amin and have been extended same benefits which have been extended to the regular Collection Amin, therefore, in such factual scenario denying the petitioners the benefit of pension and other benefits which have been extended to Regular Collection Amin would not only be arbitrary but against the concept of the right to equality as enshrined in Article 14 of the Constitution of India.

24. In view of the above discussion and given the law elucidated by the Apex Court as well as by this Court in various pronouncements referred above, the services rendered by the petitioners as Seasonal Collection Amin cannot be ignored for extending the benefits of pension and other retiral benefits to them on the pretext that their appointment is to be treated from the date of regularization and not from the date of their engagement as work charged employee.

25. Consequently,the writ petition is allowed. A writ of mandamus is issued to the respondent to compute pensionary benefit payable to the petitioners after taking into account their entire service including the service rendered by them as Seasonal Collection Amin. The amount payable to the petitioners shall be computed within three months from the date of presentation of a copy of this order downloaded from the official website of Allahabad High Court, and the same shall be paid within the next two months. The respondents shall also continue to pay current pensionary benefits as and when the same fell due.

(2021)12ILR A992
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 5064 of 2021

Sachin Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kailash Singh Kushwaha, Sri Sanjay Kumar Singh Kushwaha

Counsel for the Respondents:
C.S.C., Sri Sanjay Kumar Srivastava

A. Service Law – Compassionate Appointment - Uttar Pradesh Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Ministerial Staff and Group 'D' Employees), Rules, 1984 - Rule 6 - U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974.

The object of compassionate appointment is to provide immediate relief to the bereaved family so that the bereaved family may get over the financial hardship suffered by them on account of the untimely death of the sole bread earner of the family. It is settled in law that the compassionate appointment is an exception to the general rule and no aspirant has a right to the compassionate appointment. Thus, the petitioner cannot claim an appointment on compassionate grounds as a matter of right, and it can be given to the petitioner if he fulfills the norms prescribed for the grant of compassionate appointment. (Para 15, 16)

B. Uttar Pradesh Recognized Basic Schools (Junior High Schools)(Recruitment and Conditions of Service of Ministerial Staff and Group 'D' Employees), Rules, 1984: Rule 6 - The minimum age for recruitment on Class-III Posts is 18 years. The petitioner did not submit any application as soon as he became eligible for consideration for appointment on the compassionate ground rather he applied after six years, at the age of 24 years on 4.11.2019. (Para 14)

C. U.P. Recruitment of Dependants of Government Servants Dying-in-Harness, Rules, 1974 – (a) Under the Scheme for compassionate appointment, the Rule does not envisage any such contingency where the widow of the deceased employee submitted an application for consideration of appointment on compassionate ground, and thereafter, she sat idle and did not take any legal recourse to assert her claim for appointment, rather she waited for her son to become eligible, thereafter, she withdrew her application and requested for the appointment of her son in her place. The father of the petitioner had died in the year 2006. The family survived for more than 15 years. The mother of the petitioner was entitled to claim the compassionate appointment which she did not pursue, and surrendered her claim after nine years of submission of her application with a request for the appointment of her son in her place. If such a practice is permitted, that would frustrate the object of the Scheme of compassionate appointment. (Para 17, 18)

(b) It is true that Rules, 1974 provides that if the application for compassionate appointment is submitted after five years, the competent authority is obliged to forward it to the State Government to consider the claim of compassionate appointment who is under obligation to consider the same, but the application has to be submitted within a reasonable time after the expiry of the period prescribed for submitting such application specifying the reasons for the delay in submitting the application.

If the state government in a given case is satisfied, that the delay in filing the application is bona fide, it may consider the application and accord consideration for compassionate appointment subject to fulfillment of other eligibility criteria prescribed for compassionate appointment. The said provision does not confer an indefeasible right upon the aspirant of the compassionate appointment for consideration of his application. (Para 20)

In the present case, no such condition exists inasmuch as the petitioner has not explained the reason for the delay in submitting the application rather the facts stated above reveals that the mother of the petitioner was dormant in pursuing her claim. (Para 21)

Writ petition dismissed. (E-4)

Precedent followed:

1. Central Coalfields Limited Through its Chairman and Managing Director & ors. Vs Parden Oraon, Civil Appeal No. 897 of 2021, decided on 09.04.2021 (Para 19)

Precedent distinguished:

1. Madhav Prasad Shakya Vs St. of U.P. & ors., 2018 (11) ADJ 198 (Para 7)

2. Vishal Saini Vs St. of U.P. & ors., 2021 (3) ADJ 74 (LB) (Para 7)

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Kailash Singh Kushwaha, learned counsel for the petitioner, learned Standing Counsel appearing for the State-respondent no.1, and Sri Sanjay Kumar Srivastava, learned counsel appearing for respondents no.2,3 and 4.

2. The petitioner, through this writ petition, has prayed for the following reliefs:

"(i) Issue a writ, order or direction in the nature of Mandamus commanding the respondent no.3 to provide compassionate appointment to the petitioner without any further delay.

(ii) Issue a writ, order or direction in the nature of Mandamus commanding the respondent no.2 either to take appropriate and necessary decision on the reference made by respondent no.3 by letter dated 27.12.2011 followed by reminder dated 30.04.2013 and 04.03.2021 for providing compassionate appointment or to refer the matter to the State Government f through proper channel forthwith.

(iii) Issue any other writ, order or direction as this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case.

(iv) Award the costs of the petition in favour of the petitioner."

3. The case of the petitioner is that the father of the petitioner Late Satya Pal Singh was an Assistant Teacher in Primary School Jagra, Block Nidhauli Kala, District Etah, who unfortunately died on 16.3.2006. After his death, the mother of the petitioner applied for compassionate appointment on 3.1.2011. The application of the mother of the petitioner was processed, she was asked to submit an application in the prescribed format. Thereafter, respondent no.4 forwarded the application of the mother of the petitioner along with its recommendation for compassionate appointment to respondent no.3 on 27.12.2011. Since the mother of the petitioner applied after five years from the date of death of his father, therefore, the respondent no.3 referred the application of the mother of the petitioner vide letter dated 27.12.2011 to respondent no.2 for grant of relaxation in time for the delay in submitting the application.

4. It appears that no decision was taken on the application of the mother of the petitioner for the compassionate appointment.

5. It further transpires from the record that when no decision was taken on the application of the mother of the petitioner, she withdrew her application and requested the appointment of her son Sachin Yadav in her place. The District Basic Education Officer, Etah vide letter dated 4.3.2021 forwarded the application of the petitioner for compassionate appointment to the Secretary, U.P. Basic Shiksha Parishad, Prayagraj, for grant of relaxation in time as the petitioner has submitted the application after five years from the date of death of his father. In the aforesaid backdrop, the petitioner has prayed for the relief extracted above.

6. Learned counsel for the petitioner submitted that Para-8 of the Government Order dated 4.9.2000 provides for seeking necessary approval of the State Government where the application for the compassionate appointment has been submitted after five years from the date of death of the deceased employee, and the State Government is under obligation to consider the application of the petitioner for grant of relaxation for the delay in submitting the said application. Accordingly, he submits that the action of the respondents in not considering the application of the petitioner is illegal. He further

contends that whatever delay has occurred, the same has occurred on account of inaction on the part of the respondents in not considering the application of compassionate appointment of his mother in time, therefore, the petitioner is entitled to relaxation in limitation for grant of appointment on compassionate ground.

7. In support of the contention, he has placed reliance upon two judgments of this Court in the cases of ***Madhav Prasad Shakya Vs. State of U.P. and others*** reported in ***2018(11) ADJ 198*** and ***Vishal Saini Vs. State of U.P. and others*** reported in ***2021 (3) ADJ 74 (LB).***

8. Per contra, learned Standing Counsel contended that the father of the petitioner had died on 16.3.2006 and more than 15 years have passed since the date of death of the father of the petitioner. Accordingly, he contends that a sufficiently long time has elapsed since the death of the father of the petitioner, and the family has survived, therefore, the relief prayed for cannot be granted at this stage since the object of compassionate appointment is to provide immediate relief to the bereaved family.

9. He submits that the mother of the petitioner had submitted an application on 27.11.2011 after about five years from the date of death of the father of the petitioner, and as the limitation prescribed under the Rules for considering the application for the compassionate appointment has expired, therefore, the application of the mother of the petitioner had to be referred to the competent authority for seeking extension of time for considering her claim for compassionate appointment.

10. He submits that though the mother of the petitioner was entitled to the compassionate appointment, she did not pursue her claim, and on 4.11.2019 she withdrew her application with the request to grant compassionate appointment to her son. Accordingly, he submits that there is an inordinate delay in submitting the application for the compassionate appointment, and the relief claimed can not be allowed at this stage. Thus, he submits that the writ petition is devoid of merit and deserves to be dismissed.

11. I have heard learned counsel for the petitioner and the learned Standing Counsel.

12. Indisputably, the father of the petitioner died on 16.3.2006. The mother of the petitioner submitted an application seeking the compassionate appointment on 3.1.2011. Since the application of the mother of the petitioner was not in the proper format, therefore, she was asked to submit an application in proper format by respondent no.4. She, thereafter, submitted an application on 27.12.2011 in the proper format. Since the mother of the petitioner submitted the application after five years, therefore, respondent no.3 referred the matter to the State Government seeking the extension of time in respect to the compassionate appointment of the mother of the petitioner.

13. The matter was referred to the State Government but it appears that the State Government did not act upon the application nor the mother of the petitioner pursued her claim for appointment on compassionate ground. Later on, the mother of the petitioner withdrew her application for the grant of compassionate appointment and requested the appointment of her son on compassionate ground.

14. Accordingly, the petitioner at the age of 24 years applied for the compassionate appointment on 4.11.2019. Under Rule 6 of the Uttar Pradesh Recognized Basic Schools (Junior High Schools)(Recruitment and Conditions of Service of Ministerial Staff and Group 'D' Employees), Rules, 1984 (in Short the Rules), the minimum age for recruitment on Class-III

Posts is 18 years. The petitioner did not submit any application as soon as he became eligible for consideration for appointment on the compassionate ground rather he applied after six years after he became eligible for appointment on compassionate ground.

15. The father of the petitioner had died in the year 2006 and the mother of the petitioner withdrew her application after 13 years and requested for grant of compassionate appointment to her son. At this stage, it is worth noticing that the object of compassionate appointment is to provide immediate relief to the bereaved family so that the bereaved family may get over the financial hardship suffered by them on account of the untimely death of the sole bread earner of the family. It is settled in law that the compassionate appointment is an exception to the general rule and no aspirant has a right to the compassionate appointment.

16. Thus, the petitioner cannot claim an appointment on compassionate grounds as a matter of right, and it can be given to the petitioner if he fulfills the norms prescribed for the grant of compassionate appointment.

17. In the case in hand, the mother of the petitioner applied for the compassionate appointment in the proper format in December 2011. Since the application was submitted beyond the period of limitation i.e. five years prescribed for submitting the application for compassionate appointment, therefore, the matter was referred to the State Government, but the State Government did not take any decision on the application of the mother of the petitioner. His mother also did not pursue her claim, and after about 13 years from the date of death of petitioner's father, she withdrew her application and requested for the appointment of her son in her place on compassionate ground. The petitioner thereafter submitted an application on 4.11.2019.

18. The family of the petitioner survived for more than 15 years. The mother of the petitioner was entitled to claim the compassionate appointment which she did not pursue, and surrendered her claim after nine years of submission of her application with a request for the appointment of her son in her place. Under the Scheme for compassionate appointment under U.P. Recruitment of Dependants of Government Servants Dying-in-Harness, Rules, 1974 (in short the Rules), the Rule does not envisage any such contingency where the widow of the deceased employee submitted an application for consideration of appointment on compassionate ground, and thereafter, she sat idle and did not take any legal recourse to assert her claim for appointment on compassionate ground, rather she waited for her son to become eligible for compassionate appointment, thereafter, she withdrew her application and requested for the appointment of her son in her place. If such a practice is permitted, that would frustrate the object of the Scheme of compassionate appointment which is to provide immediate succor to the bereaved family and to help out the family from the rigors of financial hardship being faced by the family due to the death of sole bread earner of the family and also against the settled norms prescribed for grant of compassionate appointment. Since the family has survived for about 15 years, therefore, this Court believes that the relief claimed by the petitioner cannot be granted.

19. This view is supported by the judgment of the Apex Court in ***Civil Appeal No. 897 of 2021, Central Coalfields Limited through its Chairman and Managing Director & Ors. Vs. Smt. Parden Oreon*** decided on 9th April 2021 wherein the Apex Court refused to grant the compassionate appointment to the son of the respondent who submitted the application for the compassionate appointment more than ten years after the respondent's husband has gone missing.

Paragraph 9 of the judgment is reproduced herein-below:

"9. We are in agreement with the High Court that the reasons given by the employer for denying compassionate appointment to the Respondent's son are not justified. There is no bar in the National Coal Wage Agreement for appointment of the son of an employee who has suffered civil death. In addition, merely because the respondent is working, her son cannot be denied compassionate appointment as per the relevant clauses of the National Coal Wage Agreement. However, the Respondent's husband is missing since 2002. Two sons of the Respondent who are the dependents of her husband as per the records, are also shown as dependents of the Respondent. It cannot be said that there there was any financial crisis created immediately after Respondent's husband went missing in view of the employment of the Respondent. Though the reasons given by the employer to deny the relief sought by the Respondent are not sustainable, we are convinced that the Respondent's son cannot be given compassionate appointment at this point of time. The application for compassionate appointment of the son was filed by the Respondent in the year 2013 which is more than 10 years after the Respondent's husband had gone missing. As the object of compassionate appointment is for providing immediate succour to the family of a deceased employee, the Respondent's son is not entitled for compassionate appointment after the passage of a long period of time since his father has gone missing."

20. It is true that the Rule, 1974 provides that if the application for compassionate appointment is submitted after five years, the competent authority is obliged to forward it to the State Government to consider the claim of compassionate appointment who is under obligation to consider the same, but the application has to be submitted within a reasonable time after the expiry of the period prescribed for submitting such application specifying the reasons for the delay in submitting the application. If the state government in a given case is satisfied, that the delay in filing the application is bonafide, it may consider the application and accord consideration for compassionate appointment subject to fulfillment of other eligibility criteria prescribed for compassionate appointment. The said provision does not confer an indefeasible right upon the aspirant of the compassionate appointment for consideration of his application even though it has been submitted with inordinate delay without any proper and bonafide explanation for the delay in submitting the said application.

21. In the instant case, no such condition exists inasmuch as the petitioner has not explained the reason for the delay in submitting the application rather the facts stated above reveals that the mother of the petitioner was dormant in pursuing her claim. Thus, the argument of the petitioner's counsel that once the application for compassionate appointment is submitted after the period prescribed for submitting the application, the competent authority is bound to forward the same to the state government who is under obligation to consider the same is misconceived and not sustainable.

22. In the opinion of the Court, Judgments relied upon by the counsel for the petitioner are not applicable in the present case. In the case of ***Madhav Prasad Shakya (supra)***, the petitioner submitted a representation immediately after attaining the age of majority, which application was rejected by the State Government on the ground that the application has been filed after the expiry of five years. In that circumstances, the Court held that the application has wrongly been rejected. The factual situation in the case of

Madhav Prasad Shakya (supra) in which this Court allowed the writ petition is different from the facts of the present case, hence, the law enunciated in the said judgment is not attracted in the present case.

23. In the case of ***Vishal Saini (supra),*** it has been held that at the time of death of petitioner's father, he was minor. The mother of the petitioner was given the compassionate appointment, who also died on 31.1.2012 during the service period. At the time of death of his mother, the petitioner was minor, and as soon as, he became major, he submitted an application for appointment on compassionate ground on 11.10.2019 which was rejected by the authority concerned on the ground of limitation. In such a factual backdrop, the Court held that the claim of the petitioner has wrongly been rejected on the ground of limitation. The facts of the present case are not akin to the facts of the case of Vishal Saini (supra), therefore, the judgement of Vishal Saini (supra) does not help the cause of the petitioner.

24. Thus, for the reasons given above, the writ petition lacks merit and is, accordingly, dismissed. However, there shall be no order as to costs.

(2021)12ILR A998
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.10.2021

BEFORE

THE HON'BLE VIVEK AGARWAL, J.

Writ-A No. 13465 of 2021

Kanika Banshiwal & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashwani Kumar Yadav

Counsel for the Respondents:
C.S.C., Sri Vinit Kumar Srivastava, Sri Vijay Kumar Srivastava

A. Service law – Deployment of teachers for non-educational purposes - Right of Children to Free and Compulsory Education Act, 2009 - Section 27 - U.P. Rules, 2011 (Special Rules) - Rule 21(3) - Appointment of the petitioners as booth level officer and deployment of their services for the purposes of conduct of duties relating to elections, cannot be termed to be covered under the provisions of Section 27 of the Act of 2009, providing for prohibition of deployment of teachers for non-educational purposes. S. 27 of the RTE Act, 2009 itself carves out an exception to the duties relating to elections and meaning of duties relating to election, include preparation of electoral rolls. (Para 12)

B. Constitution of India - Article 324 - Section 27 of the Act of 2009 - Interpretation – The words used in **Section 27** are **'duties relating to elections'**.

Article 324 deals with the superintendence, direction and **control of the preparation of the electoral rolls for and the conduct of**, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution treating them to be vested in a commission referred to in this Constitution as the Election Commission.

Use of word 'and', between 'control of the preparation of electoral rolls for' and 'the conduct of all elections' in Article 324(1) means that **preparation of electoral rolls is a prelude to conduct of elections**. Thus, when given comprehensive and inclusive meaning means that **preparation of electoral rolls is included in duties relating to elections.** (Para 13, 15)

C. Words and Phrases – *'relating to'/'in relation to'* - 'in relation to' are words of comprehensiveness which might both have a direct significance as well as indirect significance, dependent on the context. They are not words of restrictive content and ought not to be so construed. (Para 14)

The word 'relating to' used in S. 27, has to be given a comprehensive meaning and will include all the works relating to election where elections are notified or

not. Thus, where elections are notified or not, duties of a teacher can be deployed in terms of the provisions contained in S. 27 even for works in relations to election which includes preparation of electoral rolls as provided u/Article 324 of the Constitution. Therefore, no fault can be attributed to the deployment of the petitioners in relations to the election work. (Para 16)

Writ petition dimissed. (E-4)

Precedent followed:

1. State Wakf Board, Madras Vs Abdul Azeez Sahib & ors., AIR 1968 Madras 79 (81) (Para 14)

Precedent distinguished:

1. Charu Gaur & 2 ors. Vs St. of U.P. & ors., Writ-A No. 6975 of 2021 (Para 3)

2. U.P. Pradeshiya Prathmik Shikshak Sangh Banda & anr. Vs St. of U.P. & ors. , Writ-A No. 34082 of 2017, decided on 02.08.2017 (Para 5)

3. Madan Gopal & ors. Vs St. of U.P. & ors., Writ-A No. 17884 of 2019 (Para 3)

4. Sunita Sharma Advocate High Court & anr. Vs St. of U.P. & ors., passed in PIL No. 11028 of 2015 (Para 4)

5. Sri Krishan Vs St. of U.P. & ors., Writ-A No. 18683 of 2019 (Para 12)

6. Rakesh Kumar Vishwakarma & ors. Vs St.of U.P. & 4 ors., Writ-A No. 11355 of 2020 (Para 12)

7. Ragini & ors. Vs St. of U.P. & ors., Writ-A No. 8539 of 2021 (Para 12)

8. Sandeep Kumar Bhatia Vs St. of U.P. & ors., Writ-A No. 11781 of 2021 (Para 12)

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

1. Sri Ashwani Kumar Yadav, learned counsel for petitioners, Sri Vijay Kumar Srivastava, learned counsel for respondent nos. 5 and 6.

2. Petitioners have filed this petition challenging the order annexed as Annexure-1 to the writ petition, whereby petitioners who are working as Assistant Teachers in primary school have been requisitioned to work as booth level officer (BLO).

3. Learned counsel for petitioners has placed reliance on decision of co-ordinate Benches in case of *Charu Gaur and 2 others vs. State of U.P. and 6 others (Writ - A No. 6975 of 2021) so also in case of Madan Gopal and 8 others vs. State of U.P. and 6 others* (Writ - A No. 17884 of 2019), and placing reliance on these decisions, it is submitted that in terms of the prohibition under Section 27 of the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as "the Act of 2009"), prohibits the District Magistrate and District Basic Education Officers to depute Assistant Teachers for works in violation of Section 27 of the Act of 2009, thus petitioners' engagement as BLO be set aside.

4. Petitioners have also placed reliance on the decision of Division Bench of this Court in case of *Sunita Sharma Advocate High Court & Another vs. State of U.P. & 3 others, passed in PIL No. 11028 of 201*5, where services of the petitioners were requisitioned for the purpose of work of verification of ration cards, where Division Bench of this Court allowed the writ petition and directed the District Administration to not to requisition the services of teachers in Primary Schools and Junior High Schools for carrying out such work, which is without the authority of law.

5. Similarly, reliance is placed on the decision of a co-ordinate Bench in *U.P. Pradeshiya Prathmik Shikshak Sangh Banda and another vs. State of U.P. and 3 others (Writ - A No. 34082 of 2017) decided on 2.8.2017*, where teachers were directed to undertake the exercise of verification of ration cards and the list of Antyodaya, BPL Card-holders under the provisions of National Food Security Act and

High Court was pleased to quash the proceedings.

6. This aspect has already been considered by this Court while deciding Writ - A No. 12187 of 2021, decided on 1.10.2021, wherein this Court considered the law laid down in case of Sunita Sharma (supra) and also the provisions contained in Section 27 of the Act of 2009, inasmuch as Section 27 of Act of 2009 provides as under :

"27. Prohibition of deployment of teachers for non-educational purposes.- No teacher shall be deployed for any non-educational purposes other than the decennial population census, disaster relief duties or duties relating to elections to the local authority or the State Legislatures or Parliament, as the case may be."

7. Rule 21(3) of the U.P. Rules,2011 (Special Rule) reads in the following terms:

"21(3). For the purpose of maintaining the pupil-teacher ratio, no teacher posted in a school shall be made to serve in any other school or office or deployed for any non-educational purpose, other than the decennial population census, disaster relief duties or duties relating to elections to the local authority or the State Legislatures or Parliament."

8. Whereas the order dated 3.11.2010 passed by the Election Commission of India provides that BLOs can be appointed only amongst the list mentioned below in addition to teachers who can be appointed as BLO :-

(i) Anganwadi workers,
(ii) Patwari/Amin/Lekhpal,
(iii) Panchayat Secretary,
(iv) Village Level Workers,
(v) Electricity Bill Readers,
(vi) Postman,
(vii) Auxiliary Nurses & Mid-wives,
(viii) Health workers,
(ix) Mid-day meal workers,
(x) Contract teachers,
(xi) Corporation Tax Collectors,
(xii) Clerical Staff in Urban area (UDC/LDC etc.)

9. This order dated 3.11.2010 passed by Election Commission of India will be of no assistance to the present petitioners, as teachers are included.

10. As far as the provisions contained in Section 27 of the Act of 2009 is concerned, it prohibits deployment of teachers for non-educational purposes but carves out an exception for their deployment to the work of census, disaster relief duties or duties relating to elections to the local authority or the State Legislatures or Parliament. Similarly, Rule 21(3) of the U.P. Rules of 2011 has been drafted in terms of the language of Section 27 of the Act of 2009, leaving no iota of doubt that duty of teachers can be deployed for the purposes of decennial population census, disaster relief duties or duties relating to elections to the local authority or the State Legislature or Parliament.

11. When tested on this touchstone, then cases of *Charu Gaur (supra)* and *Madan Gopal (supra)*are distinguishable on their own facts inasmuch as they have been passed taking into consideration orders of Division Bench of this Court in case of *Sunita Sharma (supra), U.P. Pradeshiya Prathmik Shikshak Sangh Banda and another (supra),* whereas the ratio of law laid down in case of U.P. Pradeshiya Prathmik Shikshak Sangh Banda and another (supra) is not applicable to the facts of the present case, inasmuch as in case of *U.P. Pradeshiya Prathmik Shikshak Sangh Banda and another (supra),* teachers were deployed to undertake exercise of verification of ration cards and the list of BPL card holders under the provisions of National Food Security Act. Similarly, in case of

Sunita Sharma (supra), they were deployed in the work of verification of card holding families on the basis of criteria for inclusion and exclusion under the National Food Security Act, 2013, which is not one of the permitted exercises, for which teachers can be deployed in terms of the provisions contained under Section 27 of the Act of 2009 and therefore, having failed to take into consideration a fact that appointment as booth level officer, as are the facts of the case of *Charu Gaur (supra)* and *Madan Gopal (supra)*, ratio of law laid down in case of *Sunita Sharma (supra) and U.P. Pradeshiya Prathmik Shikshak Sangh Banda and another (supra)* is not applicable to the facts of that case as well as present case.

12. Appointment of the petitioners as booth level officer and deployment of their services for the purposes of conduct of duties relating to elections, cannot be termed to be covered under the provisions of Section 27 of the Act of 2009, providing for prohibition of deployment of teachers for non-educational purposes and therefore, the petition is liable to be dismissed and is dismissed both on its facts and also on the touchstone of the fact that ratio of law laid down in case of *Charu Gaur (supra)* and *Madan Gopal (supra)*, which have been followed in case of *Sri Krishan vs State of U.P. and 4 others (Writ - A No. 18683 of 2019), Writ - A No. 11355 of 2020 (Rakesh Kumar Vishwakarma and 3 others vs. State of U.P. and 4 others), Writ - A No. 8539 of 2021 (Ragini and 4 others vs. State of U.P. and 5 others)*, so also in case of *Writ - A No. 11781 of 2021 (Sandeep Kumar Bhatia vs.State of U.P. and 4 others)* is not applicable to the facts and circumstances of the case and in all these orders, this fact was not presented to the court concerned that Section 27 of the RTE Act, 2009 itself carves out an exception to the duties relating to elections and meaning of duties relating to election, include preparation of electoral rolls.

13. The words used in Section 27 of the Act of 2009 are 'duties relating to elections'. Article 324(1) of the Constitution of India deals with the superintendence, direction, and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution treating them to be vested in a commission referred to in this Constitution as the Election Commission.

14. Meaning and import of the words used in Section 27 of the Act of 2009 'relating to' have been interpreted by the High Court of Madras in case of State Wakf Board, Madras vs. Abdul Azeez Sahib and Others, AIR 1968 Madras 79 (81), wherein it is held that 'in relation to' are words of comprehensiveness which might both have a direct significance as well as indirect significance, dependent on the context. They are not words of restrictive content and ought not to be so construed.

15. Similarly, use of word 'and', between control of the preparation of electoral rolls for and the conduct of all elections in Article 324(1) means that preparation of electoral rolls is a prelude to conduct of elections. Thus, when given comprehensive and inclusive meaning means that preparation of electoral rolls is included in duties relating to elections.

16. Thus, when words used in Section 27 of the Act 2009 'relating to' are construed in terms of the law laid down by Division Bench of Madras High Court, then there is no iota of doubt that the word 'relating to' has to be given a comprehensive meaning and will include all the works relating to election where elections are notified or not and cannot be given retrospective meaning as has been sought to be given by a co-ordinate Bench in case of Shri Krishan vs. State of U.P. and 4 Others (Writ-A No.18683 of 2019) and thus where elections are notified or not, duties of a teacher can be deployed in terms of the provisions contained in Section 27 of the Act

of 2009 even for works in relations to election which in my opinion includes preparation of electoral rolls as provided under Article 324 of the Constitution of India. Therefore, no fault can be attributed to the deployment of the petitioners in relations to the election work.

17. Therefore, there being no violation of the provisions of Section 27 of the Act of 2009, petition fails and is ***dismissed.***

(2021)12ILR A1002
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 6978 of 2021

Rinku Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shadab Ali

Counsel for the Respondents:
C.S.C.

A. Service Law – Criminal Case and Disciplinary proceeding – U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 - Section 14(1) - Indian Penal Code,1860 - Sections 392, 406, 395 & 412; Indian Police Act, 1861 - Section 7 - Police Regulation - Regulation 492, 493 - Proceedings in criminal case and departmental proceedings can go on simultaneously, except where departmental proceedings and criminal case are based on the same set of facts and the evidence in both the proceedings is common. (Para 16)

The purpose of the two proceedings are totally different, therefore both the proceedings can continue simultaneously as the departmental proceeding is to maintain discipline and efficiency in public service; criminal proceedings are initiated to punish a person for committing an offence violating the public duty. The nature of evidence in both criminal and disciplinary proceedings is different. In the disciplinary proceedings, the rule of the preponderance of probabilities is applied whereas, in the criminal proceeding, the principle of strict standard of proof beyond a reasonable doubt is applicable. (Para 17, 18, 19)

The gravity of the charge is not by itself enough to determine the question of continuance of departmental and criminal proceedings simultaneously unless the charge involves complicated questions of law and fact and continuance of disciplinary proceeding is likely to prejudice the defence of the employee before the criminal court. (Para 19)

In the present case, firstly, the charges against the petitioner in the criminal proceeding and disciplinary proceeding are not identical as there is one additional charge in the disciplinary proceeding. Secondly, to succeed, the petitioner has to demonstrate that charge against the petitioner is grave and involves complicated questions of fact and law and further if the disciplinary proceeding is continued that would prejudice the criminal trial of the petitioner. Though a bald averment has been made that continuance of disciplinary proceeding would prejudice the criminal trial, there is no pleading in the writ petition as to how continuance of disciplinary proceeding would prejudice the criminal trial of the petitioner. (Para 22, 23)

B. Words and Phrases – *'has been' -* 'has been' refers to an event which has already occurred. The words "has been" reflect to something which has performed and accomplished in past and is not continuing in present. The words "has been" refer to the state of affairs as existed in past and it is a present perfect tense. (Para 20)

C. Police Regulation: Regulation 492, 493 – Regulation 492 clearly says that where a police officer "***has been*** judicially tried". The language is very important. It talks of something which has already happened. The simple language of provision shows where a police officer has been tried judicially and only the judgment is awaited, in such circumstances and in interregnum period, the competent authority should not decide to take further departmental action but should await the decision. In other words, Regulation 492 shall be attracted only when the

judicial trial is over but judgment has not been delivered and it is awaited. (Para 20)

Similarly Regulation 493 is attracted when trial is complete and judgment of trial court has also come, resulting in recording a finding in favour of police officer. It restrains the competent authority in such matter to create a situation where a contrary finding can be recorded in departmental proceedings vis-a-vis court's verdict and the Regulation provides that such a contingency should not occur hence it prohibits such a course to be followed by competent authority. (Para 20)

Court observed that in the instant case, these regulations do not come in aid to petitioner as only charge sheet has been issued and that early conclusion of the disciplinary proceeding is good in the interest of the employee as well as the department for the reason that if the employee is exonerated from the charges, he may not be out of service unnecessarily and may be reinstated and if the employee is found guilty, the department will get rid of such employee who is not worth continuing in the employment. (Para 12, 24)

Writ petition dismissed. (E-4)

Precedent followed:

1. M. Paul Anthony Vs Bharat Gold Mines Ltd. & anr., 1999 (3) SCC 679 (Para 15)

2. S.B.I. & ors. Vs R.B. Sharma, (2004) 7 SCC 27 (Para 16)

3. Noida Entrepreneurs Assc. Vs NOIDA & ors. , 2007 (2) ADJ 86 (SC) (Para 17)

4. Surendra Singh & anr. Vs St. of U.P. & anr., 2012 (2) ADJ 135 (LB) (Para 20)

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard learned counsel for the petitioner and Dr. Amarnath Singh, learned Standing Counsel for respondent nos.1 to 3.

2. The petitioner by means of the present writ petition has prayed for the following relief:-

"(i). Issue a writ, order or direction in the nature Certiorari to quash departmental proceeding under Rule 14(1) of the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules-1991 related to Case Crime No.109 of 2019, under Sections 392, 406 I.P.C., Police Station-Nagal, District Saharanpur, pending against the Petitioner before Respondent no.3.

(ii). Issue a writ, order or direction in the nature of mandamus commanding and directing the Respondents especially Respondent No.3 not to proceed further departmental proceeding against the Petitioner under Rule 14(1) of the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules-1991 related to Case Crime No.109 of 2019, under Sections 392, 406 I.P.C., Police Station-Nagal, District Saharanpur, pending before him."

3. The brief facts of the case are that petitioner is a Police Constable. He was posted in Surveillance Cell G.R.P., Agra. One Mohd. Akhtar lodged an F.I.R. against one Basheer and some unknown person under Sections 406 and 392 of I.P.C alleging that at about 3.00 A.M on 13.05.2019, he had looted Rs.8,34,700/- from his brother when he was sleeping along with his friends on the roof of a house behind the Dhaba of Mulla Ji in village Umah, P.S. Nagar, District Saharanpur. The police arrested Basheer and other persons. During the investigation, the accused admitted loot, and further stated that the loot was committed with the help of Constable Rinku Singh i.e. the petitioner. The looted money was recovered from the possession of the accused and accordingly, police converted the case under Sections 395 and 412 of I.P.C.

4. According to the petitioner, he was not named in the F.I.R. and his name surfaced during the confessional statement of accused persons. The petitioner filed Criminal Misc. Writ Petition No.14957 of 2019 against the F.I.R. dated 13.05.2019 in which this Court stayed the

arrest of the petitioner till submission of a police report under Section 173(2) of Cr. P.C by order dated 29.05.2019. The police after investigation submitted charge sheet.

5. The Magistrate Deoband, Saharanpur took cognizance of the charge sheet, and accordingly, a Criminal Case No.579 of 2019 (State Vs. Basheer Khan and Others) was registered which is pending before the Additional Civil Judge (J.D.)/Judicial Magistrate, Deoband, District Saharanpur.

6. It appears that a departmental proceeding had also been initiated against the petitioner on account of his involvement in the criminal case and accordingly, a charge sheet dated 21.08.2019 has been issued to the petitioner on the following charges:-

"प्रतिसार उप निरीक्षक जी०आर०पी० लाइन अनुभाग आगरा श्री छोटे सिंह की आख्या दिनांकित 14.05.2019 के माध्यम से दिनांक 13.05.2019 को पुलिस उपाधीक्षक रेलवे आगरा अनुभाग आगरा के आदेशानुसार आप तीनों कर्मचारीगणों को आपके कार्यालय में तलाशा गया, न मिलने पर आपकी रपट गैरहाजिरी दिनांक 13.05.2019 को रपट संख्या 16 समय 20:35 बजे जीआरपी लाइन अनुभाग आगरा के रोजनामचा आम मे अंकित करायी गयी। और दिनांक 14.05.2019 को दैनिक समाचार पत्र के अवलोकन से पाया कि निरीक्षक 052010095 ना०पु० ललिक कुमार त्यागी व आरक्षी 299/062494410 शायर वेग व आरक्षी 2378/062531098 रिन्कू सिंह के विरुद्ध थाना नागल जनपद सहारनपुर मे मु०अ०सं० 109/2019 धारा 406,392 आईपीसी तरमीम धारा 395/412 आईपीसी में नाम प्रकाश मे आया है एवं निरीक्षक 052010095 ना०पु० ललित कुमार त्यागी की दिनांक 13.05.2019 को समय 21:05 बजे गिरफ्तारी हुई एवं 1,44,000/- रुपया बरामद हुआ। तथा दोनो आरक्षी गिरफ्तार नहीं किये गये है। आपका यह कृत्य पुलिस विभाग जैसे अनुशासित बल की स्वच्छ छवि को धूमिल करता है। और एतद्द्वारा आपके द्वारा घोर लापरवाही/ अनुशासनहीनता / स्वेच्छाचारिता का परिचय दिया गया है।"

7. The petitioner pursuant to the aforesaid charge sheet submitted his reply on 11.01.2020.

8. In the aforesaid factual backdrop, the petitioner has prayed for the reliefs extracted above.

9. Learned counsel for the petitioner has submitted that charge in the criminal case as well as in the departmental proceeding is identical, and in case, the departmental proceeding is allowed to be continued, same shall prejudice the criminal trial of the petitioner, as the petitioner would have to disclose the defence in the departmental proceeding which he wants to take in the criminal proceeding. Accordingly, he submits that in the facts of the present case, it is desirable in the interest of justice that this Court may stay the departmental proceeding till the criminal trial is concluded. In support of his aforesaid contention, he has placed reliance upon Regulations 492 & 493 of Police Regulation. He has also placed reliance upon the interim order passed by this Court in Writ-A No.24162 of 2010.

10. Rebutting the aforesaid contention, learned Standing Counsel would contend that there is no bar in law that the departmental proceeding and criminal trial cannot continue simultaneously. He submits that the purpose of the departmental proceeding and trial by the criminal court is different, and parameters to consider the departmental inquiry and criminal trial are different. He further submits that rules relating to the appreciation of evidence in the two inquiries are also different. The further submission is that finding can be recorded in the preponderance of probabilities in the departmental inquiry and it is not necessary that charge must be proved to the hilt.

11. The further submission is that it is the domain of the disciplinary authority to conclude in the given fact and circumstances whether the continuance of the departmental proceeding would prejudice the criminal trial of the employee, and therefore, he submits that this Court should not exercise its power under Article 226 of Constitution of India to stay the departmental proceeding, as the continuance of

departmental proceeding is dependent upon the evidence and material on record.

12. He further submits that Regulations 492 & 493 of Police Regulation do not come in aid to petitioner as the said regulation talks of cases where police official has been judicially tried and judgment in the criminal trial is awaited whereas in the instant case, only charge sheet has been issued. He further contends that charges in the departmental proceeding and criminal trial are not identical since, in addition to the charge of involvement of the petitioner in criminal activity, there is an additional charge in the departmental proceeding against the petitioner. Thus, he submits that no case for interference by the Court has been made out by the petitioner, and the writ petition deserves to be dismissed.

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

14. The undisputed facts as emanates from the record are that petitioner was implicated in a criminal case bearing Case Crime No.109 of 2019, under Sections 395 and 412 of I.P.C. Simultaneously, a departmental proceeding had also been initiated against the petitioner under Section 7 of Indian Police Act, 1861 in which two charges had been leveled against the petitioner; firstly, petitioner was absent on 13.05.2019 in the G.R.P. Line, Agra and absence of petitioner have been recorded in the general diary through Report No.16, time 20:35. Secondly, it has come to the knowledge of the department through a news item published in the daily newspaper on 14.05.2019 that a criminal case has been lodged against the petitioner along with other constables in which petitioner was arrested at 9:05 P.M. on 13.05.2019 and amount of Rs.1,44,000/- was recovered from him.

15. The Apex Court in the case of Capt. ***M. Paul Anthony Vs. Bharat Gold Mines Ltd and Another 1999 (3) SCC 679*** has held in paragraph 22 as under:-

"22. The conclusions which are deducible from various decisions of this Court referred to above are:-

(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the Departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, administration may get rid of him at the earliest."

16. In the case of ***State Bank of India and Others Vs. R.B. Sharma 2004 7 SCC 27,*** the Apex Court has explained the object of

departmental proceeding and criminal proceeding. Paragraphs 7 & 8 of the said judgment are being extracted herein below:-

"7. It is a fairly well-settled position in law that on basic principles proceedings in criminal case and departmental proceedings can go on simultaneously, except where departmental proceedings and criminal case are based on the same set of facts and the evidence in both the proceedings is common.

8. The purpose of departmental enquiry and of prosecution are two different and distinct aspects. Criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law. Offence generally implies infringement of public duty, as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Indian Evidence Act 1872 (in short "the Evidence Act"). Converse is the case of departmental enquiry. The enquiry in a departmental proceedings relates to conduct or breach of duty of the delinquent officer, to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. Under these circumstances, what is required to be seen is whether the department enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances."

17. Similar view has been reiterated by the Apex Court in the case of ***Noida Entrepreneurs Association Vs. NOIDA and Others 2007 (2) ADJ 86 (SC)*** wherein Apex Court also considered the long line decisions concerning conduct of departmental proceeding and criminal proceeding simultaneously and concluded that purpose of the two proceedings are totally different, therefore, both the proceedings can continue simultaneously as the departmental proceeding is to maintain discipline and efficiency in public service; criminal proceedings are initiated to punish a person for committing an offence violating the public duty.

18. Now, the legal position is well settled that departmental proceeding and the criminal proceeding can continue simultaneously as the object and purpose of the criminal proceeding and disciplinary proceeding are different and they operate in a different field. In the disciplinary proceedings, the rule of the preponderance of probabilities is applied whereas, in the criminal proceeding, the principle of strict standard of proof beyond a reasonable doubt is applicable.

19. The nature of evidence in both criminal and disciplinary proceedings is different. The only exception to this rule that can be culled out from the law elucidated by the Apex Court on

the issue of the continuance of disciplinary proceeding and criminal proceeding simultaneously is that disciplinary proceedings may be stayed where criminal charges against the delinquent employee are grave and involves complicated question of facts and law, and continuance of disciplinary proceeding is likely to prejudice the defence of the employee before the criminal court. The gravity of the charge is not by itself enough to determine the question of continuance of departmental and criminal proceedings simultaneously unless the charge involves complicated questions of law and fact.

20. This Court in the case of ***Surendra Singh and Another Vs. State of U.P. and Another 2012 (2) ADJ 135 (LB)*** had considered the scope of Regulations 492 & 493 of Police Regulation and this Court succinctly explained the meaning of the word 'has been and held that expression 'has been' refers to an event which has already occurred. Paragraphs 21, 27, 28 & 29 of the said judgment are being extracted herein below:-

"21. Regulation 492 clearly says that where a police officer "has been judicially tried". The language is very important. It talks of something which has already happened. The simple language of provision shows where a police officer has been tried judicially and only the judgment is awaited, in such circumstances and in interregnum period, the competent authority should not decide to take further departmental action but should await the decision. In other words, Regulation 492 shall be attracted only when the judicial trial is over but judgment has not been delivered and it is awaited. The words "has been" reflect to something which has performed and accomplished in past and is not continuing in present. The words "has been" refer to the state of affairs as existed in past and it is a present perfect tense. The words "has been" on a plain grammatical construction means, without doubt, the existence of past event i.e. the requisite event has already occurred and completed. The expression "has been" and its connotation have been subject of interpretation before Apex Court and this Court, both, at several occasions and it would be useful to refer a few thereof.

27. The above exposition of law clearly shows that the term "has been" in simple language means a thing already happened and here the term "judicially tried" means that police officer concerned's trial in the court of law is already complete but the decision is awaited.

28. Similarly Regulation 493 is attracted when trial is complete and judgment of trial court has also come, resulting in recording a finding in favour of police officer. It restrain the competent authority in such matter to create a situation where a contrary finding can be recorded in departmental proceedings vis a vis court's verdict and the Regulation provides that such a contingency should not occur hence it prohibits such a course to be followed by competent authority.

29. Going by the above discussion it becomes apparently clear that situation in the present cases do not attract either Regulation 492 or 493 in both these matters since the only stage at which the criminal cases proceeding presently are that a charge sheet has been filed against petitioners. The petitioners cannot be said to have undergone judicial trial so far. The trial is still awaited. For the purpose of understanding the meaning of word "Trial" one may simply refer to the provisions of Cr.P.C. and that would clearly show that an accused can be said to have tried when evidence by prosecution and defence has already led and matter has been argued before trial court. This itself leaves inescapable conclusion that both these writ petitions at this stage have to fail."

21. In the light of interpretation given by this Court in the case of ***Surendra Singh (supra)*** relating to Regulations 492 & 493 of Police Regulation, this Court finds that submission of

learned counsel for the petitioner based upon Regulations 492 & 493 of Police Regulation is misplaced and is not sustainable in law, since in the instant case only charge sheet in the criminal case has been filed, and trial is yet to begin.

22. Now, coming to the second limb of argument that whether disciplinary proceeding and the criminal proceeding can proceed simultaneously where both proceedings have been initiated on the same set of charges and evidence in both the proceedings are identical and shall prejudice the criminal proceeding since petitioner would have to disclose the defence which he wants to take in the criminal proceeding. In the opinion of the Court, the said submission is also misconceived for two reasons; firstly, as detailed above, the charge against the petitioner in the criminal proceeding and disciplinary proceeding are not identical as there is one additional charge in the disciplinary proceeding which has been delineated above. Secondly, to succeed, the petitioner has to demonstrate that charge against the petitioner is grave and involves complicated questions of fact and law, and further if the disciplinary proceeding is continued that would prejudice the criminal trial of the petitioner.

23. In the case in hand, though a bald averment has been made in the writ petition in paragraph 31 that continuance of disciplinary proceeding would prejudice the criminal trial, there is no pleading in the writ petition as to how continuance of disciplinary proceeding would prejudice the criminal trial of the petitioner.

24. As the petitioner has failed to demonstrate that charge against the petitioner is grave and involves complicated questions of fact and law, and further how the continuance of disciplinary proceeding would prejudice the criminal trial of the petitioner, this Court is not inclined to accept the aforesaid submission of learned counsel for the petitioner. At this stage, it is pertinent to mention that early conclusion of the disciplinary proceeding is good in the interest of the employee as well as the department for the reason that if the employee is exonerated from the charges, he may not be out of service unnecessarily and may be reinstated, and if the employee is found guilty, the department will get rid of such employee who is not worth continuing in the employment.

25. Thus, for the reasons given above, the writ petition lacks merit and is accordingly, ***dismissed*** with no order as to costs.

(2021)12ILR A1008
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.11.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE VIKAS BUDHWAR, J

Writ-A No. 15656 of 2021

Manbir Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Ashok Kumar Khare (Sr. Adv.)

Counsel for the Respondents:
C.S.C.

A. Service Law – Disciplinary Proceeding - Pension - U.P. Government Servants' Conduct Rules, 1956 - Rule 29 - A plain reading of Rule 29 reveals that a Government servant cannot marry again without permission of the state Government. The legislature to their wisdom has used the word "notwithstanding" which means, even if the marriage is permissible under personal law for the time being applicable to a Government servant, such Government servant cannot be allowed to marry again without permission of the state Government. (Para 19)

The act of performing a second marriage during the life-time of one's wife cannot be regarded as an integral part of Hindu religion nor could it be regarded as practising or professing or propagating Hindu religion and even if bigamy be regarded as an integral part of Hindu religion, Rule 27 of the U.P. Government Servants' Conduct Rules, 1956 requiring permission of the Government before contracting such marriage must be held to come under the protection of Article 25(2)(b) of the Constitution. (Para 20)

B. Misconduct on the part of the petitioner amounts to grave misconduct so as to attract Rule 29 of the Rules, 1956 read with Article 351A of the Civil Services Regulation. The petitioner has misrepresented before the authorities and made every effort to mislead them as if he has not contracted the second marriage. The conduct of the petitioner is in breach of the Rules, 1956 and unbecoming of a Government servant. The conduct of the petitioner was a gross-misconduct and the provisions of Rule 29 of the Rules, 1956 read with Article 351A of the Civil Services Regulations were rightly invoked. (Para 23)

C. Once the 1956 Rules provides that second marriage by a Government servant during the lifetime of first wife is an offence, and it amounts to misconduct, then it is not open for the Court to take a different view than what has been considered by the disciplinary authority. (Para 19)

Constitution of India: Article 226 – Scope - The scope of interference with the order of the Tribunal by this Court u/Article 226 exercising extra-ordinary, equitable and discretionary jurisdiction, has its own limits. **The scope of judicial review is extended only when there is no evidence or the conclusion or finding is such as no reasonable person would have ever reached on the basis of the material available.** Performance of second marriage during currency of the first marriage resulting in punishment of removal from service cannot be held to be shockingly disproportionate to the charge on established judicial parameters. In the present case, the findings recorded by the Tribunal in the impugned order are findings of fact based on consideration of relevant evidences and materials on record. (Para 21, 25)

Writ petition dismissed. (E-4)

Precedent followed:

1. Pawan Kumar Misra Vs St.of U.P. thru its Principal Secretary Home, Government of U.P. & ors., Special Appeal No. 570 of 2012, decided on 02.05.2014 (Para 19)

2. Javed Vs St. of Har., (2003) 8 SCC 369 (Para 20)

3. Ram Prasad Seth Vs St. of U.P., AIR 1957 All. 411 (Para 20)

4. Badruddin Vs Aisha Begum, 1957 All. LJ 300 (Para 20)

5. Khursheed Ahmad Khan Vs St. of U.P., (2015) 8 SCC 439 (Para 21)

6. Veerpal Singh Vs Senior Superintendent of Police, Agra, & ors., Civil Misc. Writ Petition No. 27190 of 1997 (Para 22)

Precedent distinguished:

1. Laxmi Devi (Smt.) Vs Satya Narayan & ors., (1994) 5 SCC 545 (Para 10)

2. Aneeta Yadav Vs St. of U.P. & ors., Writ-A No. 24493 of 2015, decided on 02.05.2016 (Para 10)

3. Gorel Lal Verma Vs St. of U.P. & ors., Writ-A No. 5204 of 2021, decided on 14.07.2021 (Para 10)

Present petition assails judgment dated 02.09.2021, passed by State Public Service Tribunal, Lucknow and order dated 28.06.2005, passed by State Government.

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Vikas Budhwar, J.)

1. Heard Sri Ashok Khare, learned senior advocate assisted by Sri Siddharth Khare, learned counsel for the petitioner and Smt. Subhash Rathi, learned Additional Chief Standing Counsel for the State-respondents.

2. This writ petition has been filed praying for the following relief:

"(i) a writ, order or direction in the nature of certiorari quashing the Judgment dated 02.09.2021 passed by the State Public Service Tribunal, Lucknow in Claim Petition No. 1350 of 2006 (Manbir Singh Vs. State of UP & Others). (Annexure 16 to the writ petition).

(ii) a writ, order or direction in the nature of certiorari quashing the order dated 28.06.2005 passed by the State Government (Annexure 13 to the writ petition).

(iii) a writ, order or direction of a suitable nature commanding the respondent to fix the final pension of the petitioner and to disburse the same regularly, every month along with all arrears arisen on account of the difference between the provisional pension and the final pension within a period to be specified by this Hon'ble court.

(iv) a writ, order or direction in the nature of which this Hon'ble court may deem fit and proper under the circumstances of the case.

(v) award cost to the humble petitioner throughout of the present writ petition."

Facts:-

3. Briefly stated, facts of the present case are that the petitioner was appointed as Assistant Prosecutor on 05.09.1970. Subsequently, he was promoted on the post of Public Prosecutor and further promoted on the post of Senior Public Prosecutor on 17.07.1999. He retired from service on 31.12.2004.

4. A disciplinary proceeding was initiated against the petitioner on the basis of complaint of his wife Smt. Rajendri Devi. A charge-sheet dated 15.09.1987 was served upon him. Another disciplinary proceeding was also initiated against the petitioner on the basis of similar allegations by virtue of charge sheet dated 30.06.1992 and the inquiry proceeding was conducted. Subsequently, the matter arising from the first inquiry was compromised before the A.D.M. Saharanpur on the basis of some statement allegedly made by the aforesaid Smt. Rajendri Devi. Consequently, the proceeding against the petitioner, was dropped on 13.06.1997. The second inquiry also met the same fate in the light of the alleged statement of Smt. Rajendri Devi. From records, it appears that the aforesaid Smt. Rajednra Devi has also stated that no children were born from the wedlock of the petitioner.

5. Subsequently, it came to light that the petitioner has two children, namely daughter - Kumari Preeti and son - Sangeet Chaudhari from the wedlock of one Rajni Devi. The petitioner moved an application dated 13.07.1999 for taking benefit of family planning in which he also decleared that he has two children. On these facts, amongst others, coming to light, a fresh inquiry was initiated against the petitioner on 07.11.2003. A charge-sheet was issued. The petitioner appeared before the inquiry officer and led evidences. However, for reasons best-known to him, he did not produce Smt. Rajendri Devi and instead took the stand that Rajendri Devi and Smt. Rajni Devi, both are one and the same person who is his legally wedded wife and as such, there is no question of second marriage.

6. When the petitioner did not produce Smt. Rajendri Devi before the inquiry officer, then the inquiry officer himself took the statement of Smt. Rajendri Devi, who stated that she is not Rajni Devi. She stated that she is the first wife and she is daughter of one Amrit Singh, resident of **Meerpurkalan, P.S. Babugarh, Post Ghunghral, Hapur, Ghaziabad.** She further stated that second wife of the petitioner is Smt. Rajni Devi who is daughter of one **Chhatar Singh, resident of Hanuman Teela, Khurja, District Bulandshahar**. The inquiry officer also afforded opportunity to the petitioner to cross-examine the aforesaid Smt. Rajendri Devi but the petitioner did not appear to cross-examine her.

7. Based on evidences on record, the inquiry officer concluded that Rajednri Devi is the first wife of the petitioner and without permission from the State Government as required under Rule 29 of the U.P. Government Servants' Conduct Rules, 1956 (hereinafter referred to as "the Rules, 1956'), the petitioner contracted the second marriage with one Smt. Rajni Devi, daughter of Chhatar Singh and has also led false evidences knowing fully well that he has contracted second marriage with Rajni Devi. After following due procedure of law, the appointing authority awarded punishment to the petitioner by forfeiting his pension inasmuch as before the order of punishment dated 28.06.2005 was passed, the petitioner had retired from service on 31.12.2004. Aggrieved with the aforesaid order of punishment/ office memorandum dated 28.06.2005, the petitioner filed Claim Petition No.1350 of 2006 before the State Public Service Tribunal, Indira Bhawan, Lucknow, which was dismissed by the impugned order dated 02.09.2021.

8. In paragraphs 14 to 25 of the impugned order dated 02.09.2021, the Tribunal has recorded the following findings of fact:-

"14. It appears from record that Smt. Rajendri Devi wife of petitioner had made a complaint against petitioner on 28.09.1978 in which she had stated that petitioner had married with another lady namely Smt. Rajni Devi. She could not give birth to any child. Before A.D.M. Smt. Rajendri Devi appeared before enquiry officer and filed her affidavit to the effect that since no child was born with her and Manbir Singh, she was mentally upset and that is why due to some misunderstanding, she had made a false complaint against her husband and now she did not want to pursue the matter. They have compromised before A.DM. Saharanpur, as such A.DM. dropped the matter against petitioner on 13.06.1997. Since this enquiry was dropped on the basis of compromise, and this time there is additional charge of giving wrong facts and concealment of facts, state government is fully justified to institute fresh enquiry, as such principle of double jeopardy does not apply in this case.

15. Study of enquiry report reveals that petitioner was given 4 opportunities to cross-examine Smt. Rajendri Devi, but he did not turn up.

16. Record also shows that petitioner has given his statement before enquiry officer on 10.01.2004 that his family members had changed the name of his wife from Smt. Rajendri Devi to Rajni Devi on the advice of astrologers and pandits. Statements of gram pradhan Sri Kishan Pal Singh, Shiv Kumar and Mahipal Singh were recorded by enquiry officer. They have given their statements in favour of petitioner. Another witness Sri Vijendra Singh has certified the family register issued by him on 25.12.2003.

17. In the birth certificate of petitioner's son Sri Sangcet Chaudhary issued by Nagar Panchayat, Mathura, name of mother of his son is mentioned as Rajni Devi and not Rajendri Devi. This is admitted by Petitioner.

18. Smt. Rajendri Devi has given statement before enquiry officer that she has no child and her name was never changed as Rajni Devi. Rajni Devi is a different lady from whom petitioner had conducted marriage and they have two children.

19. We find from record that petitioner in his application dated 30.06.1988 given before Dy. Director, Prosecution, himself admitted that he had married with Smt. Rajendri Devi and also admitted that she has no child while he has given an application dated 10.5.1999 claiming extra increment under family planning scheme that he has two children namely Km. Preeti Chaudhary and Sri Sangeet Chaudhary born in 1982 and 1984 respectively. This is own admission of petitioner. Since Rajendri Devi has no child as admitted by petitioner, he performed second marriage with Smt. Rajni Devi with

whom two children were born in the year 1982 and 1984.

20. Thus, from his own admission and material available on record, it is established that petitioner had performed second marriage with Rajini Devi during the life time of his legally wedded wife Smt. Rajendi Devi, without permission of government.

21. It is evidently proved from the record that petitioner had not given correct facts before A.DM. Saharanpur in the earlier enquiry and concealed the material facts due to which enquiry was dropped.

22. So far as punishment is concerned. learned counsel has submitted that respondents should have taken a lenient view while awarding punishment and major punishment should not have been inflicted upon petitioner.

23. He has referred to a decision of Hon'ble Allahabad High Court given in the case of Shravan Kumar Pandey vs State of U.P & others in writ petition no.70379 of 2009 regarding Rule 29 of U.P. Government. Servants Conduct Rules, 1956. We could not find any provision which prohibits the state government from awarding major punishment.

24. Submission that enquiry could not be instituted for 4 years old. We find that petitioner raised the issue on 10.05.1999 claiming extra increment under family planning scheme on the ground that he had two children, while he had earlier concealed this material fact. On account of admitted facts of petitioner, enquiry was again instituted on 25.03.2003 before retirement of petitioner. Due to concealment of the facts and compromise reached between petitioner and Rajendri Devi, enquiry was dropped by A.D.M. In the year 1997, as such this submission of learned counsel fails.

25. Petitioner not only performed second marriage with Rajni Devi without taking permission of state government during life time of his first wife, but he also tried to mislead the state government by concealing the material facts that he has two children."

Submissions:-

9. Learned counsel for the petitioner submits that the petitioner has not contracted a valid marriage with Smt. Rajni Devi and as such in the absence of any proof of his legal marriage with Smt. Rajni Devi, the question of contracting second marriage does not arise at all, as well as provisions of Rule 29 shall also not be attracted.

10. He, therefore, submits that the impugned orders passed by the Tribunal as well as by the disciplinary authority deserve to be quashed. In support of his submissions, he relied upon a judgment of Hon'ble Supreme Court in the case of **(1994) 5 SCC 545 Laxmi Devi (Smt.) vs. Satya Narayan and others** and two single Judge judgments of this Court, i.e. **Aneeta Yadav vs. State of U.P. and 5 others in Writ-A No.24493 of 2015, decided on 02.05.2016 and Gore Lal Verma vs. State of U.P. and 4 others in Writ-A No.5204 of 2021, decided on 14.07.2021.**

11. Learned Standing Counsel has supported the impugned orders.

Discussion and Findings:-

12. We have carefully considered submissions of the learned counsels for the parties and perused the records of the writ petition.

13. Perusal of the record shows that the first enquiry was dropped against the petitioner on the basis of the alleged compromise of Smt. Rajendri Devi. The second enquiry also met with the same fate as departmental proceeding was dropped. **The third enquiry** was initiated on the basis of the materials coming into the hands of the department, which indicated that the petitioner has contracted the second marriage and he had misrepresented. In the third enquiry,

charges were found proved against the petitioner on the basis of the evidences available on record.

14. We have perused the enquiry report and we find that the case set up by the petitioner was that Rajendri Devi and Rajni Devi were one and the same person. The said stand was disbelieved by the enquiry officer and it was held that Rajendri Devi and Rajni Devi are two different persons, as the first wife Smt. Rajendri Devi is the daughter of Amrit Singh, resident of Meerpurkalan, P.S. Babugarh, Post Ghunghral, Hapur, Ghaziabad and Smt. Rajni Devi (second wife) is the daughter of one Chhatar Singh, resident of Hanuman Teela, Khurja, District Bulandshahr.

15. A specific finding of fact has also been recorded by the enquiry officer on the admitted facts that with the wedlock of petitioner and Smt. Rajni Devi, two children were born namely Km. Priti and Sangeet Chaudhary. Thoroughly inconsistent and contradictory stand has been taken by the petitioner right from the very inception. On one hand, he has come up with the story that Rajendri Devi and Rajni Devi are one and the same person and on the other hand, he has taken the stand before us that Smt. Rajni Devi is not his legally wedded wife. Both the stands cannot co-exist. It was not disputed by the petitioner either before the inquiry officer or before the Tribunal that Smt. Rajni Devi is his legally wedded wife. Therefore, the submission of the learned counsel for the petitioner that he has not legally contracted second marriage with aforesaid Rajni Devi, has no legs to stand.

16. It is admitted case of the petitioner that no issue was born from Smt. Rajendri Devi. Smt. Rajendri Devi has stated that she is not Rajni Devi and no issue has born to her from the wedlock of the petitioner. Statement of Smt. Rajendri Devi was recorded by the inquiry officer who afforded opportunity to the petitioner to cross-examine Rajendri Devi, but the petitioner did not appear to cross-examine her. The petitioner could not dispute that he has two children, namely Kumari Preeti and Sangeet Chaudhary. The name of mother of these two children as per school certificates and municipal records is Smt. Rajni Devi and petitioner is shown as father of these two children. This clearly indicates that the petitioner and Smt. Rajni Devi are husband and wife and from their wedlock, two children were born but the petitioner has initially suppressed these facts. In his letter dated 30.03.1988, addressed to the Deputy Director of Prosecution, Agra Zone, Agra, the petitioner has stated that his wife is Rajendri Devi and no issue was born to her. When this letter was confronted to the petitioner by the inquiry officer, then he stated that under some confusion he has given a wrong application. Thus, while the petitioner has stated on 30.03.1988 that he has no children, sufficient documentary evidences came to light that daughter - Preeti was born in the year 1982 and the son Sangeet Chaudhary was born in the year 1984 from the wedlock of the petitioner and Smt. Rajni Devi. On the basis of the aforesaid facts and other material and evidences on record, the inquiry officer concluded that the petitioner's first wife is Rajendri Devi daughter of Amrit Singh, resident of Meerpurkalan, P.S. Babugarh, Post Ghunghral, Hapur, Ghaziabad and his second wife is Smt. Rajni Devi daughter of Chhatar Singh, resident of Hanuman Teela, Post Nayaganj, Khurja, District Buland Shahar and the two children have born from the wedlock of the petitioner and the aforesaid Smt. Rajni Devi. The findings recorded by the Tribunal in paragraphs 14 to 25 of the impugned order are based on evidences and relevant materials on record which go to show that the petitioner has contracted second marriage with Smt. Rajni Devi while his first wife Smt. Rajendri Devi is alive. Considering the facts and circumstances of the case, it cannot be said that there was absolutely no evidence before the inquiry officer or the Tribunal to hold that the petitioner has

contracted second marriage with Smt. Rajni Devi.

17. The judgment in the case of **Laxmi Devi (supra),** relied by learned counsel for the petitioner is clearly distinguishable on the facts of the present case. That apart, the aforesaid judgment was rendered by Hon'ble Supreme Court in a criminal appeal arising from a criminal case under Section 494, I.P.C. The judgment of learned single Judge of this court in the case of **Aneeta Yadav (supra)**, is also of no help to the petitioner. In the said case, anonymous complaint was made that Aneeta Yadav had solemnized marriage with Sri Brijesh Kumar Yadav who was already married with one Smt. Kusum Devi and has four children. Thus, Aneeta Yadav had not contracted the second marriage but it was her husband who contracted the second marriage and she had no knowledge about the first marriage of her husband. Therefore, it was held that no punishment could be awarded to Aneeta Yadav in terms of Rule 29 of the Rules, 1956. Thus, the facts of the case of **Aneeta Yadav (supra)** are entirely different from the facts of the present case. The other judgment of learned Single Judge in the case of **Gore Lal Verma (supra)** relied by the learned counsel for the petitioner is also of no help to the petitioner inasmuch in the case of Gore Lal Verma the dismissal order was passed solely on account of having maintained live-in relationship outside the marriage. It is not the case of the petitioner herein.

18. At this juncture, it would be appropriate to reproduce the provisions of Rule 29 of the U.P. Government Servant Conduct Rules, 1956 as under:

"Bigamous marriages- (1) ***No government servant*** *who has a wife living shall contract another marriage without first obtaining the permission of the government,* ***notwithstanding t****hat such subsequent marriage is permissible under the personal law for the time being applicable to him.*

(2) No female government servant shall marry any person who has a wife living without first obtaining the permission of the government."

19. The aforesaid provisions of Rule 29 was considered by a coordinate bench of this court in ***Special Appeal No.570 of 2012 (Pawan Kumar Misra vs. State of U.P. thru its Principal Secretary Home, Government of U.P. and others), decided on 02.05.2014*** and it was held as under:

"9. ***A plain reading of Rule 29 reveals that a government servant cannot marry again without permission of the state government. The legislature to their wisdom has used the word "notwithstanding" which means, even if the marriage is permissible under personal law for the time being applicable to a government servant, such government servant cannot be allowed to marry again without permission of the state government.***

14. We are of the view that the appellant-petitioner cannot take assistance of the provisions contained in Hindu Marriage Act or alike personal law being a government servant. The 1956 Rules has got statutory force and also got overriding effect over the provisions contained in the statute dealing with personal law.

17. In the case in hand, the appellant-petitioner had committed an offence of bigamy after enjoying 11 years of matrimonial life. ***Once the 1956 Rules provides that second marriage by a government servant during the lifetime of first wife*** *is an offence, and* ***it amounts to misconduct, then it is not open for the court to take a different view*** *than what has been considered by the disciplinary authority.*

22. ***Any liberty given by the courts or interference with such matters, may result with ill consequence in due course of time or may***

break the discipline in police force**. It is not a case where misconduct has been committed by not an ordinary government servant. Being a member of disciplined police force, it is always expected that such person shall be abide law and **in case, a member of the police or Armed forces is permitted to break the law and abuse the powers conferred by the statutes, it shall send a wrong message to the society."

(Emphasis supplied by us)

20. In the case of **Javed vs. State of Haryana, (2003) 8 SCC 369**, Hon'ble Supreme Court has dealt with the question of second marriage and affirmed the judgment of this court in **Ram Prasad Seth vs. State of U.P., AIR 1957 All. 411 and Badruddin vs. Aisha Begum, 1957 All.LJ 300** in which it was held by this court that the act of performing a second marriage during the life-time of one's wife cannot be regarded as an integral part of Hindu religion nor could it be regarded as practising or professing or propagating Hindu religion and even if bigamy be regarded as an integral part of Hindu religion, Rule 27 of the U.P. Government Servants' Conduct Rules, 1956 requiring permission of the Government before contracting such marriage must be held to come under the protection of Article 25(2)(b) of the Constitution.

21. In the case of **Kursheed Ahmad Khan vs. State of U.P., (2015) 8 SCC 439,** Hon'ble Supreme Court held that the provisions of Rule 29 of the aforesaid Rules, 1956, to be valid and further held that performance of second marriage during currency of the first marriage resulting in punishment of removal from service cannot be held to be shockingly disproportionate to the charge on established judicial parameters (see para 11 of the judgment).

22. Similar view has been taken by a learned single Judge in his **judgment dated 18.05.2006 in Civil Misc. Writ Petition No.27190 of 1997 (Veerpal Singh vs. Senior Superintendent of Police, Agra, and others).**

23. Learned counsel for the petitioner lastly submitted that there may be misconduct on the part of the petitioner but it does not amount to grave misconduct so as to attract Rule 29 of the Rules, 1956 read with Article 351A of the Civil Services Regulation. The submission made by the learned counsel for the petitioner has no substance inasmuch as the petitioner has misrepresented before the authorities and made every effort to mislead them as if he has not contracted the second marriage. The evidences on record proved that according to own admission of the petitioner, Smt. Rajni Devi is his wife and proved to be his second wife. The conduct of the petitioner is in breach of the U.P. government Servants' Conduct Rules, 1956 and unbecoming of a government servant. That apart, the conduct of the petitioner is a gross-misconduct attracting the provisions of Rule 29 of Rules, 1956. In the case of Khursheed Ahmad Khan (supra), on contracting second marriage during lifetime of the first wife and on that account, the punishment of removal from service, was held to be valid. Therefore, we have no hesitation to hold that the conduct of the petitioner was a gross-misconduct and the provisions of Rule 29 of the Rules, 1956 read with Article 351A of the Civil Services Regulations were rightly invoked.

24. The issue can also be analysed from another angle that in case the logic and the proposition so advanced by learned counsel for the petitioner is taken on its face value, it may create havoc and undesired results inasmuch as it will tantamount to create a situation wherein there would be violence to the statutory provisions of Rule 29 of the U.P. Government Servants Conduct Rules, 1956. Rule 29 was consciously enacted stipulating that no government servant, **who has a wife living** shall contract another marriage without obtaining the

permission of the government notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him. Once Rule 29 is clear and applicable to the petitioner being government servant, he has no option but to face consequences on breach of it.

25. The findings recorded by the Tribunal in the impugned order are findings of fact based on consideration of relevant evidences and materials on record. The scope of interference with the order of the Tribunal by this Court under Article 226 of the Constitution of India exercising extra-ordinary, equitable and discretionary jurisdiction, has its own limits. The scope of judicial review is extended only when there is no evidence or the conclusion or finding is such as no reasonable person would have ever reached on the basis of the material available. Perusal of the impugned order of the Tribunal shows that the Tribunal has passed the order on the basis of relevant material and evidences available on record establishing that the petitioner has contracted the second marriage in breach of Rule 29 of the Rules, 1956.

26. For all the reasons afore-stated, we do not find any good reason to interfere with the impugned order of the Tribunal. Consequently, **the writ petition** fails and is hereby **dismissed.**

(2021)12ILR A1016
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.10.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ-A No. 14072 of 2021

Ganga Ram & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Dinesh Rai, Sri Shishir Kumar Srivastava

Counsel for the Respondents:
C.S.C.

A. Service Law – Seniority – Promotion/Appointment – Constitution of India - Article 14 - The Uttar Pradesh Subordinate Revenue Executive (Naib Tehsildar) Service Rules, 2003 - Rule 16 - Uttar Pradesh Subordinate Revenue Executive (Revenue Inspector) Service Rules, 2014 - Rule 5 - The Uttar Pradesh Subordinate Revenue Executive (Naib Tehsildar) Service Rules, 2003 as amended by the Second Amendment Rules, 2014 - Rule 5(2)(b) - Uttar Pradesh Subordinate Revenue Executive (Rajasva Nirikshak) Service Rules, 2014 - Uttar Pradesh Assistant Revenue Clerk (Registrar Kanungo) Service Rules, 1958 - Uttar Pradesh Subordinate Revenue Executive (Revenue Nirikshak) Service Rules, 2017.

From bare reading of the Revenue Inspector Service Rules and Naib Tehsildar Service Rules, it emerges that originally as per Naib Tehsildar Rules 2003, 9% promotion to the post Naib Tehsildar through the Commission was to be made from amongst substantially appointed Registrars Kanungos who have completed 5 years service as such on the first day of the year of recruitment provided that if sufficient number of eligible or suitable registrar Kanungo are not available for promotion, the post may be filled by promotion under sub clause (a) i.e. from amongst substantially appointed Revenue Inspectors. (Para 13)

Since the post of Registrar Kanungo, Assistant Registrar Kanungo and Land Record Clerks were merged and amalgamated in the equal pay scale on the post of Revenue Inspector as per recommendation of the pay Commission 2008 and the decision of the State Government dated 22.11.2011 as mentioned in the GO dated 18.04.2012, as such there arose some confusion as to the post of Registrar Kanungo etc. who were given the designation of Revenue Inspector. Therefore, **to streamline the things and to preserve the benefit of promotion for the aforesaid cadre of Registrar Kanungo etc., a new clause (b) in sub-rule (2) of Rule 5 of the Naib Tehsildar**

Service Rules, 2003 was substituted which is under challenge in the present writ petition.

There is always presumption in favour of the constitutional validity of statutory provisions. (Para 18)

Perusal of Rule 5(2)(b) of the Naib Tehsildar service Rules, 2003 shows that the same 9% promotion quota has been reserved/retained by the amended Rules for Revenue Inspectors whose originally substantive posts were Registrar Kanungo/Assistant Registrar Kanungo/Land Record Clerk. This provision of 9% promotion quota shall continue till such time the availability of Registrar Kanungo/Assistant Registrar Kanungo/Land Record Clerk is fully exhausted and thereafter, the 50% quota for promotion to the post of Naib Tehsildar shall be filled by promotion through commission from amongst substantially appointed Revenue Inspectors who have completed two years service as such on the first day of the year of recruitment. (Para 14)

Conclusion can be drawn from the amended provisions of the Naib Tehsildar Rules, 2003 that it protects the interest of the originally substantially appointed Registrars Kanungo/Assistant Registrars Kanungo/Land Record clerk who have now been designated as Revenue Inspector and are now governed by the new set of Rules i.e. the Revenue Inspector Service Rules, 2014 as superseded by the Uttar Pradesh Subordinate Revenue Executive (Rajasva Nirikshak) Rules 2017 notified by Notification dated 17.10.2017. (Para 15)

The impugned Rule 5(2)(b) of the Rules 2003 as amended by the 2nd amendment Rules 2014 is neither discriminatory nor it violates any of the fundamental rights of the petitioners and instead it protects the promotion opportunity of the petitioners who were originally and substantially appointed as Assistant Registrar/Registrar Kanungo/Land Record clerks. The promotion quota of 9% as was originally provided for them for the promotion to the post of Naib Tehsildar, has been still retained by the impugned Rule 5(2)(b) of the Service Rules 2003 as amended by the 2nd amendment by the Rules 2014. (Para 16)

B. Both the well settled principles for challenging the constitutional validity of a statutory provisions, namely, lack of legislative competence and infringement of any of the fundamental rights guaranteed under the Constitution of India; are totally absent in the present set of facts. Neither there is any allegation in the writ petition nor it has been argued by learned counsel for the petitioners that the impugned Rules are beyond Rule making power or legislative competence of the State. (Para 17)

Writ petition dismissed. (E-4)

Present petition challenges validity of Rule 5(2)(b) of The Uttar Pradesh Subordinate Revenue Executive (Naib Tehsildar) Service Rules, 2003 as amended by the Second Amendment Rules, 2014.

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Vikas Budhwar, J.)

1. Heard Sri Dinesh Rai, learned counsel for the petitioners and Sri Harish Kumar Srivastava, learned standing counsel for the State - respondents.

2. This writ petition has been filed praying for the following reliefs :

"I. Issue a writ order or direction of appropriate nature declaring ultra-vires to the Rule 5 of the Uttar Pradesh Subordinate Executive (Naib Tehsildar) Service Rules, 2003 as amended by Uttar Pradesh Subordinate Executive (Naib Tehsildar) Service (Second Amendment) Rules, 2014 and by this amendment inside quota was prescribed as Rule 5(2)ka prescribed that out of 50% appointment by promotion, 41% promotion were to be made from the cadre of Revenue Inspector and 9% were to be promoted from Revenue Inspector who initially joined as Registrar Kanungo/ Assistant Registrar Kanungo/Land Revenue Clerk as arbitrary, illegal and ultra-vires to Article 14 of the Constitution of India.

II. Issue a writ order or direction in the nature of mandamus directing the Respondents to promote the petitioners on the post of Naib Tehsildar in pursuance of the Rule 16 of the Uttar Pradesh Subordinate revenue Executives (Naib Tehsildar) Service Rules, 2003 on the basis of seniority list prepared after merger of

all the cadre of Registrar Kanungo/Assistant Registrar Kanungo/Land Revenue Clerk in the cadre of Revenue Inspector.
(Annexure No. 9 to the writ petition).

IlI. Issue a writ order or direction in the nature of mandamus commanding respondent no. 2 not to promote/appoint Naib Tehsildar contrary to the seniority list as Annexure No. 9 to the writ petition and not to promote juniors to petitioners ignoring seniority of petitioners.

IV. Issue any other writ order or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case."

Facts

3. Briefly stated facts of the present case are that according to the petitioners they were initially appointed as Lekhpals and subsequently promoted to the post of Assistant Registrar Kanungo. Thereafter by Government Order No.900/,d-9-2012-jktLo-9, dated 18.04.2012, the post of Assistant Registrar Kanungo/Registrar Kanungo and Land Record Clerk were amalgamated in the equal pay scale of the post of Revenue Inspector. The Uttar Pradesh Subordinate Revenue Executive (Naib Tehsildar) Service Rules, 2003 (hereinafter referred to as "Naib Tehsildar Rules 2003") was enacted which came into effect from 16.08.2003. As per Rule 5 (1) of the Naib Tehsildar Rules, 2003, 50% post of Naib Tehsildar were to be filled by direct recruitment through commission. As per Rule 5(2)(a) 41% post of Naib Tehsildar were to be filed through promotion from amongst substantially appointed Revenue Inspectors who have completed two years of service. As per Rule 5(1) (kha) of the Naib Tehsildar Rules 2003, 9% post of Naib Tehsildars were to be filled through commission by promotion from amongst the Registrar Kanungo who have completed 5 years of service. The Naib Tehsildar Rules, 2003 was amended by the 2nd amendment Rule 2014 notified by notification No.328/1-0-2014-3-3(1)-67 PC dated 17.02.2014. By the aforesaid amendment Rule 5(2)(b) of the Naib Tehsildar Rules, 2003 was amended providing that 9% promotion through commission shall be made to the post of Naib Tehsildar from amongst such substantially appointed Rajasva Nirikshak (Revenue Inspector) whose original substantive post were Registrar Kanungo/Assistant Registrar Kanungo/Land Record Clerk and who have completed two years of service as Registrar Kanungo/Assistant Registrar Kanungo/Land Record Clerk/Rajasva Nirikshak on the first day of the year of the recruitment. The aforesaid 9% promotion quota is to continue till such time the availability of Registrar Kanungo/Assistant Registrar Kanungo/Land Record Clerk is fully exhausted and thereafter 50% quota for promotion to the post of Naib Tehsildar shall be filled by promotion through the commission from amongst substantially appointed Rajasva Nirikshak (Revenue Nirikshak) who have completed two years service as such on the first day of the year of recruitment. Simultaneously, the provisions of the Uttar Pradesh Subordinate Revenue Executive (Rajasva Nirikshak) Service Rules, 2014 were also enacted and notified by Notification No.327/1-9-2014-RA-9-4892-2011, dated 17.02.2014.

4. The aforesaid Rules 2014 amended the provisions of Uttar Pradesh Subordinate Revenue Executive (Revenue Inspector) Service Rules 2011 and the Uttar Pradesh Assistant Revenue Clerk (Registrar Kanungo Service Rules 1958.

5. The aforesaid Revenue Inspector Service Rules, 2014 were superseded by the Uttar Pradesh Subordinate Revenue Executive (Rajaswa Nirikshak) Service Rules 2017, notified by Notification No.1783/1-9-2017-3(S)/2017, dated 17.10.2017.

6. Aggrieved with the 2nd amendment Rules, 2014 amending Uttar Pradesh Revenue Executive (Naib Tehsildar) Rules, 2003, substituting new Rule 5(2)(b), the petitioners

have filed the present writ petition challenging the constitutional validity of the aforesaid Rule 5(2)(b) of the Naib Tehsildar Rules, 2003 as amended by the 2nd amendment Rules 2014.

Submissions

7. Learned counsel for the petitioners has referred to paragraph Nos.3, 7, 15, 16, 19 and 30 of the writ petition and reiterated the same as his submissions. The aforesaid paragraphs of the writ petition are reproduced below :-

3. That the petitioners were initially appointed on the post of Lekhpal in the year 1981, 1994 and 1997 and later on, promoted to the post of Assistant Registrar, Kanungo/Revenue Inspector. Now the petitioners are working as such and are posted and working in district Siddhartha Nagar.

The petitioners are filing a chart showing their names in the seniority list, their date of initial appointment, date of promotion and its confirmation. Copy of chart showing the details of the petitioners is being filed herewith and marked as Annexure No. 1 to this writ petition.

7. That initially the Assistant Registrar Kanungo and Registrar Kanungo was the functionaries required to work in the office of Teshil Headquarter, while the Land Record Clerk was required to work at Collectorate in District Headquarter.

15. That while promulgating the Naib Tehsildar (Second Amendment) Service Rules, 2014, the authorities did not taken into consideration the present position arises out of merger of posts of RK/ARK/LCR in total strength of Rajaswya Nirikshak in pursuance of the Government order dated 17.4.2012 and further the Naib Tehsildar (Second Amendment) Service Rules, 2014 which too was enacted on the same day i.e. 17.2.2014.

16. That as the Rajaswya Nirikshak Service Rules, 2014 shown the total strength of Rajaswya Nirikshak as 2473 including 1326 posts of Rajaswya Nirikshak as well as 1082 post of Assistant Registrar Kanungo / Registrar Kanungo and 65 posts of Land Record Clerks, therefore, the continuance of the earlier position of 41% and 9% posts of Naib Tehsildar for the purpose of promotion is exfacie illegal as in Rajaswya Nirikshak Service Rules, 2014 there is no post of RK/ARK/LCR after their merger in the post of Rajaswya Nirikshak.

19.That if the authorities concerned felt any impediment in providing the 50% quota to each i.e. to the erstwhile RK/ARK/LCR now merged in the total cadre strength of Rajaswya Nirikshak, they should have at least provided for the proportionate promotional avenue to the post of Naib Tehsildar should have been provided taking into account the number of posts of Rajaswya Nirikshak including erstwhile posts of Rajaswya Nirikshak (1326) and erstwhile posts of RK/ARK/LCR (1147 posts) now merged in Rajaswya Nirikshak.

30. That on 11.8.2021, a tentative list has also been published by respondent no. 2 in which the petitioners are at Serial No. 396, 397,399,498,499,500,501,502,508,
respectively and in case promotion is being made as per provided under Rule 16 of the Naib Tehsildar Service Rules, 2003, the petitioners are also entitle for promotion on the post of Naib Tehsildar, otherwise, in pursuance Rule 5(2)ka of Naib Tehsildar Service Rules, 2003, even much junior to the petitioners directly appointed as Rajaswya Nirikshak would be promoted on the post of Naib Tehsildar. A copy of tentative list dated 11.8.2021 is being filed herewith and marked as Annexure No. 9 to this writ petition.

8. Learned standing counsel supports the amended Rules and submits that the Rules do not suffer from any unconstitutionality and therefore, the writ petition deserves to be dismissed.

Discussion & Findings

9. We have carefully considered the submissions of learned counsels for the parties and perused the record of the writ petition and with the consent of learned counsels for the parties this writ petition is being finally heard without calling for a counter affidavit.

10. It is admitted case of the petitioners that they were originally appointed as Lekhpal and subsequently promoted to the post of Assistant Registrar Kanungo. Their services were governed by the provisions of the Uttar Pradesh Assistant Revenue Clerk (Registrar Kanungo/Assistant Registrar Kanungo) Service Rules, 1958. Subsequently, by the above referred Government Order dated 18.04.2012, the post of Assistant Registrar Kanungo/Registrar Kanungo (1082 posts) and Land Record Clerk (65 posts) were amalgamated in the equal pay scale and designated as Revenue Inspector.

11. In these situations, the Uttar Pradesh Subordinate Revenue Executive (Rajasva Nirikshak) Service Rules, 2014 was enacted with effect from 17.02.2014; in exercise of powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of the Uttar Pradesh Subordinate Revenue Executive (Revenue Inspector) Service Rules, 2011 and the Uttar Pradesh Assistant Revenue Clerk (Registrar Kanoongo/Assistant Registrar Kanoongo) Service Rules, 1958 as amended from time to time, and any other Rules and orders on the subject. Thus, the petitioners who were originally appointed as Lekhpal and subsequently promoted as Assistant Registrar Kanungo, came to be governed by the provisions of the Uttar Pradesh Subordinate Revenue Executive (Rajasva Nirikshak) Service Rules, 2014 (hereinafter referred to as "Revenue Inspector Service Rules, 2014"). Rule 5 of the Revenue Inspector Service Rules, 2014 provides for recruitment to the post of Revenue Inspector from four sources (a) 25% by Direct Recruitment through the Commission on the basis of competitive examination (b) 55% by promotion through the commission from amongst substantially appointed Lekhpals who have completed 5 years service as such on the first day of the year of recruitment (c) 18% by promotion through the commission from amongst substantially appointed Collection Amins who have completed five years service as such on the first day of the year of recruitment and (d) 2% by promotion through the Commission from amongst substantially appointed Land Acquisition Amins who have completed five years service as such on the first day of the year of recruitment. The aforesaid Revenue Inspector Service Rules, 2014 were notified by Notification dated 17.02.2014. Simultaneously, the Naib Tehsildar Service Rules, 2003 were also amended by 2nd Amendment Rules 2014, vide Notification No.328/1-9-2014-Ra-3-3(1)-97-T.C. dated 17.02.2014 Rule 5 by the aforesaid 2nd Amendment Rule 5(2)(b) was substituted by a new Rule 5(2)(b) which is reproduced below :

COLUMN I Existing clause	COLUMN II clause as substituted
(b) Nine percent by promotion through the commission from amongst substantively appointed Registrar Kanungos who have completed five year service as such on the first day of the year of recruitment.	**(b) Nine percent by promotion through the commission from amongst such substantively appointed Rajaswa Nirikshaks whose original substantive posts were Registrar kanungos/ Assistant Registrar kanungo/ Land record clerk and who have have completed two years service as Registrar kanungo/Assistant Registrar kanungo/Land record clerk/Rajaswa**

	Nirikshak on the first day of the year of recruitment.
provided that if sufficient number of eligible or suitable Registrar Kanungos are not available for promotion the post may be filled by promotion under sub clause(a).	**provided that the provisions referred to in sub clause (a) and (b) above shall continue till such time the availability of Registrar kanungo/Assistant Registrar Kanungo/Land Record clerk is fully exhausted and, thereafter, the fifty percent quota for promotion to the post of Naib-tahsildar shall be filled up by promotion through the commission from amongst substantively appointed Rajaswa Nirikshak who have completed two years service as such on the first day of the year of recruitment.**

12. **The aforequoted Rule 5(2)(b) of the Naib Tehsildar Service Rules, 2003 as amended by the Second Amendment Rules, 2014 dated 17.02.2014, is under challenge in the present writ petition.**

13. From bare reading of the aforesaid Revenue Inspector Service Rules and Naib Tehsildar Service Rules, it emerges that originally as per Naib Tehsildar Rules 2003, 9% promotion to the post Naib Tehsildar through the Commission was to be made from amongst substantially appointed Registrars Kanungos who have completed 5 years service as such on the first day of the year of recruitment provided that if sufficient number of eligible or suitable registrar Kanungo are not available for promotion, the post may be filled by promotion under sub clause (a) i.e. from amongst substantially appointed Revenue Inspectors. Since the post of Registrar Kanungo, Assistant Registrar Kanungo and Land Record Clerks were merged and amalgamated in the equal pay scale on the post of Revenue Inspector as per recommendation of the pay Commission 2008 and the decision of the State Government dated 22.11.2011 as mentioned in the above referred Government Order dated 18.04.2012, as such there arose some confusion as to the post of Registrar Kanungo etc. who were given the designation of Revenue Inspector. Therefore, to streamline the things and to preserve the benefit of promotion for the aforesaid cadre of Registrar Kanungo etc., a new clause (b) in sub-rule (2) of Rule 5 of the Naib Tehsildar Service Rules, 2003 was substituted which has been reproduced above and which is under challenge in the present writ petition.

14. Perusal of the clause (b) of sub Rule 2 of Rule 5 of the Naib Tehsildar service Rules, 2003 shows that the same 9% promotion quota has been reserved/retained by the amended Rules for Revenue Inspectors whose originally substantive posts were Registrar Kanungo/Assistant Registrar Kanungo/Land Record Clerk. This provision of 9% promotion quota shall continue till such time the availability of Registrar Kanungo/Assistant Registrar Kanungo/Land Record Clerk is fully exhausted and thereafter, the 50% quota for promotion to the post of Naib Tehsildar shall be filled by promotion through commission from amongst substantially appointed Revenue Inspectors who have completed two years service as such on the first day of the year of recruitment.

15. An irresistible conclusion can be drawn from the aforequoted amended provisions of the Naib Tehsildar Rules, 2003 that it protects the interest of the originally substantially appointed Registrars Kanungo/Assistant Registrars Kanungo/Land Record clerk who have now been designated as Revenue Inspector and are now

governed by the new set of Rules i.e. the Revenue Inspector Service Rules, 2014 as superseded by the Uttar Pradesh Subordinate Revenue Executive (Rajasva Nirikshak) Rules 2017 notified by Notification dated 17.10.2017.

16. The impugned clause (b) of sub Rule 2 of Rule 5 of the Rules 2003 as amended by the 2nd amendment Rules 2014 is neither discriminatory nor it violates any of the fundamental rights of the petitioners and instead it protects the promotion opportunity of the petitioners who were originally and substantially appointed as Assistant Registrar/Registrar Kanungo/Land Record clerks. The promotion quota of 9% as was originally provided for them for the promotion to the post of Naib Tehsildar, has been still retained by the impugned clause (b) of sub Rule 2 of Rule 5 of the Service Rules 2003 as amended by the 2nd amendment by the Rules 2014.

17. Neither there is any allegation in the writ petition nor it has been argued by learned counsel for the petitioners that the impugned Rules are beyond Rule making power or legislative competence of the State. Therefore, both the well settled principles for challenging the constitutional validity of a statutory provisions, namely, lack of legislative competence and infringement of any of the fundamental rights guaranteed under the Constitution of India; are totally absent in the present set of facts.

18. It is well settled that there is always presumption in favour of the constitutional validity of a statutory provisions.

19. Considering the entire facts and circumstance and the provisions of the Rule 5(2)(b) of Service Rules, 2003 under challenge and the other relevant Rules, we do not find any unconstitutionality in the impugned provisions. The writ petition is wholly devoid of merit and, therefore, deserves to be dismissed.

20. For all the reasons aforestated, the writ petition is dismissed. The provisions of Rule 5(2)(b) of Service Rules, 2003 is held to be valid.

21. After this judgment was dictated in open court, learned counsel for the petitioner states that the consideration of the petitioners for promotion are being held up by the State Government on one pretext or the other.

22. Be as it may, we feel it appropriate to observe that the State Government shall proceed forthwith to consider for promotion of Revenue Inspectors to the post of Naib Tehsildar, in accordance with law, provided there is no legal impediment.

(2021)12ILR A1022
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.10.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ-A No. 8789 of 2021

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

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Santosh Kumar Yadav

Counsel for the Respondents:
C.S.C.

A. Service Law – Compassionate Appointment - Pension - U.P. Government Servant Dying-in-Harness Rule, 1974 - Rules 4 & 5 - U.P. Procedure for Direct Recruitment for Group "C" Posts (Outside the Purview of Uttar Pradesh Public Service Commission) Rules, 1998 - Rule 5(4)(e) - Once the family member of the deceased employee has obtained compassionate appointment, his right to be considered, on a subsequent occasion upon

termination, for appointment under the same Rules would not entitle such a person to fresh appointment. (Para 20)

The purpose of the Rules 1974, for compassionate appointment is to tide over the financial hardship befallen upon the family on the sudden demise of the bread earner. **On exhaustion of the right upon appointment under Rules 1974, it is not open to the petitioner to turn around and say that he be granted a lower post.** Petitioner with all eyes open had accepted the appointment on a Class III post and was fully aware that he would have to pass the type test. On having failed to acquire the minimum prescribed type speed, it is not open for the petitioner to turn around and seek a fresh appointment on a lower post.

The claim for compassionate appointment on having being exhausted on appointment cannot be re-agitated on termination or for that matter on acquiring a higher qualification. The contention of the petitioner if accepted would be **violative of Article 14/16 of the Constitution of India.** Such an appointment at this stage, in the given facts, would tantamount to backdoor appointment bypassing the recruitment rules. (Para 20, 21)

B. Petitioner failed to point out any illegality, infirmity or jurisdictional error.

Writ petition dismissed. (E-4)

Precedent relied upon by petitioner:

1. Mukul Sagar Vs St. of U.P. & ors., Writ-A No. 12737 of 2018, decided on 04.07.2018 (Para 8)

2. Smt. Shaheen Siddiqui Vs St. of U.P. & ors., Writ-A No. 43351 of 2019, decided on 11.09.2014 (Para 8)

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

1. Heard Shri Siddharth Khare, learned counsel appearing for the petitioner and learned Standing Counsel for the State-respondents.

2. Pursuant to order dated 16 September 2021 learned Standing Counsel has received written instructions and submits that the reasons assigned in the impugned order has been reiterated by the second respondent.

3. On the consent of the parties, the matter is being heard finally at the admission stage without calling for the counter affidavit.

4. Petitioner came to be given compassionate appointment on 14 June 2018 on the post of Assistant Clerk, a Class-III post. Petitioner is having graduate degree and CCC certificate from DOEACC.

5. It was clearly provided in the appointment letter that petitioner would have to obtain computer knowledge/typing proficiency as mandated under the service rules within the period of probation.

6. Petitioner joined duties on the post of Junior Assistant in the Collectorate Sambhal. Petitioner was called upon to take the typing test of on 24 June 2019, however, petitioner sought further time to practice and gain typing speed. Thereafter, petitioner appeared on 31 January 2020 in the typing test, but failed to achieve type speed of 25 words per minute. Petitioner again was given an opportunity to improve his typing proficiency and skill but he again on 12 June 2020 failed to achieve the requisite speed in the typing test. The services of the petitioner came to be dispensed with by the second respondent, District Magistrate, Sambhal, by passing the impugned order dated 15 June 2020. The consequential order dated 15 July 2020 came to be passed by the Tehsildar, Tehsil Gunnaur, District Sambhal, terminating the services of the petitioner. Aggrieved, petitioner raised a challenge to the afore-noted orders in a petition being Writ Petition No. 7998 of 2020. The writ petition came to be disposed of by passing the judgment and order dated 5 March 2021, directing the respondent-authorities to consider the representation of the petitioner for compassionate appointment on a lower post. The

relevant portion of the order for the purposes of the case is extracted:

"21. There is no infirmity in the impugned order terminating the services of the petitioner after grant of one month notice period. The impugned orders dated 15.06.2020 and 19.07.2020 are not liable to be interfered with and the prayer for quashment of the impugned orders is declined.

22. xxx

23. xxx

24. In the wake of the aforesaid submissions this Court feels that eligibility for appointment on lower post after the services of the petitioner have been terminated, is a matter which may be considered in the first instance by the competent authority.

25. Without going into the merits of the submissions, the matter is remitted to the respondent no. 2, District Magistrate, Sambhal. The respondent no. 2, District Magistrate, Sambhal shall decide the representation of the petitioner for appointment on a lower post under the U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974, in accordance with law within a period of four months from the date of production of a computer generated copy of this order, downloaded from the official website of the High Court Allahabad.

26. The computer generated copy of such order be self attested by the petitioners (party concerned) along with a self attested identity proof of the said person (preferably Aadhar Card) mentioning the mobile number to which the said Aadhar Card is linked. The 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.

27. The writ petition is disposed of finally with the above directions."

7. In compliance thereof, by the impugned order dated 24 May 2021, claim of the petitioner for appointment on the lower post under compassionate appointment rules came to be rejected on the plea that the claim of the incumbent for compassionate appointment is considered once under the Dying-in-Harness Rules, there is no provision under the rules for appointing the incumbent on a lower post on having failed to acquire the minimum qualification/proficiency prescribed under the rules for the Class-III post.

8. It is urged by learned counsel for the petitioner that petitioner was not a confirmed employee, therefore, petitioner's case could be considered for appointment on a lower post in the event of the petitioner having not qualified the type test; in the event of the petitioner not being considered for a lower post, it would tantamount to perpetuate the financial hardship of the family; petitioner's claim for compassionate appointment still subsists. Reliance has been placed on the orders passed by this Court in **Mukul Sagar Vs. State of U.P. and others1 and Smt. Shaheen Siddiqui Vs. State of U.P. and others**2.

9. In other words, it is urged that petitioner is entitled to appointment on a lower post on having not successfully qualifying the requisite proficiency test for the post on which the petitioner came to be appointed.

10. Per contra, the learned standing counsel submits that petitioner came to be granted compassionate appointment under the Dying-in-Harness Rules, on Class-III post as per the qualification of the petitioner. The service rules mandate that the incumbent apart from having minimum educational qualification is to pass type test. Accordingly, petitioner was appointed on a condition that he would be required to appear and pass the type test within the period of probation. Services of the

petitioner came to be dispensed with as petitioner failed to qualify the type test despite several opportunities. The claim for compassionate appointment stood exhausted on being appointed. Services of the petitioner came to be dispensed with on the terms and conditions of appointment. It is not permissible under the rules that petitioner can seek a fresh appointment on compassionate ground.

11. Rival submissions fall for consideration.

12. The sole question for determination is, as to whether, petitioner can be reappointed on compassionate ground on a lower post on having failed to acquire the essential qualification prescribed for Class-III post under the service rules.

13. Facts inter-se parties are not in dispute.

14. Petitioner came to be appointed Clerk (Class-III) on compassionate ground under the provision of U.P. Government Servant Dying-in-Harness Rule, 19743, on the death of the deceased employee. It is not being disputed that under the rules governing recruitment on Class-III post, petitioner is required to pass type test. Petitioner came to appointed on 14 June 2018, subject to condition that petitioner would obtain/qualify the typing test. It is admitted that petitioner was given several opportunities but petitioner failed to qualify the typing test at 25 words per minute. Accordingly, services of the petitioner came to be terminated. Petitioner challenged the termination order before this Court in writ jurisdiction. The Court declined to interfere with the impugned order dispensing with the service of the petitioner on having not fulfilled the conditions of appointment as mandated under the service rules, however, directed the respondents to consider, as to whether, petitioner can be appointed on a lower post. Pursuant to the directions of this Court, the impugned order 24 May 2021, has been passed. The second respondent has noted in the impugned order that since petitioner failed to qualify the type test, accordingly, services of the petitioner came to be terminated as per the terms and conditions of the appointment, on having not acquired the minimum essential qualification required for appointment on Class-III post.

15. It is further noted in the impugned order that there is no provision under Rules, 1974, to reconsider the appointment of the incumbent claiming fresh appointment on a lower post after termination.

16. Rule 4 envisages that the Rules, 1974, and the order issued thereunder of having effect notwithstanding anything to the contrary contained in any rules, regulations and order in force. Rule 5 provides for recruitment of a member of the family of the deceased. The rule categorically mandates that in case a government servant dies in harness and spouse of the deceased government servant is not already employed under the government, Central and/or State, one member of the family, who is not already employed shall be given a suitable employment in government service on a post in relaxation of the normal recruitment rules, if, such person (i.) fulfils the educational qualification prescribed for the post; (ii) is otherwise qualified for government service.

17. Rule 5 came to be amended/substituted vide notification dated 22 January 2014, wherein, it was specifically provided that if the post on which a person is appointed under the rules require typing as the essential qualification, then in that event, the person would be appointed under Rules, 1974, on a condition that within one year from the date of appointment the appointee will have to obtain type speed at 25 words per minute, failing which, his services will be dispensed with. Rule 5 reads thus:

*"**5.** मृतक के कुटुम्ब के किसी सदस्य की भर्ती.—*

1 ———

(प) पद के लिए विहित शैक्षिक अर्हताएं पूरी करता हो :

परन्तु यह कि यदि नियुक्ति किसी ऐसे पद पर की जाती है जिसके लिए टंकण को एक अनिवार्य अर्हता के रूप में विहित किया गया है और मृत सरकारी सेवक के आश्रित के पास टंकण में अपेक्षित प्रवीणता नहीं है, तो उसे इस शर्त के अधीन नियुक्त किया जाएगा कि वह एक वर्ष के भीतर ही टंकण में 25 शब्द प्रति मिनट की अपेक्षित गति प्राप्त कर लेगा और यदि वह ऐसा करने में विफल रहता है तो उसकी सामान्य वार्षिक वेतन – वृद्धि रोक ली जाएगी, और टंकण में अपेक्षित गति प्राप्त करने के लिए उसे अग्रेतर एक वर्ष की अवधि प्रदान की जाएगी, और यदि बढ़ायी गयी अवधि में भी वह टंकण में अपेक्षित गति प्राप्त करते में विफल रहता है तो उसकी सेवायें समाप्त कर दी जायेंगी,

परन्तु यह और कि किसी ऐसे पद पर नियुक्ति किये जाने की दशा में, जिसके लिए कम्पयूटर प्रचालन और टंकण एक अनिवार्य अर्हता के रूप में विहित की गयी है और मृतक सरकारी सेवक का आश्रित कम्प्यूटर प्रचालन और टंकण में अपेक्षित प्रवीणता नहीं रखता है, तो उसे इस शर्त के अधीन रहते हुए नियुक्त कर लिया जायेगा कि वह एक वर्ष के भीतर ही कम्पयूटर प्रचालन में डी0ओ0ई0ए0सी0सी0 सोसायटी द्वारा प्रदत्त ''सी0सी0सी0'' प्रमाण पत्र या सरकार द्वारा उसके समकक्ष मान्यता प्राप्त किसी प्रमाण–पत्र के साथ–साथ टंकण में 25 शब्द प्रति मिनट की अपेक्षित गति अर्जित कर लेगा, और यदि वह ऐसा करने में विफल रहता है तो उसकी सामान्य वार्षिक वेतन–वृद्धि रोक ली जायेगी और कम्प्यूटर प्रचालन में अपेक्षित प्रमाण–पत्र और टंकण में अपेक्षित गति अर्जित करने के लिए उसे एक वर्ष की अग्रेतर अवधि प्रदान की जायेगी, और यदि बढ़ायी गयी अवधि में भी वह टंकण में अपेक्षित गति प्राप्त करते में विफल रहता है तो उसकी सेवायें समाप्त कर दी जायेंगी।

(ii) ....

(iii)...."

18. On specific query, learned counsel for the petitioner does not dispute that the service rules governing the appointment on Class III posts mandates typing at a prescribed speed as an essential qualification. It is also not being disputed that petitioner came to be appointed on a Class III post under Rules, 1974, on a condition that he would require to obtain the typing speed within the period noted in the appointment letter. It is also not being disputed that petitioner was asked to appear for the typing test on four occasions and petitioner was unable to obtain/qualify the prescribed speed on two occasions, consequently, the services of the petitioner came to be terminated.

19. Rule 5(4)(e) of the U.P. Procedure for Direct Recruitment for Group "C" Posts (Outside the Purview of Uttar Pradesh Public Service Commission) Rules, 1998 reads thus:

"5. Procedure for direct recruitment

(1) .....

x

x

(4)

x

x

x

x

(e) In the case of candidates to be selected for any post for which typewriting or shorthand and typewriting has been prescribed as an essential qualification, there shall be a test of typewriting or shorthand and typewriting, as the case may be....."

20. The submission of the learned counsel for the petitioner that petitioner on having not fulfilled the essential qualification mandated for a Class III post, should now be offered a lower post under Rules 1974, is misconceived. The purpose of the Rules 1974, for compassionate appointment is to tied over the financial hardship befallen upon the family on the sudden demise of the bread earner. Once the family member of the deceased employee has obtained compassionate appointment, his right to be considered, on a subsequent occasion upon termination, for appointment under the same Rules would not entitle such a person to fresh appointment. On exhaustion of the right upon appointment under Rules 1974, it is not open to the petitioner to turn around and say that he be granted a lower post. Petitioner with all eyes open had accepted the appointment on a Class III post and was fully aware that he would have to pass the type test. On having failed to acquire the minimum prescribed

type speed, it is not open for the petitioner to turn around and seek a fresh appointment on a lower post. The claim for compassionate appointment on having being exhausted on appointment cannot be re-agitated on termination or for that matter on acquiring a higher qualification. The contention of the petitioner if accepted would be violative of Article 14/16 of the Constitution of India. Such an appointment at this stage, in the given facts, would tantamount to backdoor appointment bypassing the recruitment rules.

21. Petitioner cannot claim reversion or fresh appointment on a post which he had not held at the time of appointment under Rules, 1974. Petitioner having not fulfilled the specific condition of appointment, this Court had declined to interfere with the impugned order terminating the services of the petitioner as no illegality or infirmity could be pointed out. Petitioner cannot seek appointment on mercy and/or sympathy. Such an appointment was rightly not granted by the State-respondents.

22. Learned counsel for the petitioner failed to point out any illegality, infirmity or jurisdictional error.

23. The petition being devoid of merit is, accordingly, dismissed.

(2021)12ILR A1027
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 8780 of 2021

Karunesh Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sujeet Kumar, Ms. Chhaya Gupta, Sri Ashok Khare

Counsel for the Respondents:
C.S.C.

A. Service Law – Suspension – Indian Penal Code -1860 - Sections 409, 420 & 468.

1) Issue of delay in submitting the charge sheet - Ordinarily, when there is an accusation of defalcation of the monies, the delinquent employees have to be kept away from the establishment till the charges are finally disposed of. Whether the charges are baseless, malicious or vindictive and are framed only to keep the individual concerned out of the employment is a different matter. But even in such a case, no conclusion can be arrived at without examining the entire record in question and hence it is always advisable to allow disciplinary proceedings to continue unhindered. (Para 19, 21)

Where such a huge amount of money has been defalcated by several officers in collusion with Directors/Managers and Principals of several institutions; naturally, the investigation would take time to ascertain the link of the flow of money into hands of several persons, who colluded with each other to misappropriate such a huge amount. (Para 24)

In the case in hand, only seven months have elapsed, and considering the gravity of the charge, this Court finds that the principles elucidated by the Apex Court in the cases of *U.P. Rajya Krishi Utpadan Mandi Parishad* (infra) and *Allahabad Bank & anr.* (infra) are applicable, and delay in submitting the charge sheet cannot be ground to interfere in the suspension order. (Para 25)

2) This Court expressed its reservation regarding practice of keeping an employee under suspension for an indeterminate period - Suspension order should not be for an indeterminate period as it amounts to harassment of an employee and employee has to endure the scorn of the society and would injure his reputation in the society and his family. Court observed that considering the nature of charge in the instant case, one and half year would be sufficient time within which the respondents should issue charge sheet. If for any reason, the respondents are not able to comply with that, it is

open to the petitioner to submit a representation before the competent authority requesting for revocation of the suspension order. And if at that time, the competent authority thinks that the petitioner should continue under suspension, he shall pass reasoned and speaking order on the representation specifying the reasons for continuance of suspension. (Para 28)

B. Though petitioner contends that no other person except him has been suspended but there is no pleading in the writ petition stating the name of persons who are also charged with the same allegation as that of the petitioner but have not been suspended. (Para 26)

C. The mere grant of interim order in favour of some of the I.T.I. institutions does not establish that charge against the petitioner is incorrect or false. (Para 27)

Writ petition dismissed. (E-4)

Precedent followed:

1. U.P. Rajya Krishi Utpadan Mandi Parishad & ors. Vs Sanjiv Rajan, 1993 Supp. (3) SCC 483 (Para 19)

2. Allahabad Bank & anr. Vs Deepak Kumar Bhola, (1997) 4 SCC 1 (Para 20)

Precedent distinguished:

1. Ajay Kumar Chaudhary Vs U.O.I. through its Secretary, (2015) 7 SCC 291 (Para 6, 22)

Precedent referred:

1. Ajay Kumar Chaudhary Vs U.O.I. through its Secretary, (2015) 7 SCC 291 (Para 28)

Present petition assails suspension order dated 24.12.2020, passed by Principal Secretary, Social Welfare, UP at Lucknow.

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Ms. Chhaya Gupta, learned counsel for the petitioner and learned Standing Counsel for respondent nos.1 & 2.

2. The petitioner by means of the present writ petition has assailed the suspension order dated 24.12.2020 passed by respondent no.1.

3. The petitioner was appointed as District Social Welfare Officer. He was promoted to the post of Additional District Development Officer on 07.01.2010. Thereafter, the petitioner was transferred to District Mathura on the post of District Social Welfare Officer/Additional District Development Officer on 27.06.2017.

4. It appears that a report was published in the newspaper Times of India, Lucknow on 11.08.2018 regarding defalcation of funds allocated for students fee reimbursement as well as scholarship by the Directors/Managers and principals of I.T.I. institutions in Mathura. Acting on the said report, the state government constituted a committee to enquire into the allegations of misappropriation of fund of fee reimbursement and scholarship of the students.

5. The committee enquired into the matter and submitted the report on 27.11.2020. The committee found that the allegation of misappropriation of fund prima facie is correct. Based on the aforesaid report, an F.I.R. was also lodged against the erring officers including petitioner under Sections 409, 420 & 468 of I.P.C. Thereafter, petitioner was suspended by order dated 24.12.2020 on the ground that in the inquiry conducted by three members committee in respect of allegations of misappropriation of fund of fee reimbursement and scholarship, it was prima facie found that the petitioner was involved in collusion with private ITI institutions in misappropriation of about 23 crores of public money allotted for scholarship and reimbursement of the fee to students.

6. Challenging the suspension order, learned Senior Counsel for the petitioner has urged that more than seven months have passed from the date of the suspension order, neither

charge sheet has been issued nor the inquiry has commenced, therefore, the petitioner cannot remain in suspension for an indefinite period, hence, the suspension order deserves to be quashed. In support of his contention, he has placed reliance upon the judgment of Apex Court in the case of ***Ajay Kumar Choudhary Vs. Union of India through its Secretary 2015 7 SCC 291.***

7. He further contends that the inquiry report reveals that it does not indict the petitioner, therefore, the suspension order has been passed mechanically and without application of mind. He submits that petitioner has issued recovery orders for recovery of the embezzled amount, therefore, the charge against the petitioner of defalcation of huge public money in the suspension order on the face of the record is incorrect. He further submits that the affiliation of private ITI institutions was canceled which has been stayed by this Court in several writ petitions and order of one of such petitions passed in Writ-C No.928 of 2021 is Annexure 7 to the writ petition. He also contends that several officers have been named in the inquiry report, but only the petitioner has been suspended, therefore, the action of the respondent is arbitrary and discriminatory. Thus, he contends that the suspension order is not sustainable in law.

8. Per contra, learned Standing Counsel would contend that the charge against the petitioner is serious inasmuch as the petitioner is said to be involved in embezzlement of Rs. 23 crores which is huge public money allotted for fee reimbursement and scholarship to students, and therefore, considering the nature of the charge leveled against the petitioner, the petitioner has rightly been suspended. He submits that considering the gravity of the charge, the petitioner must be kept out of duty so that he may not manipulate or tamper with the evidence. He further submits that to substantiate the charge against the petitioner that he is involved in the defalcation of Rs. 23 crores of public money; link of the trail of money to various accounts have to be traced out by the authority and investigating agencies which obviously would take time, therefore, considering the nature of the charge, the delay in submitting the charge sheet cannot be ground in the instant case to interfere with the order of suspension.

9. He further submits that the argument of learned counsel for the petitioner that the petitioner has not been indicted in the inquiry is incorrect. He contends that the issuance of the recovery order by the petitioner does not imply that he is not involved in the defalcation of public money.

10. Learned Standing Counsel further contends that so far as the contention of counsel for the petitioner that no other officer except the petitioner has been suspended, the said contention is not borne out from the record since there is no pleading to this effect in the writ petition. He submits that the petitioner cannot take shelter of the interim order passed by this Court in Writ-C No.928 of 2021 filed by the private ITI institutions as stay order in the said writ petitions does not mean that the court has given the clean chit to the institutions.

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

12. Three members committee was constituted pursuant to a report published in the daily newspaper in Times of India, Lucknow on 11.08.2018 unearthing a big scam where 2700 private I.T.I. institutions have been found involved in the misuse of affiliation to these I.T.I. Institutions, and misappropriation of funds allocated for fee reimbursement and scholarship to the students.

13. On the basis of the said report, F.I.R. has been registered against the erring officers including the petitioner under Sections 409, 420,

and 468 of IPC. Based on the said inquiry report, the petitioner is charged with involvement in misappropriation of Rs. 23 crores of public money allotted for reimbursement of fees and scholarship to the marginal section of the students. The charge on the face of it is very serious, and if found proved, would entail major punishment.

14. Now coming to the argument of learned counsel for the petitioner that petitioner has issued recovery certificate against the institutions and as per the inquiry report he is not indicted.

15. The inquiry report, page 48 of the paper book, only suggest that District Social Welfare Officer, Mathura on 01.09.2020 issued notices to several I.T.I. institutions for returning excessive fund which has been wrongly paid to them towards fee reimbursement and scholarship to the students.

16. So far as the submission of learned counsel for the petitioner that inquiry report does not indict the petitioner, it is worth mentioning that report is bulky and runs into several pages. At this stage, it would be apt to refer to paragraph 11 of the conclusion of the inquiry report which shows that the petitioner is also indicted. Paragraph 11 of the conclusion of the inquiry report is being reproduced herein below:-

"11. नियमावली के नियम-12 (vii) के अन्तर्गत दशमोत्तर छात्रवृत्ति एवं शुल्क प्रतिपूर्ति की स्वीकृति हेतु गठीत जनपदीय छात्रवृत्ति स्वीकृति समिति व वर्ष 2015-16 से 2019-20 तक जनपद मथुरा मे तैनात रहे जिला समाज कल्याण अधिकारी, जिला विद्यालय निरीक्षक, संयुक्त निदेशक प्रशिक्षण, आगरा मण्डल आदि एवं दशमोत्तर छात्रवृत्ति का कार्य देख रहे सम्बन्धित पटल सहायक अनियमितता के लिए उत्तरदायी हैं। उक्त वर्षों मे कार्यरत रहे जिला समाज कल्याण अधिकारियों व कर्मचारियों का विवरण संलग्न हैं।"

17. Thus, the submission of counsel for the petitioner that the inquiry report does not indict the petitioner is not sustainable.

18. So far as the argument of counsel for the petitioner that more than seven months have elapsed and no charge sheet has yet been issued against the petitioner and he cannot remain in suspension for an indefinite period; in the opinion of the Court, the said submission of the counsel for the petitioner is misconceived in the fact of the present case since considering the gravity of the charge against the petitioner, and the fact that amount of Rs. 23 crores have been defalcated by the petitioner and other persons in connivance with private I.T.I. institutions, it is obvious that the investigation will take time as the investigating agency is to find out the trail of money into various hands to establish the charge. Hence, there would naturally be delay in issuing charge sheet due to the tedious process of finding out the trail of money into various hands.

19. In this respect, it would be apt to refer to the judgment of the Apex Court in the case of ***U.P. Rajya Krishi Utpadan Mandi Parishad and Others Vs. Sanjiv Rajan 1993 Supp. (3) SCC 483*** where on the issue of delay in submitting the charge sheet, Apex Court held as under in paragraph 5 of the aforesaid judgment:-

"5. The ground given by the High Court to stay the operation of the suspension order, is patently wrong. There is no restriction on the authority to pass a suspension order second time. The first order might be withdrawn by the authority on the ground that at that stage, the evidence appearing against the delinquent employee is not sufficient or for some reason, which is not connected with the merits of the case. As happened in the present case, the earlier order of suspension dated March 22, 1991 was quashed by the High Court on the ground that some other suspended officer had been allowed to join duties. That order had nothing to do with the merits of the case. Ordinarily, when there is an accusation of defalcation of the monies, the delinquent

employees have to be kept away from the establishment till the charges are finally disposed of. Whether the charges are baseless, malicious or vindictive and are framed only to keep the individual concerned out of the employment is a different matter. But even in such a case, no conclusion can be arrived at without examining the entire record in question and hence it is always advisable to allow disciplinary proceedings to continue unhindered. It is possible that in some cases, the authorities do not proceed with the matter as expeditiously as they ought to, which results in prolongation of the sufferings of the delinquent employee. But the remedy in such cases is either to call for an explanation from the authorities in the matter, and if it is found unsatisfactory, to direct them to complete the inquiry within a stipulated period and to increase the suspension allowance adequately. It is true that in the present case, the charge-sheet was filed after almost a year of the order of suspension. However, the facts pleaded by the appellants show that the defalcations were over a long period from 1986 to 1991 and they involved some lakhs of rupees. It also appears that the authorities have approached the police and in the police investigation, the amount of defalcation is found to be still more. Since the matter is of taking accounts which are spread over from 1986 to 1991 and of correlating the entries with the relevant documents, and several individuals are involved, the framing of charges was bound to take some time. The Court has to examine each case on its own facts and decide whether the delay in serving the charge-sheet and completing the inquiry is justified or not. However, in the present case, the High Court has not quashed the order of suspension on the ground of delay in framing the charges. As stated earlier, it has set aside the order or suspension on the ground that the authority had no power to pass the second order of suspension in the same case. We are afraid that the High Court has misconstrued the nature and purpose of the power of suspension vested in the management. It is not disputed that at present all officers concerned are served with the charge-sheets and have been suspended. There is no discrimination between the officers on that account. The charges are also grave and the authorities have come to the conclusion that during the disciplinary proceedings, the officers should not continue in employment to enable them to conduct the proceedings unhindered. Hence, we are satisfied that the order in appeal was not justified."

20. In another case of ***Allahabad Bank and Another Vs. Deepak Kumar Bhola (1997) 4 SCC 1*** the Apex Court allowed the appeal of the bank against the order of the High Court setting aside the suspension order of the respondent who was charged with the offence of criminal misconduct and cheating by adopting corrupt and illegal means or otherwise abusing his position to obtain undue pecuniary gain for himself which amounted to an offence involving moral turpitude.

21. One of the arguments raised by the learned counsel for the respondent, as noted by the Apex Court in paragraph 4 of the judgment, is that since 10 years had elapsed from the date order of suspension was set aside, therefore, the Court should not interfere. The said argument was repelled by the Apex Court and it has noted in paragraph 11 of the judgment that merely because 10 years have elapsed since the charge sheet had been filed cannot be a ground to the respondent to come back to duty on a sensitive post of the bank till he is exonerated of the charges. Paragraph 11 of the aforesaid judgment is being extracted herein below:-

"11. We are unable to agree with the contention of learned counsel for the respondent that there has been no application of mind or the objective consideration of the facts by the appellant before it passed the orders of

suspension. As already observed, the very fact that the investigation was conducted by the C.B.I which resulted in the filing of a charge-sheet, alleging various offences having been committed by the respondent, was sufficient for the appellant to conclude that pending prosecution the respondent should be suspended. It would be indeed inconceivable that a bank should allow an employee to continue to remain on duty when he is facing serious charges of corruption and mis-appropriation of money. Allowing such an employee to remain in the seat would result in giving him further opportunity to indulge in the acts for which he was being prosecuted. Under the circumstances, it was the bounden duty of the appellant to have taken recourse to the provisions of clause 19.3 of the First Bipartite Settlement, 1966. The mere fact that nearly 10 years have elapsed since the charge-sheet was filed, can also be no ground for allowing the respondent to come back to duty on a sensitive post in the Bank, unless he is exonerated of the charge."

22. Now coming to the judgment of the Apex Court in the case of ***Ajay Kumar Choudhary (supra)*** relied upon by the learned counsel for the petitioner; the said judgment has been rendered in different factual circumstances wherein an officer was suspended for the charge that he had granted NOC to certain land treating the same to be private land though, in fact, the land was owned by Union of India and held by Director General of Defence Estates. In the said case, the charged officer was suspended on 30.09.2011 and no charge sheet was issued till 21.06.2013 and thereafter, the suspension order was extended from time to time, and when it was extended four times for 90 days w.e.f. 22.03.2013, the appellant challenged the same before the Central Administrative Tribunal who disposed of the Original Application directing that if no charge memo was issued to the appellant before the expiry of 21.06.2013, the appellant would be reinstated in service. The said order came to be challenged by the respondent in the writ petition before the Delhi High Court who allowed the writ petition with certain directions. Against the order of Delhi High Court, the appellant preferred S.L.P. and Apex Court held that currency of a suspension order should not extend beyond three months if, within this period, the charge sheet is not served on the delinquent employee. Paragraph 21 of the said judgment is being reproduced herein below:-

"21. We, therefore, direct that the currency of a suspension order should not extend beyond three months if within this period the memorandum of charges/charge-sheet is not served on the delinquent officer/employee; if the memorandum of charges/charge-sheet is served a reasoned order must be passed for the extension of the suspension. As in the case in hand, the Government is free to transfer the concerned person to any department in any of its offices within or outside the State so as to sever any local or personal contact that he may have and which he may misuse for obstructing the investigation against him. The Government may also prohibit him from contacting any person, or handling records and documents till the stage of his having to prepare his defence. We think this will adequately safeguard the universally recognised principle of human dignity and the right to a speedy trial and shall also preserve the interest of the Government in the prosecution. We recognise that previous Constitution Benches have been reluctant to quash proceedings on the grounds of delay, and to set time limits to their duration. However, the imposition of a limit on the period of suspension has not been discussed in prior case law, and would not be contrary to the interests of justice. Furthermore, the direction of the Central Vigilance Commission that pending a criminal investigation departmental proceedings are to be held in abeyance stands superseded in view of the stand adopted by us."

23. The judgment of Apex Court in the case of ***Ajay Kumar Chaudhary (supra)*** has not noticed the judgments of Apex Court in the cases of ***U.P. Rajya Krishi Utpadan Mandi Parishad (supra) and Allahabad Bank and Another (supra)***. Further, the judgment of Apex Court in the case of ***Ajay Kumar Chaudhary (supra)*** was rendered in a factual situation where charge leveled against the appellant was that he has wrongly granted N.O.C. to the land owned by the Union of India which was held by the Director-General of Defence Estates treating it to be private land and there was no charge of defalcation of huge amount of money traveling into the hands of several persons as in the present case.

24. It is worth noticing that where such a huge amount of money has been defalcated by several officers in collusion with Directors/Managers and Principals of several institutions; naturally, the investigation would take time to ascertain the link of the flow of money into hands of several persons, who colluded with each other to misappropriate such a huge amount.

25. In the case in hand, only seven months have elapsed, and considering the gravity of the charge, this Court finds that the judgment of ***Ajay Kumar Chaudhary (supra)*** does not come in aid to the petitioner rather, the principles elucidated by the Apex Court in the cases of ***U.P. Rajya Krishi Utpadan Mandi Parishad (supra)*** and ***Allahabad Bank and Another (supra)*** are applicable, and delay in submitting the charge sheet cannot be ground to interfere in the suspension order.

26. The contention of learned counsel for the petitioner that no other person except petitioner has been suspended is also not substantiated from the record since there is no pleading in the writ petition stating the name of persons who are also charged with the same allegation as that of the petitioner have not been suspended.

27. The submission of learned counsel for the petitioner that several I.T.I. institutions who are also charged with defalcation of money have been granted an interim order by this Court, and therefore, prima facie, the charge leveled against the petitioner is not correct is concerned, the said submission also has no substance inasmuch as the mere grant of interim order in favour of some of the I.T.I. institutions does not establish that charge against the petitioner is incorrect or false. Therefore, the said contention does not stand to merit.

28. This Court before concluding, may note that Apex Court in the case of ***Ajay Kumar Chaudhary (supra)*** has expressed its reservation regarding practice of keeping an employee under suspension for an indeterminate period, therefore, keeping in view the fact that suspension order should not be for an indeterminate period as it amounts to harassment of an employee and employee has to endure the scorn of the society and would injure his reputation in the society and his family, this Court believes that considering the nature of charge in the instant case, one and half year would be sufficient time within which the respondents should issue charge sheet. If for any reason, the respondents are not able to submit the charge sheet within the said period, it is open to the petitioner to submit a representation before the competent authority requesting for revocation of the suspension order. In case, petitioner submits any such representation for revocation of the suspension order, and if, the competent authority thinks that the petitioner should continue under suspension, he shall pass reasoned and speaking order on the representation of the petitioner specifying the reasons for continuance of suspension of the petitioner.

29. Thus, for the reasons given above, the writ petition lacks merit and is accordingly,

dismissed subject to the observations made above.

(2021)12ILR A1034
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2021

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 20566 of 2019

Raju ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Syed Fahim Ahmed

Counsel for the Respondents:
C.S.C., Sri Ashish Mishra, Ms. Pooja Agarwal

A. Service Law – Termination - Uttar Pradesh State District Court Rules, 2013 - Rules 3(3), 4, 19 & 23(5) - Once the time of probation is prescribed and employee is allowed to continue on the said post after completion of maximum period of probation without an express order of confirmation, he shall be treated confirm by implication. (Para 11, 17)

Uttar Pradesh State District Court Rules, 2013: Rules 19(1) and (2) - Period of probation is two years and as per Rule 19(3) of Rules, 2013, it can be extended maximum for two years. Therefore, once petitioner has completed the service of four years, his probation cannot be extended beyond that. (Para 11)

Schedule-B of Rule 3(3) and 4 provides that for promotion on the post of Senior Assistant from Junior Assistant, minimum five years of substantive and satisfactory service in the said scale is required. Here, as petitioner is promoted on the post of Senior Assistant, his service would be deemed to be substantive and satisfactory and his probation is to be deemed completed. Therefore, his service cannot be terminated on the ground that he was on probation. (Para 11, 20)

B. Violation of Principles of Natural Justice as well as procedure prescribed in law - No Inquiry Officer has been appointed except the show-cause notice, no opportunity of hearing was given to petitioner before passing order. In the present case, petitioner was appointed on the post of Junior Assistant on probation and thereafter he has been promoted on the post of Senior Assistant and his service is to be treated confirmed, therefore, petitioner cannot be terminated from service without following the procedure prescribed in Rule 23(5) of Rules, 2013. (Para 21)

Direction for re-instatement. Writ petition allowed. (E-4)

Precedent followed:

1. St. of Punj. Vs Dharam Singh, AIR 1968 SC 1210 (Para 11)

Precedent distinguished:

1. High Court of M.P. Vs Satya Narain Jhavar, (2001) 7 SCC 161 (Para 10)

2. G.S. Ramaswamy Vs Inspector-General of Police, 1966 SC 175 (Para 10)

3. St. of U.P. Vs Akbar Ali Khan, AIR 1966 SC 1842 (Para 10)

4. Shamsher Singh Vs St.of Pun. & anr., (1974) 2 SCC 831 (Para 10)

5. Sukhbans Singh Vs St.of Pun. & ors., AIR 1962 SC 1711 (Para 10)

6. St. of Pun. & ors. Vs Balbir Singh (2004) 11 SCC 743 (Para 10, 18)

7. St. of U.P. Vs Harendra Arora & anr. (2001) 6 SCC392 (Para 10, 19)

8. Om Prakash Mann Vs Director of Education (Basic) & ors., (2006) 7 SCC 558 (Para 10, 19)

Present petition assails order of termination dated 14.11.2019, passed by District Judge, Maharajganj.

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

1. Heard learned counsel for the petitioner, learned standing counsel for respondent No. 1 and Ms. Pooja Agarwal, learned counsel for respondent Nos. 2 to 5.

2. Pleadings are exchanged between the parties. With the consent of parties, writ petition is being decided at the admission stage itself.

3. Learned counsel for the petitioner submitted that High Court of judicature at Allahabad has issued advertisement for recruitment of Group 'C' post in the U.P. Civil Court Staff Centralized Recruitment Scheme-2014, (Advertisement No. 1/Sub. Court/Category 'C'/Clerical Cadre/2014). He further pointed out that as per Point No. 9 of General Instruction, all the candidates, who are already in Central/State Government Service or in any Central/State Government undertaking or in any type of other organization established and governed by the Central/State Government, shall have to produce no objection certificate (N.O.C.) as and when called for. Petitioner, being fully eligible for the said post, has submitted application form and ultimately after going through the due procedure as provided in advertisement, he was appointed on the post of Junior Assistant vide appointment letter dated 09.09.2015 at District Court Maharajganj on probation.

4. He next submitted that prior to this joining, petitioner was working on Group 'D' post in Northern Central Railways. On 10.09.2015, he had sent his resignation to Civil Division, Mechanical Engineering, Jhansi and on 11.09.2015, submitted his joining at District Court, Maharajganj. On 31.05.2016, respondent No. 5 has issued notice to the petitioner to submit his reply as to whether prior to this department, he was working in some other department or not and whether he was allotted any PRAN or not, which was replied by the petitioner vide letter dated 13.06.2016 that earlier he was working as class IV employee in Northern Central Railway and submitted his resignation. He has also informed that he was allotted PRAN No. 110073384088 from Northern Central Railway and along with his letter, he has also annexed the photocopy of resignation letter.

5. He further submitted that on reply dated 13.06.2016, he was directed by the Officer concerned to inform the date of resignation and further about no objection certificate, if obtained and also as to why he has concealed the facts. The same was duly replied by the petitioner vide letter dated 21.06.2016 in which petitioner submitted that while submitting his application form, there was no requirement of no objection certificate as it is stated that candidates shall have to produce no objection certificate as and when called for. This is also stated that he has never concealed the facts and further he was willing to fill up the details of his service in police verification form, but it was never been required to fill up, therefore, he could not disclose about his first service.

6. It is next submitted that again, petitioner was issued letter dated 22.08.2016 with almost similar allegation which was also replied by the petitioner vide letter date 15.09.2016. After 22.08.2016, no further notices were issued to the petitioner. According to the petitioner, after completion of two year's of probation period, as per rule 19 of Uttar Pradesh State District Court Rules, 2013 (hereinafter referred to as the 'Rules, 2013'), his services were made confirmed and vide order dated 03.09.2019, he has been promoted on the post of Senior Assistant at District Court, Maharajganj.

7. It is further submitted that on 29.08.2019 i.e. after three years from the issuance of last notice, he has received another notice and submitted reply vide letter dated 03.10.2019. On 15.10.2019, petitioner was

issued one more notice by which he was required to present acceptance of his resignation letter by the Northern Central Railway within a period of one month, failing which, his services shall automatically be terminated. It is next submitted that vide letters dated 02.11.2019 and 12.11.2019, petitioner requested respondents to give more time and also provide the entire material on the basis of which inquiry against the petitioner was proceeded. Lastly, vide letter dated 14.11.2019, service of petitioner was terminated without following the procedure as enshrined in Rules, 2013.

8. Facts are not disputed that in the advertisement, there was no requirement to produce no objection certificate at the time of submission of application form, neither petitioner has concealed any fact at any point of time nor he was required to disclose the status of his first service prior to his joining. It is next submitted that petitioner was also promoted vide letter dated 03.09.2019, therefore, in all eventuality, it is required on the part of respondents to follow Rule 23(5) of Rules, 2013 for holding enquiry to award major punishment. Neither any notice has been served to the petitioner nor any inquiry officer has ever been appointed. Except show cause notice, no opportunity of hearing was given to the petitioner before passing impugned order.

9. Lastly, it is submitted that petitioner has taken specific plea in paragraph Nos. 50 to 59 in writ petition that he has not been provided opportunity to face inquiry. It is further submitted that in paragraph No. 31 of the counter affidavit, there is no denial of the facts and only stated that by the perusal of records, it indicates that petitioner concealed the fact that at the time of joining, he was working in Railway Department. Petitioner reiterated that he has never concealed any facts and further his appointment was made permanent and given promotion, therefore, Rule 23(5) of Rules, 2013 has to be followed before awarding major punishment, therefore, order is bad and is liable to be set aside.

10. Ms. Pooja Agarwal, learned counsel for respondent Nos. 2 to 5 has vehemently opposed the submissions made by learned counsel for the petitioner, but could not dispute the facts as well as provisions of Rules, 2013 placed by learned counsel for the petitioner. She only submitted that petitioner has concealed the facts about his working at Railway Department prior to submission of application form as well as joining pursuant to the advertisement. Petitioner was on probation, therefore, his services can be terminated at any point of time. She also submitted that promotion on the post of Senior Assistant could not be a ground for completion of his probation as no order has been passed for completion of probation as required in Rule 19(5) of Rules, 2013. She next submitted that even in case charge-sheet has not been issued, no prejudice caused to the petitioner, therefore, order is well within the limits of law. She further submitted that opportunity of hearing was given to the petitioner and petitioner has never raised any objection that he has not been given opportunity of hearing. In support of her contention, she has placed reliance upon the judgment of Apex Court in the case of **High Court of Madhya Pradesh vs. Satya Narain Jhavar, (2001) 7 SCC 161**. She further submitted that similar view was taken by the Courts in the case of **G.S. Ramaswamy vs. Inspector-General of Police, 1966 SC 175, State of U.P. vs. Akbar Ali Khan, AIR 1966 SC 1842, Samsher Singh vs. State of Punjab and another, (1974) 2 SCC 831, Sukhbans Singh vs. State of Punjab and others, AIR 1962 SC 1711.** She further placed reliance upon the judgment of Apex Court passed in **State of Punjab and others vs. Balbir Singh (2004) 11 SCC 743** and submitted that termination of petitioner is simplicitor and not punitive in nature, therefore, no inquiry is required. Lastly,

she placed reliance upon the judgment of Apex Court in **State of U.P. vs. Harendra Arora and Another (2001) 6 SCC 392** and submitted that it is required on the part of petitioner to show that prejudice is caused to him. She also submitted that similar view was taken by the Apex Court in **Om Prakash Mann vs. Director of Education (Basic) and other (2006) 7 SCC 558.**

11. Learned counsel for the petitioner in his rejoinder arguments submitted that submissions made by learned counsel for respondents is self contradictory as on one hand, Rule 19(2) of Rules, 2013 provides two years as period of probation and Rule 19(5) of Rules, 2013 says that for completion of probation, specific order is required and contrary to that Schedule-B of Rule 3(3) & 4 provides that for promotion on the post of Senior Assistant from Junior Assistant, minimum five years of substantive and satisfactory service in the said scale is required. Further, Rule 19(3) of Rules, 2013 provides maximum period of extension of probation which cannot be more than the period specified in Rule 19(1) & (2) of Rules, 2013. As per Rule 19(1) & (2) of Rules, 2013, period of probation is two years and as per Rule 19(3) of Rules, 2013, it can be extended maximum for two years. Therefore, once petitioner has completed the service of four years, his probation cannot be extended beyond that. Here, petitioner is promoted on the post of Senior Assistant, his service would be deemed to be substantive and satisfactory and his probation is to be deemed completed. In support of his contention, he has placed reliance upon the judgment of Apex Court in the case of ***State of Punjab v. Dharam Singh, AIR 1968 Supreme Court 1210*** which says that if service rules fix a certain period of time beyond which the probationary period cannot be extended and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer. In fact, he would be treated to be confirmed on the post by implication.

12. I have considered rival submissions made by learned counsel for the parties, perused the records, judgments as well as Rules, 2013.

13. Certain facts of the case are undisputed. As per terms of advertisement, there is no requirement of annexing "**No Objection Certificate**" alongwith application form and further no opportunity was given to the petitioner at any point of time to disclose as to whether he was working on any other post at the time of submission of application form or at the time of joining. Further, as and when notices were issued to the petitioner, he has duly replied the same without concealment of any fact, therefore, it cannot be said that he has concealed any fact at any point of time.

14. Service of petitioner is governed by the provisions of Rules, 2013 and Rule 19 provides for probation. Rule 19 of Rules, 2013 is quoted below:-

"19. Probation-

(1) All appointments to the Service by direct recruitment shall be on probation for the period of two years.

(2) All appointments by promotion shall be on probation basis for a period of two years.

(3) The period of probation for reasons to be recorded in writing, may be extended by the appointing authority by such period not exceeding the period of probation specified in sub-rule (1) or (2).

(4) At the end of period of probation or the extended period of probation the appointing authority shall consider the suitability of the person so appointed or promoted to hold the post to which he was appointed or promoted, and-

(i) if it decides that he is suitable to hold the post to which he was appointed or promoted and has passed the examinations or tests, if any, required to be passed during the period of probation it shall, as soon as possible, issue an order declaring him to have satisfactorily completed the period of probation and such an order shall have effect from the date of expiry of the period of probation, including extended period, if any, as the case may be.

(ii) if the appointing authority considers that the person is not suitable to hold the post to which he was appointed or promoted, as the case may be, he shall by order-

(a) If he is a promotee, revert him to the post which he held prior to his promotion.

(b) If he is a probationer, discharge him from service;

(5) A person shall not be considered to have satisfactorily completed the period of probation unless a specific order to that effect is passed. Any delay in passing such an order shall not entitle the person to be deemed to have satisfactorily completed the period of probation."

15. Further, Schedule-B, Rule 3(3) & (4) of Rules, 2013 deals with the procedure and requirement for recruitment and promotion and for promotion on the post of Senior Assistant from Junior Assistant, minimum five years of substantive and satisfactory service in the earlier scale is required. Relevant part of Schedule-B is quoted below:-

Sl. No.	Category Posts	Method of Recruitment	Qualification etc.
4-	Senior Assistant (Munsarim, Civil Judge (SD & JD, Addl. Civil Judge (SD & JD) /Munsarim-cum-Reader/Readers of these Courts & JSCC & Addl. JSCC /Deputy; Nazir/Record Keeper(Cr.)/ Suits Clerk/Decree writer/Clerk to CMM, CJM, JM Courts/Librarian/Head Copyist (Civil & Criminal), etc., Protocal Officer., Category "C") & Amin Grade-I Category "C") 5200-20,200 Grade pay 2800	By Promotion from Junior Assistant amongst Clerical Cadre of pay scale of Rs. 5200-20,200 Grade Pay 2000 On the basic of seniority-cum- merit with minimum Five years of substantive and satisfactory service in the said scale	For Librarian the qualification would be preferably bachelor in Library Science.

16. From the perusal of Rule 19 of Rules, 2013, it is apparently clear that appointment shall be made on probation for a period of two years and further in the light of Rule 19(3) of Rules, 2013, probation may be extended not exceeding the period of probation specified in sub-rule 1 & 2 of Rule 19 of Rules, 2013 i.e. two years. In the present case, probation of petitioner has never been extended and he has completed five years of service crossing the bars of Rule

19(1) & (3). Rule 19(5) provides that a person shall not be considered to have satisfactorily completed the period of probation unless a specific order to that effect is passed. Any delay in passing such an order shall not entitle the person to be deemed to have satisfactorily completed the period of probation. No doubt, in present case, no specific order has been passed, but Schedule-B clearly provides that promotion on the post of Senior Assistant shall be made only after completion of five years substantive and satisfactory service in the earlier scale meaning thereby his service was found satisfactory as he was promoted on the post of Senior Assistant. Considering this fact, respondents also have never extended his probation, therefore, under such facts of the case, probation of petitioner is deemed to be treated complete for the reason that in case service of petitioner was not satisfactory, he should never been promoted on the post of Senior Assistant.

17. Apex Court in the matter of ***State of Punjab Vs. Dharam Singh (Supra)*** has clearly held that once the time of probation is prescribed and employee is allowed to continue on the said post after completion of maximum period of probation without an express order of confirmation, he shall be treated confirm by implication. Paragraph No. 5 of the said judgment is quoted below:-

"5. In the present case, Rule 6(3) forbids extension of the period of probation beyond three years. Where, as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negatived by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."

18. I have also gone through the judgments relied upon by learned counsel for respondents in the matter of **High Court of Madhya Pradesh (Supra)** where it was not the case that petitioner was promoted and thereafter termination was made. In **G.S. Ramaswamy (Supra), State of U.P. vs. Akbar Ali Khan(Supra), Samsher Singh(Supra)** and **Sukhbans Singh(Supra)** Court has also taken similar view in the light of different facts, therefore, these judgments would not come into the rescue of respondents.

19. So far as case of **State of Punjab and others vs. Balbir Singh (Supra)** is concerned, it says about determination of suitability of an employee for a particular job, such termination would be termination simplicitor and not punitive in nature. In the present case, undoubtedly, service of petitioner was found satisfactory and considering his suitability, he was promoted on the post of Senior Assistant, therefore, this judgment also could not help respondents. So far as judgments of State of U.P. vs. Harendra Arora(Supra) & Om Prakash Mann (supra) are concerned, facts are entirely different and there is prejudice against the petitioner as he was not given opportunity before Inquiry Officer to show that at no point of time, he has never concealed any fact. Learned counsel for respondents could not demonstrate this fact that at any point of time, in advertisement or at any stage of joining, appointment or in continuation of service, he was given opportunity to disclose about his previous service, therefore, these judgments also would not applicable in the case

of respondents. The very submission made by learned counsel for respondents, that petitioner was on probation, therefore, his service can be terminated, cannot be accepted in the light of Rule 3(3) & 4 of Rules, 2013 alongwith Schedule-B for promotion as well as law laid down by the Apex Court in the matter of **State of Punjab(Supra)**, therefore, the contention raised by learned counsel for respondents is having no force.

20. Therefore, under such facts of the case as well as provisions of Rules, 2013 and law laid down by the Apex Court, probation of petitioner shall be treated to be complete and his service cannot be terminated on the ground that he was on probation.

21. Petitioner has taken specific plea that no Inquiry Officer has been appointed except the show cause notice, no opportunity of hearing was given to him before passing order which was also not denied in the counter affidavit. In the present case, petitioner was appointed on the post of Junior Assistant on probation and thereafter he has been promoted on the post of Senior Assistant and in the light of discussions made here-in-above, his service is to be treated confirmed, therefore, petitioner cannot be terminated from service without following the procedure prescribed in Rule 23(5) of Rules, 2013.

22. Therefore, under such circumstances as well as provisions of Rules, 2013 and law laid down by the Apex Court, order of termination dated 14.11.2019 passed by respondent No. 3 is bad and is hereby set aside. Respondent No. 3-District Judge, Maharajganj is directed to reinstate the petitioner in service forthwith alongwith all consequential benefits.

23. Accordingly, writ petition is **allowed.**

24. No order as to costs.

(2021)12ILR A1040
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE VIKAS BUDHWAR, J.

Spl. Appl. No. 218 of 2021

Prashant Shukla ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Surendra Prasad Sharma

Counsel for the Respondents:
C.S.C.

A. Service Law – Right of a contractual employee – Legitimate expectation - 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 recognized 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 concerned cases, in consultation with the Public Service Commission. (Para 19)

In the present case, the petitioner-appellant entered into a contract voluntarily and with eyes wide open for his engagement for a fixed period from 02.03.2020 to 31.8.2020 and on expiry of the period of agreement, his agreement was not renewed and he was not re-engaged. Sufficient reasons have been disclosed in the order dated 06.05.2021 passed by CDO, Kannauj for not extending the engagement of the petitioner-appellant. (Para 14, 15)

It is settled law that a writ of mandamus can be issued if a petitioner is able to establish that he has legally protected and judicially enforceable subsisting

right. The petitioner has completely failed to demonstrate that he has any statutory or legal right to compel the respondents to execute an agreement for his re-engagement or further engagement as Computer Operator for MANREGA in District Kannauj. (Para 20)

Constitution of India – Article 226 - This Court in exercise of its extraordinary, equitable and discretionary jurisdiction u/Article 226 of the Constitution of India has no power to re-write contract or to compel the State to enter into an agreement. (Para 23)

Appeal dismissed. (E-4)

Precedent followed:

1. Rajesh Bhardwaj Vs U.O.I. & ors., 2019 (2) ADJ 830 (Para 9)

2. Director, Institute of Management Development, U.P. Vs Smt. Pushpa Srivastava, JT 1992 (4) S.C. 489 (Para 18)

3. Secretary, State of Karnataka & ors. Vs Umadevi & ors., (2006) 6 SCC 1 (Para 19)

4. Director of Settlement, A.P. Vs M.R. Apparao, (2002) 4 SCC 638 (Para 21)

Precedent distinguished:

1. Prem Chandra Gupta Vs St.of U.P. & ors., Special Appeal No. 104 of 2021, decided on 14.06.2021 (Para 9)

2. Jagbhan Vs St. of U.P. & ors., Special Appeal Defective No. 250 of 2021, decided on 14.06.2021 (Para 9)

Present Special Appeal challenges judgment and order dated 09.08.2021, passed by Hon'ble Single Judge.

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Vikas Budhwar, J.)

1. Heard Sri Surendra Prasad Sharma, learned counsel for the petitioner-appellant and learned Standing Counsel for the State-respondents.

Brief facts of the case

2. This special appeal has been filed challenging the order dated 9.8.2021 passed by learned Single Judge in Writ -A No.6652 of 2021 which is reproduced below:-

"Heard Sri Rahul Agarwal, learned counsel for the petitioner and Sri Birendra Pratap Singh, learned Standing Counsel for the State respondents.

The contractual engagement of the petitioner has been brought to an end by the respondents. Quite apart from the reasons which have been taken into consideration, the principal question which arises is whether the Court should consider the grant of a prerogative writ consequent to the contractual appointment of the petitioner having been brought to an end. The Court in this regard bears in mind the principles enunciated by a Division Bench of the Court in Rajesh Bhardwaj Vs. Union of India [2019 (2) ADJ 830]. Undisputedly, the Court cannot by way of a writ command the respondents to either renew or perpetuate the contractual engagement of the petitioner. In any case and since it is not governed by any statutory rules or regulations, the Court cannot issue a declaration invalidating the termination or direct reinstatement.

Consequently, the writ petition fails and is dismissed."

3. The petitioner had filed the aforesaid Writ -A No. 6652 of 2021 challenging the order dated 6.5.2021. The operative portion of the impugned order in the writ petition is reproduced below:-

"उक्तानुसार पारित निर्देशों के क्रम में जनपद स्तर पर कम्प्यूटर आपरेटर का पद सृजित न होने, राज्य मरनेगा प्रकोष्ठ लखनऊ से मनरेगा संविदा कर्मियों के सीधे उनके खाते में मानदेय हस्तान्तरित किये जाने एवं जनपद स्तर पर कार्यहित में आवश्यकता न होने के .ष्टिगत श्री प्रशान्त शुक्ला की संविदा अवधि / अनुबन्ध दिनांक 31.08.2020 को समाप्त होने पर आगे संविदा के नवीनीकरण किये जाने की जिला कार्यक्रम

समन्वयक / जिलाधिकारी महोदय .ारा दिनांक 31.01.2021 को स्वीकृति प्रदान नहीं की गई है, जिसके फलस्वरूप दिनांक 31.08.2020 के पश्चात उनसे आगे कार्य नहीं लिया गया है, क्योंकि न ही जनपद स्तर पर कम्प्यूटर आपरेटर का शासन द्वारा पद सृजित है और न ही श्री शुक्ला की विधिक प्रक्रिया (चयन समिति) से नियुक्ति की गई है।

अतः मा0 उच्च न्यायालय इलाहाबाद में श्री प्रशान्त शुक्ला बनाम उ0प्र0 सरकार एवं 06 अन्य के नाम से योजित याचिका सं0 ए–1936 / 2021 के साथ संलग्न प्रत्यावेदन दिनांक 25.09.2020 पर कार्यवाही करने हुये प्रत्यावेदन को एतद् द्वारा निस्तारित किया जाता है।"

4. It would be relevant to mention that the petitioner voluntarily and with eyes wide open entered into an agreement dated 31.3.2020 for his engagement on honorarium basis @ Rs.11,200/- per month for the specific period of 2.3.2020 to 31.8.2020 (six months) or till continuation of the scheme, whichever is earlier. The agreement came to an end on 31.8.2020. Thereafter, on account of no necessity of engagement for work, the petitioner-appellant was not further engaged.

5. Consequently, the petitioner filed Writ - A No.1936 of 2021 (Prashant Shukla Vs. State of U.P. & six others) which was disposed of by order dated 18.3.2021 observing that "*without expressing any opinion on the merits of the issue the concerned respondent is directed to look into the grievance of the petitioner and redress the same strictly in accordance with law.*"

6. Pursuant to the aforesaid order passed by learned Single Judge, the representation of the petitioner was decided by the impugned order dated 6.5.2021 passed by the Chief Development Officer, Kannuaj declining to extend the contractual engagement of the petitioner or to reengage him.

7. In the order dated 6.5.2021 it has also been observed that neither post of Computer Operator has been created by the State Government at the District Level for work under Mahatma Gandhi National Rural Employment Guarantee Scheme (MNREGA) scheme nor the petitioner-appellant was employed through lawful selection process.

8. The aforesaid order dated 6.5.2021 was challenged by the petitioner-appellant in Writ-A No.6652 of 2021 which has been dismissed by the abovequoted impugned order passed by learned Single Judge dated 9.8.2021 observing that "*the Court cannot by way of a writ command the respondents to either renew or perpetuate the contractual engagement of the petitioner. In any case and since it is not governed by any statutory rules or regulations, the Court cannot issue a declaration invalidating the termination or direct reinstatement.*"

Aggrieved with this order the petitioner-appellant has filed the present special appeal.

Submissions

9. Learned counsel for the petitioner-appellant submits that the impugned order has been passed by the learned Single Judge merely on the basis of the law laid down by a Division Bench in ***Rajesh Bhardwaj Vs. Union of India and others 2019(2) ADJ 830*** whereas the contrary view has been taken by two different Division Benches in **Special Appeal No.104 of 2021 (Prem Chandra Gupta Vs. State of U.P. and 4 others)** decided on 14.6.2021 and **Jagbhan Vs. State of U.P. and 5 others in Special Appeal Defective No.250 of 2021** decided on 14.6.2021.

10. Learned counsel for the petitioner-appellant has further urged that the judgment in the csae of **Rajesh Bhardwaj (Supra)** is liable to be referred to Larger Bench as it runs counter to the view taken by two different coordinate Bench in the case of **Jagbhan (Supra) and Prem Chandra Gupta (Supra).**

Learned Standing Counsel supports the impugned judgement.

Finding

11. We have carefully considered the submissions of the learned counsel for the parties.

12. It is admitted case of the petitioner that he was engaged for the period from 2.3.2020 to 31.8.2020 on honorarium basis as Computer Operator under a written agreement dated 31.3.2020 which he entered voluntarily and with eyes wide open. On expiry of the period of agreement, his contractual engagement came to an end. Neither any statutory provision nor any judgement could be placed by learned counsel for the petitioner before us, which may indicate that in absence of legally protected or judicially enforceable subsisting right, the petitioner-appellant has a right to ask for a mandamus from the writ court to the authorities to compel them to renew the contract or to extend the period of engagement by entering into a fresh agreement.

13. The judgment relied by learned counsel for the petitioner-appellant in the case of **Jagbhan (Supra)** has no bearing on the facts of the present case. The facts in the case of **Jagbhan (Supra)** are different inasmuch as in the case the services of the petitioner were terminated by an order on the basis of an enquiry report dated 25.9.2020 without affording any opportunity of hearing to him. When the said order of termination was challenged, the learned Single Judge passed the order dismissing the writ petition, which is reproduced below:-

"Heard learned counsel for the parties.

This petition at the behest of a contractual employee aggrieved by an order of termination would not be maintainable in light of the decision of the Division Bench in Rajesh Bhardwaj Vs. Union of India and Others [2019 (2) ADJ 830]. It is accordingly dismissed as such."

The facts of the case of **Prem Chandra Gupta (Supra)** relied by learned counsel for the petitioner are also similar to the facts of the case of Jagbhan (Supra).

The order of learned Single Judge, which was challenged in Special Appeal in the case of Prem Chandra Gupta (Supra), is reproduced below:-

"Heard learned counsel for the petitioner and the learned Standing Counsel.

*The Court finds no ground to entertain this petition directed against an order of termination of the contractual engagement of the petitioner bearing in mind the judgment rendered by the Division Bench of the Court in **Rajesh Bhardwaj Vs. Union of India and Others [2019 (2) ADJ 830].** The writ petition is accordingly dismissed as not maintainable"*

14. Thus, the orders of learned Single Judge, which were challenged in the case of **Jagbhan (Supra)** and **Prem Chandra Gupta (Supra)** arose from an ex parte order of termination of services on the basis of an ex parte enquiry report and the orders of the learned Single Judge were not on merit of the case, but it was simply observed that the writ petition is not maintainable in the light of the law laid down in the case of **Rajesh Bhardwaj (Supra).**

The facts of the present case are entirely different as the petitioner-appellant herein entered into a contract voluntarily and with eyes wide open for his engagement for a fixed period from 2.3.2020 to 31.8.2020 and on expiry of the period of agreement, his agreement was not renewed and he was not re-engaged.

15. Sufficient reasons have been disclosed in the order dated 6.5.2021 passed by Chief Development Officer, Kannauj for not extending the engagement of the petitioner-appellant.

16. The writ petition of the petitioner-appellant herein was dismissed by the learned Single Judge not by merely referring to the law laid down in the case of **Rajesh Bhardwaj (Supra)** but it was also held that the Court cannot by way of a writ command the respondents to either renew or perpetuate the contractual engagement of the petitioner. In any case and since it is not governed by any statutory rules or regulations, the Court cannot issue a declaration invalidating the termination or direct reinstatement.

17. The petitioner-appellant had filed the aforesaid Writ-A No.6652 of 2021 praying for (a) to quash the order dated 6.5.2021 and (b) to issue a writ order or direction in the nature of mandamus directing the respondents to execute the agreement reinstating the petitioner as Computer Operator for MANREGA works in District Kannauj. We find that the order dated 6.5.2021 does not suffer from any manifest error of law and as such a writ of certiorari cannot be issued.

18. The Apex Court in the case of Director, Institute of Management Development, U.P. Vs. Smt. Pushpa Srivastava JT 1992 (4) S.C.489 had the occasion to consider the right of a contractual employee for re-engagement and held as under:-

"4. The respondent was first appointed in the appellant- Institute as a Research Executive on a consolidated fixed compensation of Rs. 1,250 per month on contract basis for aperiod of three months. It was specifically stated in the order that it was purely on ad hoc basis, liable for termination without any notice on either side.

5. By an order dated 18th of July, 1988 the appointment of respondent was exended for a further period of three months with effect from 2nd August, 1988 on the same terms and conditions. Here again, it requires to be noted that the appointment was purely on ad hoc basis. On 28th of January, 1989 a fresh Office Order was made appointing the respondent as Training Executive on a contract basis for a period of three months. The consolidated pay was fixed at Rs.1,500 per month. Here also, the appointment was purely on ad hoc basis and terminable without notice by either side. On 20th June, 1989 she was appointed on a newly created post of Executive carrying a pay scale of Rs. 770-1600. This appointment was also on ad hoc basis for a period of six months and it was terminable by one month's notice on either side. on 5th January, 1990 another ad hoc appointment was made for a period of three months. Though by efflux of time the appointment came to an end on 21st of March, 1990 yet she was continued beyond the prescribed period.

6. On 13th July, 1990 she submitted a resignation letter. This letter of resignation was forwarded to the Director of the Institute who accepted the same by an order dated 31st July, 1990.

7. Notwithstanding the acceptance of resignation, on 25th of August, 1990, the respondent made a further request that her services might be continued for some more time in the appellant-institute. On this request, the respondent was appointed on a contractual basis as a Training Executive on a consolidated compensation of Rs.2,400 per month. On this occasion also, the appointment was purely on a ad hoc basis terminable without notice.

8. On 3rd of January, 1991 a Committee of the Institute went into the question of abolition of redundant posts. The report was submitted by the Committee to the effect that several posts including the posts of Training Supervisors and Research Executive had become redundant. Therefore, the committee recommended their abolition. Accepting the report of the committee on 14th January, 1991 five posts were abolished including the post of Training Supervisors and Research Executive with effect from the last

training programme of the current financial year.

9. Since the appointment of the respondent was coming to an end at the end of February 1991 she preferred W.P. 1041 of 1991."

17.For our part, we do not think it is necessary to decide the question as to who has the power to abolish the post of Training Executive; whether under Rule 16(viii), the Director or under Rule 11, the Board since we propose to limit the controversy to the terms of appointment.

18.The order dated 1.9.90 reads as follow :

"1-168D/1132 1.9.90

OFFICE ORDER

With effect from the date of joining Smt. Pushpa Rani Srivastava is appointed a consolidated fixed pay of Rs. 2400 per month on contract basis for a period of six months in the Institute.

The appointment of Smt. Srivastava is purely on ad hoc basis and is terminable without any notice.

sd/-

(K.K.N. SINGH) DIRECTOR"

(19) The following are clear from the above order :

(i) The respondent was appointed on a contractual basis.

(ii) The post was to carry a consolidated pay of Rs.2400 per month.

(iii) The duration of appointment was six months from the date of the respondent joining charge.

(iv) It is purely on ad hoc basis.

(v) It is terminable without any notice.

20. Because the six months' period was coming to an end on 28th February, 1991, she preferred the Writ petition a few days before and prayed for mandamus which was granted by the learned Judge under the impugned judgment. The question is whether the directions are valid in law. ***To our mind, it is clear that where the appointment is contractual and by efflux of time, the appointment comes to an end, the respondent could have no right to continue in the post. Once this conclusion is arrived at, what requires to be examined is, in view of the services of the respondent being continued from time to time on `ad hoc' basis for more than a year whether she is entitled to regularisation? The answer should be in the negative.***

23. In the instant case, there is no such rule. The appointment was purely ad hoc and on a contractual basis for a limited period. Therefore, by expiry of the period of six months, the right to remain in the post comes to an end. (Emphasis supplied by us)

9. Further in the case of **Secretary, State Of Karnataka and others vs Umadevi And Others (2006) 4 SCC 1**, the Hon'ble Supreme Court has held as under:-

"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 recognized 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 concerned cases, 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."*

20. It is also settled law that a writ of mandamus can be issued if a petitioner is able to establish that he has legally protected and judicially enforceable subsisting right. The petitioner has completely failed to demonstrate that he has any statutory or legal right to compel the respondents to execute an agreement for his re-engagement or further engagement as Computer Operator for MANREGA in District Kannauj.

21. In **Director of Settlement, A.P. Vs. M.R. Apparao (2002) 4 SCC 638** (para 17) Hon'ble Supreme Court considered the High Court's power for issuance of mandamus and held as under :-

"17. Coming to the third question, which is more important from the point of consideration of High Court's power for issuance of mandamus, it appears that the constitution empowers the High Court to issue writs, directions or orders in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the rights conferred by Part III and for any other purpose under Article 226 of the Constitution of India. It is, therefore essentially, a power upon the High Court for issuance of high prerogative writs for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights, which may come within the expression 'for any other purpose'. The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion, they must be exercised along recognised lines and subject to certain self-imposed limitations. The expression 'for any other purpose' in Article 226, makes the jurisdiction of the High Courts more extensive but yet the Court must exercise the same with certain restraints and within some parameters. One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior Courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition.{Kalyan Singh vs. State of U.P., AIR 1962 SC 1183}. The duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law. When the aforesaid principle are applied to the case in hand, the so-called right of the respondents, depending upon the conclusion that the amendment Act is constitutionally invalid and, therefore, the right to get interim payment will continue till the final decision of the Board of Revenue cannot be sustained when the Supreme Court itself has upheld the constitutional validity of the amendment Act in Venkatagiri's case (2002) 4 SCC 660 on 6.2.1986 in Civil Appeal Nos. 398 & 1385 of 1972 and further declared in the said appeal that interim payments are payable till determination is made by the Director under Section 39(1). The High Court in

exercise of power of issuance of mandamus could not have said anything contrary to that on the ground that the earlier judgment in favour of the respondents became final, not being challenged. The impugned mandamus issued by the Division Bench of the Andhra Pradesh High Court in the teeth of the declaration made by the Supreme Court as to the constitutionality of the amendment Act would be an exercise of power and jurisdiction when the respondents did not have the subsisting legally enforceable right under the very Act itself. In the aforesaid circumstances, we have no hesitation to come to the conclusion that the High Court committed serious error in issuing the mandamus in question for enforcement of the so-called right which never subsisted on the date, the Court issued the mandamus in view of the decision of this Court in Venkatagiri's case. In our view, therefore, the said conclusion of the High Court must be held to be erroneous."

22. A Division Bench of this Court in which one of us (Justice Surya Prakash Kesarwani) is one of the member, had considered the power of the High Court for issuance of high prerogative writ for enforcement of fundamental rights, and held as under:-

"18. It is settled law that writ of mandamus can be issued if the petitioner has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition. Similar view has also been taken by Hon'ble Supreme Court in Kalyan Singh vs. State of U.P.13. Applying the principles of issuance of writ of mandamus on the facts of the present case, we find that the petitioners have no legal right for protection on the facts of the present case inasmuch as such the protection as being asked, may amount to protection against commission of offence under Section 494/495 I.P.C. It is well settled law that writ of mandamus can not be issued contrary to law or to defeat a statutory provision including penal provision. The petitioners do not have legally protected and judicially enforceable subsisting right to ask for mandamus."

Therefore, the learned Single Judge has not committed any error of law in dismissing the writ petition by refusing to issue mandamus as prayed for.

23. It is also well settled law that this Court in exercise of its extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India has no power to re-write contract or to compel the State to enter into an agreement.

24. For all the reasons aforestated, we do not find any merit in this special appeal. Consequently, the Special Appeal is **dismissed.**

(2021)12ILR A1047
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE VIKAS BUDHWAR, J.

Spl. Appl. No. 1552 of 2012

Hari Om Saran Srivastava ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Yogesh Kumar Saxena, Sri Siddhartha Srivastava

Counsel for the Respondents:
C.S.C.

A. Service Law – Education – Superannuation – Extension - Uttar Pradesh High School and Intermediate College (Payment and Salary to Teachers and other Employees) Act, 1971 - U.P. Intermediate Education Act, 1921 - Regulation

21 of Chapter 3 under Section 16-G - A Government servant has no right to continue in service after his retirement from service. The appellant/petitioner having retired from service much before the grant of National Award for Teachers to him, has no right for extension of service. The appellant retired from service on 30.6.2009 after attaining the age of superannuation on 01.01.2009. He was awarded the National Award to Teachers-2008 on 5.9.2009, i.e., after his retirement from service. Thus, at the time of his retirement, he was not in service. There is no provision for extension of service of a teacher after his retirement from service or extension of service with retrospective effect. Thus, once the contract of service has come to an end, then no extension of service can be accorded. Therefore, denial of extension of service of the appellant/petitioner does not deprive him of his any fundamental rights, guaranteed under the Constitution or any of his statutory rights. (Para 16, 19)

The petitioner-appellant was an Assistant Teacher, LT Grade, who had superannuated on 30.6.2009 after attaining the age of 62 years. The basic ground sought to be raised by the learned counsel for the appellant is w.r.t. the fact that the appellant is entitled to extension of services for a period of 2 years in the light of the provisions contained u/Regulation 21 Chapter 3 of the U.P. Intermediate Education Act, 1921 and the GOs dated 6.5.1982, 4.12.1986, 4.2.2004, 29.6.2004 and 30.6.2005, as the appellant has been awarded with National Award to Teachers-2008. (Para 7, 8)

Government Order dated 04.02.2004 - Two conditions have to be fulfilled, namely, (a) The concerned Teacher should be possessed with an award on the date of consideration for extension of 2 years; (b) He or she (Teacher) should be on duty and performing on the post, so assigned to him/her. (Para 9 to 11)

On the date, the appellant was awarded the National Award to Teachers-2008, he stood superannuated as the award was granted to him on 5.9.2009, whereas the date of his superannuation was 30.6.2009. Thus, the appellant on the date of being considered for extension of 2 years had already superannuated. (Para 12)

B. Order as to extension of service made on a date when servant has ceased to be in service, then order of extension is nullity. Order of extension cannot be passed after petitioner has attained the age of superannuation. (Para 14)

Contract of service came to an end with petitioner's attaining age of superannuation, and extension could have been accorded only when contract of service have been in subsistence and not at the point of time when contact of service has come to an end. **According extension of service prerequisite condition is subsistence of contract of service, and once contract of service has come to an end by operation of law on account of the incumbent having attained the age of superannuation, then same cannot be permitted to be revived by according extension with retrospective effect.** (Para 14)

C. The date, on which an award is granted, is a determining factor for the grant of benefits - In the present case, the award was with regard to the public recognition of valuable services in the community, as a Teacher of outstanding merit referable to National Award to Teacher-2008, but the same was granted to the appellant on 5.9.2009, i.e., after the date of superannuation i.e., 30.6.2009. Scheme/event, which pertains to the **conferring an award is one thing and grant of award is another thing.** Consideration and decision might be taken to award a particular incumbent referable to a particular scheme or a policy, but the crucial factor for determining the date vis-a-vis the eligibility is the date, when the award is being granted to the beneficiary. Therefore, the crucial date, relevant for the purposes of considering the claim of the appellant for grant of extension is the date, when the appellant became eligible under the provisions of Regulation 21 Chapter 3 of the U.P. Intermediate Act, 1921 and the Government Orders issued from time to time. (Para 15)

Appeal dismissed. (E-4)

Precedent followed:

1. St. of Assam & ors. Vs Padma Ram Borah, AIR 1965 SC 473 (Para 13)

2. Smt. Indira Daniels Vs St. of U.P. & ors., 2005 (3) ESC Alld 1612 (Para 14)

3. St. of Assam & ors. Vs Basanta Kumar Das, AIR 1973 SC 1252 (Para 16)

4. State Bank of Bikaner and Jaipur & ors. Vs Jag Mohan Lal, AIR 1989 SC 75 (Para 17)

5. P. Venugopal Vs U.O.I., (2008) 5 SCC 1 (Para 18)

Present Special Appeal assails judgment and order dated 20.10.2010, passed by Hon'ble Mr. V.K.Shukla, J.

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Vikas Budhwar, J.)

1. Present intra-court appeal, purported to be under Chapter 8 Rule 5 of the Rules of the High Court 1952, has been instituted by the appellant challenging the valildity and the correctness of the judgment and order dated 20.10.2010 passed by the learned Single Judge in Civil Misc. Writ Petition No. 62959 of 2010, Hariom Sharan Srivastava Vs. State of U.P. and others.

2. Though the present appeal was filed with delay condonation application, and the delay was condoned by virtue of the order dated 28.8.2012. Today, when the matter came up before this Court, then the learned counsel for the appellant as well as the learned Standing Counsel appearing for the Respondent nos.1 to 5 requested the Court to decide the present appeal at the admission stage itself. Though, notices were issued to Respondent no.6, but no response has been filed by it. Hence in the circumstances, this Court is proceeding to decide the appeal on the basis of the material available on record.

3. Heard Sri Siddhartha Srivastava holding brief of Sri Yogish Kumar Saxena, learned counsel for the petitioner and Smt. Shubhra Singh, learned counsel for the State respondents and carefully perused the records.

4. As per the case, set up by the petitioner- appellant before the Writ-Court and in the present appeal, the petitioner-appellant, has pleaded that Respondent no.6 is an Institution by the name and the nomenclature of the K.K. Inter College, Kannauj, recognized under the provisions of U.P. Intermediate Act, 1921 and is receiving grant-in-aid from the State Government. Consequently, the provisions contained under the Uttar Pradesh High School and Intermediate College (Payment and Salary to Teachers and other Employees Act, 1971 are fully applicable to Respondent no.6, Institution. It appears that the petitioner- appellant, was appointed as an Assistant Teacher in Respondent no.6/ Institution in the year 1967 and thereafter he was promoted to CT Grade Teacher in the year 1972 and further promoted as LT Grade Teacher on 8.7.1995. As the date of birth of the petitioner-appellant was 2.1.1947, therefore, he attained the age of superannuation, i.e, 62 years, on 1.1.2009, but the petitioner-appellant was granted an extension till the end of the academic Session. Thus his date of retirement of service became 30.6.2009. However, it appears that the petitioner-appellant was awarded with National Award to Teachers, 2008 by the Ministry of Human Resource Development, Department of School Education and Literacy on 5.9.2009, which is already on record at Page-47 of the paper-book. It further transpires from the record that when the petitioner was not allowed extension of his services while granting the benefit of 2 years and not being allowed to function as Assistant Teacher in Respondent no.6/ Institution till 30.6.2011, i.e, after 2 years of his actual retirement, 30.6.2009, on the strength of the Government Orders dated 6.5.1982, 4.12.1986, 4.2.2004, 29.6.2004 and 30.6.2005, then the petitioner instituted Civil Misc. Writ Petition No. 36334 of 2010, Hariom Sharan Srivastava Vs. State of U.P. seeking relief to the extent that in terms of the Government Order dated 6.6.1982 recommendation had already been made by the Regional Joint Director of Education, Kanpur Nagar for grant of extension, so a suitable decision be taken by the

State Government in the light of the same. The said writ petition was eventually disposed of on 5.7.2010 with an appropriate direction to the State Government to take appropriate decision on the recommendation of the Joint Director of Education, Kanpur Nagar strictly in accordance with law, as early as possible, preferably within 4 weeks from the date of submission of the certified copy of the order.

5. In compliance of the order dated 5.7.2010 passed in Writ Petition No. 38339 of 2010, Hariom Sharan Srivastava vs. State of U.P, the respondent no.1, has proceeded to pass an order, whereby claim set up by the petitioner-appellant for extension of the services for a period of 2 years has been declined. The said order has been made the subject matter of challenge at the instance of the petitioner-appellant, by filing Writ Petition No.62959 of 2010, Hariom Sharan Srivastava Vs. State of U.P, which came to be dismissed on 20.10.2010, which is subject matter of challenge in the present Special Appeal.

6. We have heard learned counsel for the appellant, as well as the learned Standing Counsel appearing for the State-respondents and carefully considered their submissions.

7. It is undisputed that the petitioner-appellant was an Assistant Teacher, LT Grade, who had superannuated on 30.6.2009 after attaining the age of 62 years. Admittedly, Respondent no.6 is a recognized Institution under the provisions of U.P. Intermediate Education Act, 1921 and is also receiving grant-in-aid from the State Government. So far as the service condition of the appellant is concerned, with reference to the date of his superannuation and extension, the same is clearly providing under Regulation 21 of Chapter 3 under Section 16-G. Regulation 21 of Chapter 3 for the ready reference is being quoted hereunder: -

"21. आचार्य, प्रधानाध्यापक, अध्यापकों का अधिवर्ष वय 62 वर्ष होगा। फलस्वरूप 58 वर्ष की अधिवर्षता पर मिलने वाले सेवानिवृतिक लाभ अब 60 वर्ष की अधिवर्षता आयु पर तथा 60 वर्ष की अधिवर्षता आयु पर मिलने वाले सेवानिवृतिक लाभ 62 वर्ष की अधिवर्षता आयु पर अनुमन्य होगा। यदि किसी आचार्य, प्रधानाध्यापक अथवा अध्यापक का उपर्युक्त अधिवर्ष वय 2 जुलाई और 30 जून के मध्य में किसी तिथि को पड़ता है तो उसे, उस दशा को छोड़ कर जबकि वह स्वयं सेवा विस्तरण न लेने हेतु लिखित सूचना अपने अधिवर्ष वय की तिथि से 2 माह पूर्व दे दें, 30 जून तक सेवा विस्तरण स्वमेव प्रदान किया गया समझा जायेगा, ताकि ग्रीष्मावकाश के उपरान्त जुलाई में प्रतिस्थानी की व्यवस्था हो सके। इसके अतिरिक्त सेवा विस्तारण केवल उन्हीं विशिष्ट दशाओं में प्रदान किया जा सकेगा जो राज्य सरकार द्वारा निर्धारित की जाये।

अन्य कर्मचारियों के विषय में अधिनियम में दिये गये प्राविधान यथावत रहेंगे।"

8. It is not in dispute that Regulation 21 of Chapter 3 of the U.P. Intermediate Education Act, 1921 will govern the controversy in question. The basic ground sought to be raised by the learned counsel for the appellant is with regard to the fact that the appellant is entitled to extension of services for a period of 2 years in the light of the provisions contained under Regulation 21 Chapter 3 of the U.P. Intermediate Education Act, 1921 and the Government Orders dated 6.5.1982, 4.12.1986, 4.2.2004, 29.6.2004 and 30.6.2005, as the appellant has been awarded with National Award to Teachers-2008.

9. A bare reading of the Government Order dated 4.2.2004, which is at page-51 of the paper-book, itself provides in paragraph-2 as under: -

" .....

2. अतः श्री राज्यपाल महोदय तात्कालिक प्रभाव से अशासकीय सहायता प्राप्त उच्चतर माध्यमिक विद्यालयों में शासन द्वारा सृजित पदों पर नियमानुसार कार्यरत अध्यापकों की वर्तमान अधिवर्षता आयु को 60 वर्ष से बढ़ाकर 62 वर्ष किये जाने की सहर्ष स्वीकृति प्रदान करते हैं। फलस्वरूप आयु पर तथा 60 वर्ष की अधिवर्षता आयु पर मिलने वाले सेवा नैवृत्तिक लाभ 62 वर्ष की अधिवर्षता आयु पर अनुमन्य होंगे।

3.

....."

10. In the Government Order dated 4.2.2004, purposely the word "*Karyarat Adhyapak*" has been employed, which itself implies that on the date of superannuation for extension for a period of 2 years, the respective teacher has to be on duty, i.e, he should be serving on the post in question and performing the duty so assigned to him.

11. Thus two conditions have to be fulfilled, namely, (a) The concerned Teacher should be possessed with an award on the date of consideration for extension of 2 years; (b) He or she (Teacher) should be on duty and performing on the post, so assigned to him / her.

12. After analysing the facts of the present case with regard to the aforesaid requirement as reproduced hereinabove, the net conclusion is that on the date, the appellant was awarded the National Award to Teachers-2008, he stood superannuated as the award was granted to him on 5.9.2009, whereas the date of his superannuation was 30.6.2009. Thus, the appellant on the date of being considered for extension of 2 years had already superannuated.

13. Now, a question arises as to whether in law, it is permissible to grant extension to an officer or employee, once he / she stood superannuated. The issue is no more res integra, as the Hon'ble Apex Court in the case of ***State Of Assam & Ors vs Padma Ram Borah, AIR 1965 SC 473*** has clearly observed as under:

"We do not think that the State Government had any jurisdiction to pass such an order on May 9, 1961. According to the earlier order of the State Government itself, the service of the respondent had come to an end on March 31, 1961. The State Government could not by unilateral action create a fresh contract of service to take effect from April 1, 1961. If the State Government wished to continue the service of the respondent for a further period, the State Government should have issued a notification before March 31, 1961. In R. T. Rangachari v. Secretary of State 64 Ind App 40 : 1937 AIR(PC) 27, their Lordships of the Privy Council were dealing with a case in which a Sub-Inspector of Police was charged with certain irregular and improper conduct in the execution of his duties. After the Sub-Inspector had retired on invalid pension and his pension had been paid for three months, the matter was re-opened and an order was made removing the Sub-Inspector from service as from the date on which he was invalided. Lord Roche speaking for the Board said :

"It seems to require no. demonstration that an order purporting to remove the appellant from the service at a time when, as their Lordships hold, he had for some months duly and properly ceased to be in the service, was a mere nullity and cannot be sustained.""

14. Following the judgment in the case of State of Assam (supra), a learned Single Judge of this Court in the case of **Smt. Indira Daniels Vs. State of U.P. and others, reported in 2005 (3) ESC Alld 1612** in paragraph-7, 8, 9, 10 and 11 has observed as under:-

"7. After respective arguments have been advanced, the undisputed factual position, which is emerging is to the effect that as far as petitioner is concerned, she had been performing and discharging her duties as Principal of the institution in question, and on account of commendable job performed by her, recommendation was made for giving her National Award, but before any decision could be taken in the matter of grant of National Award, she attained the age of superannuation and retired from service on 30.6.2003. In fact said National Award was given to her on 5.9.2003 i.e. much after attaining the age of superannuatipn. Therefore, the Government has chosen not to extend the service of petitioner. As

to whether the action of the State Government in not extending service of petitioner by two years is correct or incorrect decision has to be seen in the context of relevant Regulations and Government Orders. Regulation 21 of Chapter III of the Regulations framed under U.P. Intermediate Education Act, 1921, provides that an incumbent shall retire after he/she attains the age of 60 years and in case the age of superannuation falls in between the academic session then benefit is extended and superannuation takes place on the last date of academic session. Government Orders dated 23.10.1991 with reference to previous Government Order dated 6.5.1982, 27.7.1983, 4.12.1986. 2.8.1984, 3.9.1985 and 10.5.1988, provides for two years' extension of service to those teachers who have been recipient of National Awards/State Awards, and one year to those, who; had participated in the freedom struggle of 1942, and thereafter, re-appointment for further period of one year. As per the said Government Order earlier procedure has been sought to be simplified, and precise time schedule has been provided for so that decision is taken before the end of academic session. Director of Education by the first week of April is obliged to furnish full particulars in prescribed proforma along with requisite testimonials to the Committee constituted in this respect. The said Committee will forward its recommendation to State Government in the second or third week of April, and thereafter, State Government would take final decision by the first week of May. Said schedule is purposive, so that before any incumbent attains his/her age of superannuation, decision is taken qua him/her for extension of service. There is provision of extension of service of teachers, but the question is as to whether extension can be provided for with retrospective effect or not? Hon'ble apex Court in the case of State of Assam and Ors. v. Padma Ram Borah, AIR 1965 SC 473, has taken the view that order as to extension of service made on a date when servant has ceased to be in service, then order of extension is nullity. Relevant extract of the aforementioned judgment is being extracted below :

"We do not think that State Government had any jurisdiction to pass such an order on May 9, 1961. According to the earlier order of the State Government itself, the service of the respondent had come to an end on March 31, 1961. The State Government could not by unilateral action create a fresh, contract of service of the respondent for a further period; the State Government should have issued a notification before March 31, 1961. In R.T. Rangachari v. Secretary of the State, 64 Ind App 40 : AIR 1937 PC 27, their Lordships of the Privy Council were dealing with a case in which a Sub-Inspector of Police was charged with certain irregular and improper conduct in the execution of his duties. After the Sub-Inspector had retired on invalid pension and his pension had been paid for three months, the matter was reopened and an order was made removing the Sub-Inspector from service as from the date on which he was invalided. Lord Roche speaking for the Board said:

"It seems to require no demonstration that an order purporting to remove the appellant from the service at a time when as their Lordships hold, he had for some months duly and properly ceased to be in the service was a mere nullity and cannot be sustained."

The position is the same here The respondent had ceased to be in service on March 31, 1981 by the very order of the State Government. An order of retention in service passed more than a month thereafter, was a mere nullity and cannot be sustained."

8. Testing the facts of the present case on the touchstone of the principles as laid down in the aforementioned judgment that once the contract of service has come to an end, then by no stretch of imagination, any extension can be accorded to the same, here it is clearly reflected that petitioner had attained her age of

superannuation and continued till 30.6.2003, with session benefit. Contract of service came to an end with petitioner's attaining age of superannuation, and extension could have been accorded only when contract of service have been in subsistence and not at the point of time when contract of service has come to an end. Re-employment could not have been offered to petitioner, as in case of teachers, who are recipients of National Award, there is no scheme for re-employment and the scheme is only in respect to grant of extension. For according extension of service prerequisite condition is subsistence of contract of service, and once contract of service has come to an end by operation of law on account of the incumbent having attained the age of superannuation, then same cannot be permitted to be revived by according extension with retrospective effect. Scheme which provides for final decision for extension of service by first week of May clearly intended that decision for extension of service be taken during subsistence of contract of service and not when incumbent had attained age of superannuation. The precise view taken by the State Government in the present case is that as the petitioner had already attained the age of superannuation on the date when National Award had been given to him, as such extension cannot be accorded to her does not appear to be unreasonable or arbitrary view.

9. The Hon'ble apex Court in the case of Prem Dutta Chamoli v. State of U.P., (S.L.P.) (C) No. 16808 of 1993, has taken the view that teachers with National/State Awards can be given extension both in the interest of the institution and the public to utilise their services as teachers. However, Hon'ble apex Court has precluded the said extension for according Principalship or any other higher post. The said judgment has been followed by this Court in the case of Committee of Management, Indian Girls Inter College, Allahabad v. State of U.P. and Ors., (C.M.W.P. No. 50031 of 2003, decided on 26.2.2004), wherein extension as teachers has been provided for. In the aforesaid judgment, the view taken in Five Judge Bench judgment of the apex Court (supra) referred to above that order of extension cannot be passed after petitioner has attained the age of superannuation, has not been noticed, as such no advantage or benefit can be extended of the aforesaid two judgments to the petitioner.

10. As far as question of parity is concerned, here in the present case teachers who are alleged to have been accorded benefit of extension with retrospective effect same has been made, that was in compliance to the interim orders passed by this Court. As far as petitioner is concerned, there has been no interim order in her favour, and that is why the State Government has proceeded to exercise its discretion independently and as claim of petitioner was not legally sustainable, same has been refused by giving valid reasons, in support of the same. Incorrect decision cannot be made foundation and basis for asking the Court to take similar view, inasmuch as parity is not extendable qua illegal acts. As petitioner had already attained the age of superannuation, then by no stretch of imagination, extension could have been accorded to the petitioner.

11. In view of what has been stated above, present writ petition lacks merit and is dismissed."

15. The issue as to whether the date, on which an award is granted, is a determining factor for the grant of benefits? In the present case, the award was with regard to the public recognition of valuable services in the community, as a Teacher of outstanding merit referable to National Award to Teacher-2008, but the same was granted to the appellant on 5.9.2009, i.e, after the date of superannuation i.e, 30.6.2009. Scheme/ event, which pertains to the conferring an award is one thing and grant of award is another thing. Consideration and decision might be taken to award a particular incumbent referable to a particular scheme or a

policy, but the crucial factor for determining the date vis-a-vis the eligibility is the date, when the award is being granted to the beneficiary. Therefore, the crucial date, relevant for the purposes of considering the claim of the appellant for grant of extension is the date, when the appellant became eligible under the provisions of Regulation 21 Chapter 3 of the U.P. Intermediate Act, 1921 and the Government Orders issued from time to time.

16. Even otherwise, the issue that an officer or employee has no unfettered and absolute right to continue in service beyond the age of superannuation, is no more res integra in view of the law laid down by the Hon'ble Apex Court in the case of ***State of Assam and others vs. Basanta Kumar Das*, AIR 1973 SC 1252** held as under: -

"A Government servant has no right to continue in service beyond the age of superannuation and if he is retained beyond that age it is only in the exercise of the discretion of the Government."

17. Following judgment in the case of ***Basanta Kumar Das*** (supra), the Hon'ble Apex Court in the case of ***State Bank of Bikaner and Jaipur and others Vs. Jag Mohan Lal*** reported in **AIR 1989 SC 75** in paragraph 9 and 10 has observed as under:-

"9. What do we have here in this case to distinguish those principles or not to apply those principles? In our opinion, there is none. In the scheme provided herein the respondent or any other officer of the Bank has a legitimate right to remain in service till he attains the age of superannuation. But beyond that age, he has no such right unless his service is extended by the Bank. The further rights of parties are regulated by the proviso to Regulation 19(1). It reads:

"Provided that the competent authority may at its discretion, extend the period of service ot an officer who has attained the age of fifty eight years or has completed thirty years' service as the case may be, should such extension be deemed desirable in the interest of the Bank. "

10. Look at the language of proviso and the purpose underlying. The Bank may in its discretion extend the service of any officer. On what ground? For what purpose?

That has been also made clear in the proviso itself. It states "should such extension be deemed desirable in the interest of the Bank". The sole purpose of giving extension of service is, therefore, to promote the interest of the Bank and not to confer any benefit on the retiring officers. Incidentally the extension may benefit retired officials. But it is incorrect to state that it is a conferment of benefit or privilege on officers. The officers upon attaining the age of superannuation or putting the required number of years of service do not earn that benefit or privilege. The High Court has completely misunderstood the nature of right and purpose of the proviso. The proviso preserves discretion to the Bank. It is a discretion available with every employer, every management, State or otherwise. If the Bank considers that the service of an officer is desirable in the interest of the Bank, i~ may allow him to continue in service beyond the age of superannuation. If the Bank considers that the service of an officer is not required beyond superannuation, it is an end of the matter. It is no reflection on the officer. It carries no stigma."

18. Yet the Hon'ble Apex Court in the case of ***P. Venugopal vs. Union of India***, reported in **(2008) 5 SCC 1**, in paragraph-8 has observed as under:-

"It is true that in establishments like AIIMS, there is an age of superannuation governing the length of service of its officers and employees. Such age of superannuation may be suitably altered by way of reducing the age so as to affect even the serving employees under

appropriate circumstances and no exception can be taken to such course of action. Similarly under the Service Rules, there may be provision for extension of service after the attainment of the age of superannuation and it is well settled that in the event of refusal by an employer to grant an extension, the employee cannot justifiably claim to be deprived of any right or privilege. The view taken is that the employer has a discretion to grant or not to grant such extension having regard to the interest of the employer or the establishment. This view is expressed by this Court in the ***Case of State Bank of Bikaner and Jaipur and Ors. vs. Jag Mohan Lal (AIR 1989 SC 75).*** *In this case, at para 12, this Court observed as follows :*

"13. ...The Bank has no obligation to extend the services of all officers even if they are found suitable in every respect. The interest of the Bank is the primary consideration for giving extension of service. With due regard to exigencies of service, the Bank in one year may give extension to all suitable retiring officers. In another year, it may give extension to some and not to all. In a subsequent year, it may not give extension to any one of the officers. The Bank may have a lot of fresh recruits in one year. The Bank may not need the services of all retired persons in another year. The Bank may have lesser workload in a succeeding year. The retiring persons cannot in any year demand that "extension to all or none". If we concede that right to retiring persons, then the very purpose of giving extension in the interest of the Bank would be defeated. We are, therefore, of opinion that there is no scope for complaining arbitrariness in the matter of giving extension of service to retiring persons.""

19. The discussion made above leads to the conclusion that the appellant retired from service on 30.6.2009 after attaining the age of superannuation 01.01.2009. He was awarded the National Award to Teachers-2008 on 05.09.2009, i.e, after his retirement from service. Thus, at the time of his retirement, he was not in service. There is no provision for extension of service of a teacher after his retirement from service or extension of service with retrospective effect. Thus, once the contract of service has come to an end, then no extension of service can be accorded. Therefore, denial of extension of service of the appellant/ petitioner does not deprive him of his any fundamental rights guaranteed under the Constitution or any of his statutory rights. A government servant has no right to continue in service after his retirement from service. The appellant / petitioner having retired from service much before the grant of National Award for Teachers to him, has no right for extension of service.

20. Learned counsel for the appellant has miserably failed to show any illegality or manifest error in the impugned judgment passed by the learned Single Judge.

21. No other point has been raised by the learned counsel for the appellant.

22. For all the reasons aforestated, the present intra-court appeal lacks merit and is, therefore, **dismissed.**

23. Cost made easy.

(2021)12ILR A1055
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.12.2021

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.
THE HON'BLE VIVEK VARMA, J.

Spl. Appeal No. 490 of 2021

Shiksha Prachar Tatha Prasar Samiti & Anr. ...Appellants

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Anu Pratap Singh

Counsel for the Respondents:
C.S.C., Pawan Kumar Pandey, Sharad Pathak

A. Practice and Procedure – Intra-Court Appeal against interlocutory order – Maintainability - Interlocutory orders which finally decide a question or issue in controversy in the main case or which finally decide a collateral issue or a question which is not the subject-matter of the main case, are "judgments" for the purpose of filing appeals under the relevant rules of the High Court. Orders passed by the Court which are of a routine nature would not be "judgments" even if they cause some inconvenience to the parties. (Para 6)

In the present case, the order dated 01.11.2021, against which the present appeal has been preferred, is merely of a procedural nature and cannot in any manner be said to touch the merits of the controversy or the dispute between the parties so as to be deemed to have been issued in exercise of powers conferred u/Art. 226 of the Constitution. It is open to the appellant to raise his grievance before the Single Judge before whom the matter is to be taken up as per the direction of the learned Single Judge. (Para 11)

Appeal dismissed. (E-4)

Precedent followed:

1. Shah Babulal Khimji Vs Jayaben D Kania & anr., (1981) 4 SCC 8 (Para 6)

2. Midnapore People's Coop. Bank Ltd. & ors. Vs Chunilal Nanda & ors., (2006) 5 SCC 399 (Para 7)

3. Usha Devi & ors. Vs St. of U.P. & ors., Special Appeal Defective No. 1124 of 2021 (Para 8)

4. St. of U.P. Vs Kumari Renu Tiwari, 1993 (2) UPLBEC, 1325 (Para 9)

5. Ashutosh Shrotriya & ors. Vs Vice-Chancellor, Dr. B.R. Ambedkar University & ors., 2015 (8) ADJ 248 (Para 10)

Present Special Appeal challenges order dated 01.11.2021, passed by learned Single Judge.

(Delivered by Hon'ble Rakesh Srivastava, J. & Hon'ble Vivek Varma, J.)

1. Heard Sri Anu Pratap Singh, learned counsel for the appellants, Sri Amitabh Rai, learned Additional Chief Standing Counsel for respondent nos. 1 and 2, Sri Pawan Kumar Pandey, learned counsel for respondent nos. 3 and 4 and Sri Shashank Pathak, Advocate holding brief of Sri Sharad Pathak, learned counsel for respondent nos. 6 to 18.

2. The present special appeal has been filed seeking to challenge the order dated 1.11.2021 passed by the learned Single Judge in Writ Petition No. 25379 (M/S) of 2021 (Rama Kant Pandey and others v. Principal Secretary. Institutional finance, Lucknow & Ors.).

3. A preliminary objection has been raised by the learned counsel for the respondents with regard to maintainability of the special appeal. It has been contended that the order under challenge in this appeal does not decide the rights of the parties and as such, the same cannot held to be a judgment for the purposes of filing an intra Court appeal. He further submits that the appellant has filed a stay vacation application along with counter affidavit in the present writ petition and the said application is stated to be listed on 6.12.2021.

4. Learned counsel for the appellant by referring to the merits of the case has contended that the present special appeal is maintainable.

5. In order to appreciate the rival contentions, we deem it necessary to set out the impugned order dated 1.11.2021 passed by the learned Single Judge against which the present special appeal has been preferred. The order dated 1.11.2021 reads as under:

"The petitioners' names were included in the list of members of the General Body of the

Society registered for the year 2017 and 2018 with the office of the Deputy Registrar, Firms Societies and Chits. Now, by the impugned order dated 28.07.2021, the said list that was registered under Section 4B of the Societies Registration Act, has been revised. It has excluded the petitioners names. The list of 2017-18 relates to members of the General Body of the Society known as Shiksha Prachar Tatha Prasar Samiti, Village Babhnan, Post Sugar Mill Babhnan, District Gonda, carrying a total of 78 members, including the petitioners. The list that has now been drawn up and made part of the impugned order dated 28.07.2021, passed by the Deputy Registrar, Firms Societies and Chits, carries 45 names excluding the petitioners.

The submission of learned counsel for the petitioners is that once a list of members is registered, the name of its members cannot be excluded on any ground whatsoever without hearing the members whose name is proposed to be excluded. It has been asserted in paragraph Nos. 50 and 51 of the writ petition that the impugned orders have been passed by the Deputy Director, Firms Societies and Chits, in collusion with opposite party Nos. 4 and 5, without providing any opportunity of hearing to the petitioners.

Mr. Virendra Singh, learned Standing Counsel accepts notice on behalf of respondent Nos.1 and 2. Mr. Pawan Kumar Pandey, accepts notice on behalf of respondent No.5. Learned Standing Counsel and Mr. Pandey, appearing on behalf of the respondents submits that the earlier list was got illegally registered by unauthorized persons on the basis of sham elections and that before passing the impugned order, Kashi Prasad Mishra, Vipin Kumar Mishra, Brij Bihari Mishra and Shalini Mishra, respondent No.5, were heard.

Prima facie, the impugned order has been passed without opportunity of hearing. Reliance in this connection has been placed by the learned counsel for the petitioners on the decision of this Court in Shiv Narain Agarwal and Others Vs. State Of U.P. Thru. Prin.Secy. Institutional Finance, Lko. & Ors, Miscellaneous Single No.16656 of 2021 decided on 06.08.2021, where opportunity of hearing before removal of the name of a member of the General Body has been held to be an essential requirement of the exercise of power to amend the list of members of the General Body.

Issue notice to respondent Nos.3, 4 and 6.

Steps be taken by RPAD, returnable on 09.11.2021.

List this petition for admission on 01.12.2021.

Order on Civil Misc. Application No.143707 of 2021

Issue notice.

Until further orders, operation of the impugned orders dated 28.07.2021 and 26.08.2021, (Annexure Nos. 1 and 2, respectively) passed by the Deputy Director, Firms Societies and Chits, Ayodhya Division Ayodhya shall remain suspended."

6. The question as to whether an intra Court appeal would be available against an interlocutory order or not, has been considered by the Supreme Court in the case of *Shah Babulal Khimji v. Jayaben D. Kania and another, (1981) 4 SCC 8*, and it was held that interlocutory orders which finally decide a question or issue in controversy in the main case or which finally decide a collateral issue or a question which is not the subject matter of the main case, are "judgments" for the purpose of filing appeals under the relevant rules of the High Court. The law laid down by the Supreme Court in *Shah Babulal Khimji (supra)* is to the effect that orders passed by the Court which are of a routine nature would not be "judgments" even if they cause some inconvenience to the parties.

7. In *Midnapore Peoples' Coop. Bank Ltd. and others v. Chunilal Nanda and others, (2006) 5 SCC 399*, the Supreme Court again

emphasised that routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment are not to be held as "judgments" for the purposes of filing intra-court appeals. It was also held that orders which may cause some inconvenience or some prejudice to a party but which do not finally determine the rights and obligations of the parties, would not amount to "judgments".

8. The view taken by the Apex Court in the case of *Shah Babulal Khimji (Supra)* was followed by the Division Bench of this Court in *Usha Devi and others vs. State of U.P. and others (Special Appeal Defective No.1124 of 2007*). The Court said as under :

"However, in our view, this appeal is not maintainable. The Hon'ble Single Judge while permitting the respondents to file counter affidavit has granted an interim order till the next date of listing. Neither the rights of the parties have been adjudicated finally nor any issue has been decided. When an order can be construed as a "judgment" whereagainst a special appeal under Chapter-VIII Rule 5 is maintainable has been considered repeatedly in catena of cases by this Court time and again. Earlier while Letters Patent appeal under Clause 15 was maintainable against the judgment of the Hon'ble Single Judge, the question as to when an "order" would be a "judgment" came up for consideration before a full Bench in the case of Shital Din and others Vs. Anant Ram, 1993 A.L.J. 127 (FB) and it held as under:-

"".....on a reading of several clauses of the Letters Patent of the High Court we have come to the conclusion that a final decision, which effectually disposes of the appeal before the High Court, should amount to a judgment, whether it amounts to a decree or not."

The Apex Court in the case of Shah Babulal Khimji Vs. Jayaban D. Kania and another, AIR 1981 SC, 1786 while dealing with an appeal from a suit for specific performance of a contract considered the question as to whether under clause 15 of the Letters Patent, special appeal would be maintainable. In the said case the plaintiff sought an interim relief of appointment of a Receiver on the suit property during the pendency of the suit. The learned Single Judge dismissed the application seeking interim relief. The plaintiff filed special appeal under clause-15 of the Letter Patent, which was dismissed as not maintainable. The Apex Court while reversing the judgment of the appellate court, classified judgments in three categories:-

a) Final judgment

b) Preliminary judgment

c) Intermediary or interlocutory judgment.

It was also held by the Apex Court where a proceeding finally terminates after adjudication of all the issues or some of the issues the adjudication is a judgment. The adjudication is also a judgment, even though it does not result in termination of proceedings, if it possesses the characteristics and trappings of a judgment. An order may possess such characteristics and trappings when the order adversely affects a valuable right of the party by deciding an important aspect of the trial in an ancillary proceeding.

The Apex Court in para-119 at page-1817 also held as under:

"(1) That the trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the trial Judge. The courts must give sufficient allowance to the trial Judge and raise a presumption that any discretionary order, which

he passes, must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice.

(2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings."

9. The said view was followed by another Division Bench in the case of *State of U.P Vs. Kumari Renu Tiwari,1993(2) UPLBEC,1325* and the following propositions were laid down:

"(1) When the term "judgment" is used in a Statute or rule linked with the term "decree" as defined in the Code of Civil Procedure, it will have a restricted and narrow meaning but when it is not so linked, it will have a wider connotation;

(2) ordinarily for an adjudication to be a "judgment" it should bring about termination of the proceeding in which the adjudication is made; and

(3) an order passed on an application for interim relief is ordinarily not a "judgment" but it will qualify to be called "judgment' if it affects valuable right of the party or decides an important aspect of the trial and the effect of the order on the party concerned is direct and immediate rather than indirect and remote"

The same view was taken by the Division Bench in Special Appeal No. 1247 of 2005 (Musafir Singh vs. Shiv Ram Yadav and others) decided on 20.10.2005.

We have also followed and taken the same view in Special Appeal No. 1247 of 2005, Musafir Singh Vs. Shiv Ram Yadav and others decided on 20.10.2005. A similar contention has also been dispelled by this Court in Special Appeal No. 1288 of 2006 Rajendra Singh Bhadauriya Vs. Committee of Management & others decided on 6.11.2006. Moreover, after perusing the relief sought by petitioner-respondent no. 5, we are not convinced that the interim order passed by the Hon'ble Single Judge can be treated to have granted any final relief to the petitioner-respondent no. 5."

10. Similar controversy came up before a Full Bench of this Court in the case of *Ashutosh Shrotriya and others v. Vicc-Chancellor, Dr. B.R. Ambedkar University and others, 2015 (8) ADJ 248*, wherein the matter was considered in detail and the law was finally laid down to the effect that an order of a learned Single Judge upon a petition under Articles 226 or 227 of the Constitution only calling for counter and rejoinder affidavits is merely a procedural order in aid of the progression of the case. An order of this nature which is purely of a procedural nature in aid of the progression of the case and to enable the Court to form a considered view after a counter affidavit and a rejoinder are filed would not be amenable to a special appeal under Chapter VIII Rule 5. Such an order does not decide anything nor does it have the trappings of finality. If a party to the proceedings seeks to press an application for ad interim relief of a protective nature even before a counter affidavit is filed, on the ground that a situation of irretrievable injustice may result or that its substantive rights would be adversely affected in the meantime, such an argument must be addressed before the Single Judge. If such an argument is urged, it would be dealt with however briefly, consistent with the stage of the case, by the Single Judge. It is for the Division Bench hearing the special appeal to consider whether the order decides matters of moment or is of such a nature that would affect the vital and valuable rights of the parties and causes serious injustice to the concerned party.

11. In the facts of the present case the order dated 1.11.2021, against which the present appeal has been preferred, is merely of a procedural nature and cannot in any manner be said to touch the merits of the controversy or the

dispute between the parties so as to be deemed to have been issued in exercise of powers conferred under Article 226 of the Constitution. It is open to the appellant to raise his grievance before the Single Judge before whom the matter is to be taken up as per the direction of the learned Single Judge.

12. In view of the aforementioned facts and circumstances, the preliminary objection raised with regard to maintainability of the special appeal under the provisions of Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, is sustained.

13. The special appeal is held to be not maintainable and is accordingly dismissed.

(2021)12ILR A1060
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.11.2021

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE JASPREET SINGH, J.

Spl. Appeal No. 98 of 2021

Madhusoodan ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Mr. Anand Prakash Pandey

Counsel for the Respondents:
Mr. Manjiv Shukla, Addl. C.S.C.

A. Service Law – Appointment – Concealment - Pendency of criminal case - Allahabad High Court Rules, 1952 - Chapter VIII Rule 5 - It could not be disputed that the application form did not require the appellant to disclose pendency of any criminal proceedings. All what the application required was to disclose whether the appellant had been convicted of any offence or not and in the instant case, the appellant has not been convicted by any competent court in respect of any offence. Also, till such time the application form was filled and the affidavit was furnished by the appellant, he was not served with summons of the criminal case, hence **the affidavit of the appellant stating to the best of his knowledge that he has not been convicted by any court of law, cannot be said to be a statement which was incorrect or suffered from any concealment.** (Para 9 to 11, 14, 15)

Hon'ble Court after noticing the dictum of the Apex Court in the case of Sandeep Kumar's case *(infra)* as well as Avtar Singh's case *(infra)* held that it was not open for the Authorities to have taken a different view on the same set of facts. Also, for the reason that once the learned Single Judge in its judgment dated 05.08.2019 had already noticed that the case of the appellant was covered by the judgment of Avtar Singh's case *(infra),* (Para 8, 16)

Appeal allowed. (E-4)

Precedent followed:

1. Avtar Singh Vs U.O.I. 2016, (2016) 8 SCC 471 (Para 5)

2. Commissioner of Police & ors. Vs Sandeep Kumar, (2011) 4 SCC 644 (Para 12)

Present Special Appeal challenges order dated 20.01.2021, passed by learned Single Judge as well as order dated 31.08.2019, passed by respondents.

(Delivered by Hon'ble Jaspreet Singh, J.)

1. The instant intracourt appeal has been preferred under Chapter VIII Rule 5 of Allahabad High Court Rules, 1952 assailing the order dated 20.01.2021 passed by the learned Single Judge in Writ Petition No.33715 (S/S) of 2019 (Madhusoodan Vs. State of U.P. & others).

2. In order to appreciate the controversy involved, certain brief facts giving rise to the instant appeal are being noticed hereinafter.

3. The appellant had applied for the post of Police Constable in the Uttar Pradesh Police in

pursuance of an advertisement issued by the Uttar Pradesh Police Recruitment and Promotion Board Lucknow, for Police Constable and Constable P.A.C. (male) Direct Recruitment, 2015. The appellant was selected and he was also provided with a provisional admit card. The appellant also participated in the physical test scheduled on 23rd of April, 2016, thereafter the documents of the appellant were verified and he was also found medically fit.

4. Thereafter, on 30.06.2018, the appellant received a notice from the Additional District Magistrate (Judicial), Ambedkar Nagar seeking his explanation regarding the case registered against the appellant. The appellant replied to the same. However, the reply of the appellant did not find favour. Consequently by means of order dated 21.07.2018, the appellant was not found fit for appointment on the ground of pendency of criminal case number NCR No.292 of 2013 under Sections 323, 504, 506, 427 IPC, at police station Jalalpur, District Ambedkar Nagar.

5. The appellant assailed the order dated 21.07.2018 before learned Single Judge of this Court. After hearing the parties the learned Single Judge, after noticing the dictum of Apex Court in the case of **Avtar Singh Vs. Union of India 2016 reported as (2016) 8 SCC 471** partly allowed the writ petition. The relevant portion of the judgment dated 05.08.2019 reads as under:-

"Consequently, keeping in view the aforesaid principles of law enunciated by Hon'ble the Supreme Court in the case of Avtar Singh (supra), the order impugned cannot be sustained. As such, the writ petition is partly allowed. A writ of certiorari is issued quashing the impugned order dated 21.07.2018, a copy of which is annexure 1 to the petition. A writ of mandamus is issued directing the competent authority to consider the case of the petitioner and pass a reasoned and speaking order strictly in light of the principles of law laid down by Hon'ble the Supreme Court in the aforesaid judgment within a period of three weeks from the date a certified copy of this order is produced before him.
Consequences to follow."

6. The respondents thereafter considering the case of the appellant again by means of the impugned order dated 31.08.2019 rejected the case of the appellant. Being aggrieved against this order of rejection dated 31.08.2019 the appellant preferred the writ petition in this Court which has been dismissed by the learned Single Judge.

7. The Court has heard the learned counsel for the appellant Shri Anand Prakash Pandey and the learned Standing Counsel for the State-respondents Shri Manjiev Shukla.

8. Submission of the learned counsel for the appellant is that the respondents have erred in rejecting the case of the appellant and even the learned Single Judge has not noticed that the appellant had not concealed any fact regarding the said criminal case. It is also urged that the case of Avtar Singh (supra) was squarely applicable as already held by the learned Single Judge in the first round of litigation in its judgment dated 05.08.2019 passed in Writ Petition No.22104 (S/S) of 2018.

9. Further submission of the learned counsel for the appellant is that the application form which was filled, did not require the appellant to disclose the pendency of any criminal case. Learned counsel has drawn the attention of the Court to the application form which has been brought on record as Annexure A-1 with this appeal and has pointed out that all what the application form required is to state whether the appellant has been convicted by any competent court.

10. It is also urged that in so far as the appellant is concerned, he was not even aware of the said proceedings. He has drawn the attention of the Court to the extracts of the order-sheet of the case NCR No.292 of 2013 and has indicated that though the summons were issued by the Court but the same were never served on the appellant till the time, he had filled the said application and even subsequently he had furnished an affidavit and till such time, he was not aware of the said proceedings. It is only on 11.09.2019 that the appellant had been served with the summon.

11. Thus, the submission is that the appellant has never been convicted at any time. Even at the time of filling of the application he was not aware of the proceedings as till then he was not served with the summons and thus there was never any concealment or intention to conceal the pendency of any proceedings. Even though the application did not seek any information regarding pendency of any criminal case.

12. It is submitted that once in Avtar Singh's case (supra) wherein the Apex Court has laid down principles to be considered while making an appointment of a person against whom certain cases are pending and morefully enunciated in para 38 of the said report and the same were squarely applicable and held by the learned Single Judge in its judgment dated 05.08.2019 passed in Writ Petition No.22104 (S/S) of 2018, it was not open for the respondents to have taken any other view, hence the impugned order dated 31.08.2019 was bad in the eyes of law and this aspect of the matter has not been considered by the learned Single Judge. Learned Counsel for the appellant has relied upon a decision of the Apex Court in the case of ***Commissioner of Police and others Vs. Sandeep Kumar reported in (2011) 4 SCC 644*** in support of his submissions.

13. Learned Standing Counsel, on the other hand, has submitted that since the appellant did not inform the Authorities regarding the pendency of the criminal case, consequently the impugned order passed by the Authorities, finding the appellant not fit for appointment, cannot be faulted. Moreover, even the learned Single Judge has found that the pendency of the criminal case was not properly disclosed and a petition under Article 226 of the Constitution of India being discretionary in nature and having been dismissed for want of disclosure in the aforesaid circumstances, the appeal is also devoid of merits and may not be entertained and is liable to be dismissed.

14. Apparently, what the learned Standing Counsel could not dispute is the fact that the application form did not require the appellant to disclose pendency of any criminal proceedings. All what the application required was to disclose whether the appellant had been convicted of any offence or not and in the instant case, the appellant has not been convicted by any competent court in respect of any offence.

15. Learned Standing Counsel also could not dispute the fact that till such time the application form was filled and the affidavit was furnished by the appellant, he was not served with the summons of the criminal case, hence the affidavit of the appellant stating to the best of his knowledge that he has not been convicted by any court of law, cannot be said to be a statement which was incorrect or suffered from any concealment.

16. Noticing the dictum of the Apex Court in the case of Sandeep Kumar's case (supra) as well as Avtar Singh's case (supra) also for the reason that once the learned Single Judge in its judgment dated 05.08.2019 had already noticed that the case of the appellant was covered by the judgment of Avtar Singh's case (supra), it was

not open for the Authorities to have taken a different view on the same set of facts.

17. It is also not disputed that the sole ground of passing the order dated 31.08.2019 is the alleged non-disclosure of the criminal case.

18. In view of the aforesaid, we find that the dismissal of the writ petition by the learned Single Judge was not justified, accordingly, we are of the view that the appeal deserves to be allowed. Consequently, the order dated 20.01.2021 passed by the learned Single Judge is set aside so also the impugned order dated 31.08.2019 shall stand set aside and the writ petition shall stand allowed.

19. Consequences to follow.

20. In the facts and circumstances, there shall be no order as to costs.

(2021)12ILR A1063
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2021

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Spl Appl. (D) No. 660 of 2021

State of U.P. & Ors. ...Appellants
Versus
Pooja Singh ...Opp. Party

Counsel for the Appellants:
Sri Rama Nand Pandey

Counsel for the Respondents:
Sri Om Prakash Singh

A. Service Law – Compassionate Appointment - U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 - Rule 2(c)(iii) - This Court has held that exclusion of married daughter from the ambit of expression of "family" as defined u/Rule 2(c) of the Rules is illegal and unconstitutional. Meaning thereby, **even married daughters are eligible for appointment on compassionate basis**, and hence, cannot be treated ineligible, as such, as this Court has not framed any law rather has merely declared the law. (Para 10)

B. No concealment of fact - When the respondent filed application seeking compassionate appointment, she was not married as she is stated to have married on December 01, 2001 whereas the application for compassionate appointment was filed on October 13, 1999. Hence, **it is not a case of concealment of fact in the application filed by the respondent**. (Para 7, 8)

Considering the fact that the respondent is in service for the last more than 15 years and, there was no concealment of fact as such in the application filed by her seeking compassionate appointment, no ground is made out for interference. (Para 11)

Appeal dismissed. (E-4)

Precedent followed:

1. Smt. Vimla Srivastava Vs St. of U.P. & anr., 2016 (1) ADJ 21 (DB) (Para 4, 10)

2. The St. of U.P. & anr. Vs Neha Srivastava, Special Leave Petition No. 22646 of 2016, decided on 23.07.2019 (Para 4, 10)

Present Special Appeal assails judgment and order dated 25.01.2021, passed by learned Single Judge.

(Delivered by Hon'ble Rajesh Bindal, C.J.)

1. Order dated January 25, 2021 passed by learned Single Judge has been challenged by the State by filing the present intra-Court appeal.

2. The respondent had approached this Court challenging the order dated September 1, 2017, whereby the order of her appointment on compassionate basis was cancelled on the

ground that she had concealed the factum of her being married at the time of initial appointment.

3. Learned Standing Counsel, appearing for the appellants, submitted that it is a case where respondent had concealed the factum of her being married at the time of the compassionate appointment, hence there being concealment of fact, her appointment is liable to be cancelled. Relying upon Rule 2(c)(iii) of U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as "the Rules"), it is submitted that married daughter is not included in the definition of the "family". That being so, the appointment granted to the respondent on compassionate basis was liable to be withdrawn. As such, there was no error in the order withdrawing compassionate appointment granted to the respondent and learned Single Judge has wrongly quashed the same.

4. On the other hand, learned counsel for the respondent submitted that exclusion of unmarried daughter from the definition of the family vide Rule 2(c)(iii) of the Rules was struck down by this Court in **Smt. Vimla Srivastava Vs. State Of U.P. And Another 2016(1) ADJ 21 (DB)**. It means that the daughter, whether married and unmarried, both are now included within the definition of the "family" for the purpose of Rule 2(c) of the Rules. **Special Leave Petition No. 22646 of 2016 (The State of U.P. and another Vs. Neha Srivastava**) against the same was dismissed by Hon'ble Supreme Court vide order dated July 23, 2019.

5. It is further submitted that at the time when the respondent filed application for appointment on compassionate basis, she was not married, hence, there was no concealment of fact as such. Marriage took place thereafter. She, being in service for the last 15 years and having family to support, should not be thrown out of service. At present, she would be over age for entry into service.

6. Heard learned counsel for the parties and perused the paper book.

7. As is evident from the fact on record, father of the respondent, who was working as Labour Inspector in the Labour Department, died during service in September, 1980. The respondent was an infant at that time. She attained majority in the year 1998. Only thereafter, she filed application for appointment on compassionate basis on October 13, 1999. Her case remained pending for a period of about six years. During interregnum period, on December 1, 2001, she got married. In pursuance of order dated July 21, 2006 issued by Government giving appointment to the respondent on a Class-III post, Deputy Labour Commissioner on November 4, 2006 issued appointment letter, pursuant whereof the respondent joined service.

8. From the aforesaid fact, it is evident that when the respondent filed application seeking compassionate appointment, she was not married as she is stated to have married on December 01, 2001 whereas the application for compassionate appointment was filed on October 13, 1999. Hence, it is not a case of concealment of fact in the application filed by the respondent.

9. Rule-2 (c)(iii) of the Rules defines "family" as under:

"2. Definitions.- In these rules, unless the context otherwise requires,-

.....

(c) "family" shall include the following relations of the deceased Government servant:

(i) Wife or husband;

(ii) Sons;

(iii) Unmarried and widowed daughters;"

10. Validity of the aforesaid provision, whereby married daughters were excluded for consideration for appointment on compassionate basis, was subject matter of challenge before this Court in **Smt. Vimla Srivastava's case (supra).** This Court held that exclusion of married daughter from the ambit of expression of "family" as defined under Rule 2(c) of the Rules is illegal and unconstitutional, hence was struck down. Special Leave Petition against the aforesaid judgment was dismissed by Hon'ble Supreme Court vide order dated July 23, 2019 in **Neha Srivastava's case (supra).** Meaning thereby, after exclusion of married daughter for being eligible for appointment on compassionate basis having been struck down by this Court, even married daughters are eligible for appointment on compassionate basis, and hence, cannot be treated ineligible, as such, as this Court has not framed any law rather has merely declared the law.

11. Considering the fact that the respondent is in service for the last more than 15 years and, as noticed above, there was no concealment of fact as such in the application filed by her seeking compassionate appointment, we do not find that any ground is made out to interfere in the order passed by learned Single. The appeal is, accordingly, dismissed.

(2021)12ILR A1065
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2021

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Spl Appl. No. 278 of 2021

Arti **...Appellant**

Versus

State of U.P. & Ors. **...Respondents**

Counsel for the Appellant:
Sri Ashutosh Mani Tripathi, Sri D.S.M. Tripathi

Counsel for the Respondents:
Sri P.K. Ganguly

A. Service Law – Compassionate Appointment - Mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. **If the family had sufficient means to carry on its affairs for long time, in such a case compassionate appointment cannot be made. The purpose of compassionate appointment is not to provide employment by succession, it is not a source of recruitment but it is to meet immediate hardship arose due to sudden demise of sole bread earner of the family leaving behind the legal heirs in penury. The purpose is not for providing a post against post. It is not reservation in service by virtue of succession.** (Para 6 to 11)

Late Sri Jagdish Narayan Mishra (Assistant Teacher, L.T. Grade) was survived by four persons, his wife, his son Ashutosh Mishra, his daughter Anju Devi and appellant Arti Mishra. In respect of the appellant, it is recorded that she has got married 15 years ago and her husband is employed, and despite opportunity, learned counsel for the appellant could not establish from the record the penury condition of the appellant or the family of the deceased so as to entitle her for consideration of her request for compassionate appointment sympathetically. He also could not satisfy the Court as to why the application seeking compassionate appointment was made at such a belated stage. (Para 4, 5)

Compassionate appointment is an exception to the general rule of appointment in the public services. The whole object of granting compassionate appointment is thus to enable the family to tide over the sudden crisis. (Para 11)

Appeal dismissed. (E-4)

Precedent followed:

1. Mumtaz Yunus Mulani Vs St. of Mah. & ors., (2008) 11 SCC 384 (Para 7)

2. Santosh Kumar Dubey Vs St. of U.P. & ors., JT 2009 (8) SCC 135 (Para 8)

3. M/s Eastern Coalfields Ltd. Vs Anil Badyakar & ors., JT 2009 (6) SC 624 (Para 8)

4. St. of H.P. & anr. Vs Shashi Kumar, (2019) 3 SCC 653 (Para 9)

5. Umesh Kumar Nagpal Vs St. of Har., (1994) 4 SCC 138 (Para 9)

6. The St. of U.P. & ors. Vs Premlata, Civil Appeal No. 6003, decided on 05.10.2021 (Para 11)

Present Special Appeal assails judgment and order dated 24.09.2021, passed by Hon'ble Mr. Pankaj Bhatia, J.

(Delivered by Hon'ble Rajesh Bindal, C.J.)

1. This intra-Court appeal filed under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, is directed against the order dated 24.09.2021 passed by learned Single Judge dismissing the Writ Petition.

2. The facts, in brief, are that the appellant's father, Late Jagdish Narain Mishra, was working as Assistant Teacher (L.T. Grade) in Sri Bhola Nath Shanti Niketan Inter College, Belwa Bazar, Mariahu, Jaunpur (hereinafter referred to in short as "College"). He died during service on January 21, 2005, leaving behind his wife, son Ashutosh Mishra, and two daughters, Anju and the appellant, Arti. At that time the appellant claimed to be unmarried.

However, it appears that subsequently the appellant got married sometime in the year 2006-07. As per own case of the appellant, as stated in Annexure-5 to the writ petition, she applied for compassionate appointment on October 24, 2008 under the U.P. Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 (hereinafter referred to in short as "the Rules"). The application of the appellant seeking compassionate appointment was rejected by the District Inspector of Schools, Jaunpur (hereinafter referred to in short as "DIOS") vide order dated September 9, 2011/ December 13, 2012 on the ground that after examining the matter, it has come to his notice that the applicant, Arti, is married. Aggrieved against the same the appellant filed Writ Petition (Writ-A) No. 21185 of 2013 challenging the aforesaid order passed by DIOS. The learned Single Judge finding that despite being married, the petitioner is not excluded from the definition of the family as defined under Rule 2(c) of the Rules, allowed the writ petition vide order dated January 06, 2020 and set aside the aforesaid order passed by the DIOS. The learned Single Judge further directed the DIOS to reconsider the appellant's claim for compassionate appointment and observed that the candidature of the petitioner would not be ignored only for the reason that she is a married daughter. Pursuant to the aforesaid order dated January 06, 2020, the DIOS reconsidered the claim of the appellant regarding compassionate appointment and rejected the same vide order dated 29.12.2020. Feeling aggrieved, appellant filed Writ Petition (Writ-A) No. 2045 of 2021, which has been dismissed by learned Single Judge vide order dated 24.09.2021 affirming the order passed by DIOS, which is under challenge.

4. The learned Single Judge, while dismissing the writ petition of the appellant, has noticed the reasons given by of DIOS in the order rejecting the claim of the appellant for compassionate appointment and observed as under:

"A perusal of the impugned order records that late Sri Jagdish Narayan Mishra was survived by four persons, his wife, his son

Ashutosh Mishra, his daughter Anju Devi and petitioner Arti Mishra. In respect of the petitioner, it is recorded that she has got married 15 years ago and her husband is employed, and finding that no hardship existed so as to consider the case for appointment of the petitioner, the application was rejected."

5. Despite repeated opportunity, learned counsel for the appellant could not point out any illegality, irregularity or infirmity in the aforesaid findings recorded by learned Single Judge. Moreover, even before this Court, despite opportunity, learned counsel for the appellant could not establish from the record the penury condition of the appellant or the family of the deceased so as to entitle her for consideration of her request for compassionate appointment sympathetically. He also could not satisfy the Court as to why the application seeking compassionate appointment was made at such a belated stage.

6. It is well settled that if the family had sufficient means to carry on its affairs for long time, in such a case compassionate appointment cannot be made. The purpose of compassionate appointment is not to provide employment by succession but it is to meet immediate hardship arose due to sudden demise of sole bread earner of the family leaving behind the legal heirs in penury.

7. In **Mumtaz Yunus Mulani Vs. State of Maharashtra and others (2008) 11 SCC 384**, the Court held that now a well settled principle of law is that appointment on compassionate ground is not a source of recruitment. The reason for making such a benevolent scheme by the State or public sector undertakings is to see that the dependants of the deceased are not deprived of the means of livelihood. It only enables the family of the deceased to get over sudden financial crises.

8. The purpose of compassionate appointment is not for providing a post against post. It is not reservation in service by virtue of succession. If the family is not in penury and capable to maintain itself for a long time, no mandamus would be issued after a long time for providing compassionate appointment to a legal heir of the deceased employee. In **Santosh Kumar Dubey Vs. State of U.P. and others JT 2009 (8) SC 135 and M/s Eastern Coalfields Ltd. Vs. Anil Badyakar and others JT 2009(6) SC 624** the Apex Court has declined to issue any mandamus after expiry of a long time. In **Santosh Kumar Dubey Vs. State of U.P.'s case (upra)** after considering the Rules the Apex Court said that if family of the deceased has been able to survive, after five years no mandamus or direction should be issued for giving compassionate appointment.

9. Recently, the Supreme Court in **State of Himachal Pradesh and Anr. vs. Shashi Kumar reported in (2019) 3 SCC 653** had an occasion to consider the object and purpose of appointment on compassionate ground. The Court referring to earlier judgment in **Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138** observed as under:

"21. ... it is necessary to note that the nature of compassionate appointment had been considered by this Court in Umesh Kumar Nagpal v. State of Haryana [(1994) 4 SCC 138 : 1994 SCC (L&S) 930]. The principles which have been laid down in Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] have been subsequently followed in a consistent line of precedents in this Court. These principles are encapsulated in the following extract:

"2. ... As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the

public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. ... What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. (emphasis added)

10. The Court further referring to its earlier decision in **Mumtaz Yunus Mulani Vs. State of Maharashtra's case (surpa),** in para 26, observed:

"26. The judgment of a Bench of two Judges in **Mumtaz Yunus Mulani v. State of Maharashtra (2008) 11 SCC 384** has adopted the principle that appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden financial crisis. The financial position of the family would need to be evaluated on the basis of the provisions contained in the scheme."

11. Hon'ble Supreme Court very recently in **Civil Appeal No. 6003 of 2021 (The State of Uttar Pradesh and others Vs. Premlata)** decided on October 5, 2021, in para 10 of the judgment, referring to the above authorities on the subject, said as under:

"10. Thus as per the law laid down by this court in the aforesaid decisions, compassionate appointment is an exception to the general rule of appointment in the public services and is in favour of the dependents of a deceased dying in harness and leaving his family in penury and without any means of livelihood, and in such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis.

(emphasis added)

12. Taking into account the above binding precedents and in view of the discussions made hereinabove, we do not find any error in the order passed by learned Single Judge, impugned herein, so as to warrant interference.

13. The appeal lacks merits and is, accordingly, dismissed.

(2021)12ILR A1068
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.11.2021

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

First Appeal From Order No. 71 of 2015

Dayal & Anr. ...Appellants
Versus
Sanjeev Batra & Anr. ...Respondents

Counsel for the Appellants:
Balendru Shekhar, Prakash Chandra

Counsel for the Respondents:
Vashu Deo Mishra

A. Interpretation - Doctrine of prospective overruling - where the question of law has been declare & settled by the Courts, then it has to be held that the said question of law was in existence right from day one - decision of Apex Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception - Prospective operation is only exception to this general rule - Under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved - principle of prospective overruling would not apply in respect of the judgment passed by the Supreme Court unless and until it is expressly so mentioned in the judgment - However, where the rights of a party have been considered and declared, then the said proceedings cannot be reopened on the ground that the judgment on the basis of which, the rights were declared, has been overruled . (para 8, 9, 12, 14, 16, 17)

Held - though the date of accident is 07.03.2013 but still the judgment passed in the case of National Insurance Company Ltd. Vs Pranay Sethi & ors., which is of the year 2017, is applicable in the present first appeal from order which is continuation of original proceedings

B. Civil Law - Accident claim - Motor Vehicles Act,1988 – Enhancement of compensation - Deceased was 20 years old at the time of accident on 07.03.2013 & was black smith when he was hit by Vehicle and succumbed to the injuries – Tribunal assumed notional income to be Rs. 3,000/- per month, based upon the age of father of the deceased applied the multiplier of 11, No amount towards future prospects was provided by the Tribunal & under the head(s) of miscellaneous expenses and loss of estate Tribunal awarded Rs. 5000/- each – Held - Court held notional income of the deceased to be Rs. 5,000/- per month- Future prospects at 40% as deceased was self-employed & below 40 years - multiplier of 18 applied as the age of the deceased was 20 years at the time of accident - Loss of estate Rs 15000/- +Loss of Funeral expense Rs 15000/- + Loss of consortium to both appellants Rs 40000/- +Rs 40000/- person getting amount towards loss of consortium is not entitled to compensation towards loss of love and affection - interest @ 7%, from the date of filing of claim petition till realization (Para 34)

Allowed. (E-5)

<u>Cases Relied on</u> :

1. National Insurance Company Ltd. Vs Pranay Sethi & ors. (2017) 16 SCC 680: 2017 ACJ 2700

2. Sarwan Kumar Vs Madan Lal Aggarwal (2003) 4 SCC 147

3. M.A. Murthy Vs St. of Karn. (2003) 7 SCC 517

4. K. Madhava Reddy Vs St. of A.P. (2014) 6 SCC 537

5. B.A. Linga Reddy Vs Karnataka State Transport Authority (2015) 4 SCC 515

6. P.V. George Vs St. of Kerala (2007) 3 SCC 557

7. Bengal Iron Corpn. Vs CTO 1994 Supp (1) SCC 310

8. U.O.I. (E-5)s Madras Telephone SC & ST Social Welfare Assn. (2006) 8 SCC 662

9. Magma General Insurance Company Ltd. Vs Nanu Ram & ors. 2018 SCC Online SC 1546

10. Chameli Devi & ors. Vs Jivrail Mian & ors. 2019 (4) TAC 724 (S.C.)

11. Syed Sadiq & ors. Vs Divisional Manager, United India Insurance Com. Ltd.; (2014) 2 SCC 735

12. Smt. Sheela Pandey W/O Late Surendra Kumar Pandey & ors. Vs The New India Insurance Co. Ltd. Bena Ghabar Branch & ors.s F.A.F.O. (D) No. 748 of 2011

13. New India Assurance Co. Ltd. Vs Resha Devi & ors. 2017 (4) T.A.C. 288 (All.)

14. New India Assurance Company Limited Vs Smt. Somwati & ors. 2020 (3) T.A.C. 711 (S.C.),

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Prakash Chandra, learned counsel for the appellants and Sri Vashu Deo Mishra, learned counsel for the respondents.

2. The present appeal has been filed for enhancement of compensation awarded by Motor Accident Claims Tribunal (in short "Tribunal"), vide judgment and order dated 22.10.2014 passed in Claim Petition No. 134 of 2013 (Dayal and Others Versus Sanjeev Batra and Others).

3. Facts, in brief, as pleaded in claim petition before the Tribunal, are that the deceased Heera Lal, who was 20 years old at the time of accident, on 07.03.2013 at about 06:30 AM while he was waiting for some vehicle to reach Lucknow at a place which is situated at Lucknow-Raebareli National Highway near village Mastipur, P.S.-Nigoha, Lucknow, was hit by Vehicle Tata Ace bearing Registration No. UP-32 CZ-5364 and he succumbed to the injuries sustained in the accident and the driver of the Tata Ace was driving it rash and negligently, are not in dispute. The plea that the deceased was earning Rs. 5,000/- per month was not accepted by the Tribunal. The Tribunal, on the basis of notional income i.e. Rs. 3,000/- per month, awarded the compensation. No amount towards future prospects was provided by the Tribunal. Under the head(s) of miscellaneous expenses and loss of estate, the Tribunal awarded Rs. 5000/- each.

4. For the purposes of adjudication of the claim, the Tribunal framed the following issues:-

१. क्या दिनांक 07–3–2013 को समय करीब 06:30 बजे सुबह लखनऊ रायबरेली राजमार्ग पर, ग्राम मस्तीपुर के सामने थाना निगोहां, लखनऊ में टाटा ऐस वाहन संख्या यू0पी0–32/सी0जेड0–5364 के चालक ने वाहन के इन्तजार में खड़े हीरा लाल को टक्कर मार दी जिससे उसे काफी चोटें आई जिसके फलस्वरूप घटनास्थल पर ही उसकी मृत्यु हो गयी?

2. क्या दुर्घटना के समय टाटा ऐस वाहन संख्या यू0पी0–32/सी0जेड0–5364 विपक्षी संख्या–2, बीमा कम्पनी से बीमित थी?

3. क्या दुर्घटना के समय टाटा ऐस वाहन संख्या यू0पी0–32/सी0जेड0–5364 के चालक के पास वैध एवं प्रभावी चालन अनुज्ञप्ति थी?

4. क्या याचीगण क्षतिपूति के रूप में धनराशि पाने के अधिकारी हैं, यदि हॉ तो कितनी और किससे ?

5. There is no dispute regarding the findings recorded by the Tribunal on issue nos. 1 to 3. The issue no. 4 which relates to grant of compensation is in question before this Court.

6. While pressing the present appeal for enhancement of compensation, the first issue raised is to the effect that the Tribunal wrongly applied the multiplier. Elaborating on this aspect, learned Counsel for the appellants submitted that multiplier of 18 ought to have been applied after taking note of the age of the deceased i.e. 20 years at the time of accident, however, in the present case the multiplier of 11 has been applied by the Tribunal after considering the age of the father of the deceased. In this regard reliance has been placed on the judgment of Hon'ble Supreme Court passed in the case of ***National Insurance Company Ltd. Vs. Pranay Sethi and Others; reported in (2017) 16 SCC 680: 2017 ACJ 2700***. Relevant paragraph 59 reads as under:-

59. In view of the aforesaid analysis, we proceed to record our conclusions:

59.1. The two-Judge Bench in Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC

(L&S) 167] should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma[Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] , a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

59.2. As Rajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] has not taken note of the decision in Reshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] , which was delivered at earlier point of time, the decision in Rajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] is not a binding precedent.

59.3. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

59.4. In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

59.5. For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paras 30 to 32 of Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] which we have reproduced hereinbefore.

59.6. The selection of multiplier shall be as indicated in the Table in Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] read with para 42 of that judgment.

59.7. The age of the deceased should be the basis for applying the multiplier.

59.8. Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

7. On the issue of multiplier, the learned Counsel for the Insurance company Sri Vashu Deo Mishra, submitted that the judgment passed in the case of ***Pranay Sethi (Supra)***, is of the year 2017 and it is not applicable in the present case as the accident in which Heeralal expired is of year 2013. However, he could not dispute the ratio of the judgment passed by the Hon'ble Supreme Court in the case of ***Pranay Sethi (Supra)***. The submission of learned Counsel for the Insurance Company Sri Vashu Deo Mishra, on the issue of applicability of law laid down by the Hon'ble Supreme Court in the judgment passed in the case of ***Pranay Sethi (Supra)*** is fallacious and unsustainable as law is otherwise.

8. All the judgments apply retrospectively except otherwise provided. It is well established principle of law that the principle of prospective operation of over ruling of judgment, does not apply except where it is specifically mentioned.

The law declared by the Hon'ble Supreme Court is normally assumed to be the law from inception. Prospective operation is only exception to this general rule. It is trite law that where the question of law has been settled by the Courts, then it has to held that the said question of law was in existence right from the first day.

9. The Hon'ble Supreme Court in the case of ***Sarwan Kumar vs. Madan Lal Aggarwal;*** r***eported in*** (2003) 4 SCC 147 , observed as under:-

"15. For the first time this Court in Golak Nath v. State of Punjab accepted the doctrine of "prospective overruling". It was held: (AIR p. 1669, para 51)

"51. As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions: (1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest court of the country i.e. the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its "earlier decisions' is left to its discretion to be moulded in accordance with the justice of the cause or matter before it."

The doctrine of "prospective overruling" was initially made applicable to the matters arising under the Constitution but we understand the same has since been made applicable to the matters arising under the statutes as well. Under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship on those who had trusted to its existence. Invocation of the doctrine of "prospective overruling" is left to the discretion of the Court to mould with the justice of the cause or the matter before the Court. This Court while deciding Gian Devi Anand case did not hold that the law declared by it would be prospective in operation. It was not for the High Court to say that the law laid down by this Court in Gian Devi Anand case would be prospective in operation. If this is to be accepted then conflicting rules can supposedly be laid down by different High Courts regarding the applicability of the law laid down by this Court in Gian Devi Anand case or any other case. Such a situation cannot be permitted to arise. In the absence of any direction by this Court that the rule laid down by this Court would be prospective in operation, the finding recorded by the High Court that the rule laid down in Gian Devi Anand case by this Court would be applicable to the cases arising from the date of the judgment of this Court cannot be accepted being erroneous."

10. The Hon'ble Supreme Court in the case of ***M.A. Murthy vs. State of Karnataka; reported in*** (2003) 7 SCC 517, observed as under:-

"8. The learned counsel for the appellant submitted that the approach of the High Court is erroneous as the law declared by this Court is presumed to be the law at all times. Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in L.C. Golak

Nath v. State of Punjab. InManaging Director, ECIL v. B. Karunakar the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (See Ashok Kumar Gupta v. State of U.P. and Baburam v. C.C. Jacob.) It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs. That being the position, the High Court was in error by holding that the judgment which operated on the date of selection was operative and not the review judgment in Ashok Kumar Sharma case No. II. All the more so when the subsequent judgment is by way of review of the first judgment in which case there are no judgments at all and the subsequent judgment rendered on review petitions is the one and only judgment rendered, effectively and for all purposes, the earlier decision having been erased by countenancing the review applications. The impugned judgments of the High Court are, therefore, set aside."

11. The Hon'ble Supreme Court in the case of ***K. Madhava Reddy vs. State of Andhra Pradesh; reported in*** (2014) 6 SCC 537, observed as under:-

"10. We have heard the learned counsel for the parties at length. The doctrine of prospective overruling has its origin in American jurisprudence. It was first invoked in this country in Golak Nath v. State of Punjab, with this Court proceeding rather cautiously in applying the doctrine, was conscious of the fact that the doctrine had its origin in another country and had been invoked in different circumstances. The Court sounded a note of caution in the application of the doctrine to the Indian conditions as is evident from the following passage appearing in Golak Nath case wherein this Court laid down the parameters within which the power could be exercised. This Court said: (AIR p. 1669, para 51)

"51. As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions: (1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest court of the country i.e. the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its ''earlier decisions' is left to its discretion to be moulded in accordance with the justice of the cause or matter before it."

11. It is interesting to note that the doctrine has not remained confined to overruling of earlier judicial decision on the same issue as was understood in Golak Nath case. In several later decisions, this Court has invoked the doctrine in different situations including in cases where an issue has been examined and determined for the first time. For instance in India Cement Ltd. v. State of T.N., this Court not only held that the levy of the cess was ultra vires the power of the State Legislature brought about by an amendment to the Madras Village Panchayat Amendment Act, 1964 but also directed that the State would not be liable for any refund of the amount of that cess which has been paid or already collected. In Orissa Cement Ltd. v. State of Orissa, this Court drew a distinction between a declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequence thereof. This Court held that it was open to the Court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way so as to advance the interest of justice."

12. Reference may also be made to the decision of this Court in ***Union of India v. Mohd. Ramzan Khan w****here non-furnishing of a copy of the enquiry report was taken as violative of the principles of natural justice and any disciplinary action based on any such report was held liable to be set aside. The declaration of law as to the effect of non-supply of a copy of the report was, however, made prospective so that no punishment already imposed upon a delinquent employee would be open to challenge on that account."*

13. In ***Ashok Kumar Gupta v. State of U.P.****, a three-Judge Bench of this Court held that although Golak Nath case regarding unamendability of fundamental rights under Article 368 of the Constitution had been overruled in* ***Kesavananda Bharati v. State of Kerala*** *yet the doctrine of prospective overruling was upheld and followed in several later decisions. This Court further held that the Constitution does not expressly or by necessary implication provide against the doctrine of prospective overruling. As a matter of fact Articles 32(4) and 142 are designed with words of width to enable the Supreme Court to declare the law and to give such directions or pass such orders as are necessary to do complete justice. This Court observed: (Ashok Kumar Gupta case, SCC pp. 246-47, para 54)*

"54. ... So, there is no acceptable reason as to why the Court in dealing with the law in supersession of the law declared by it earlier could not restrict the operation of law, as declared, to the future and save the transactions, whether statutory or otherwise, that were effected on the basis of the earlier law. This Court is, therefore, not impotent to adjust the competing rights of parties by prospective overruling of the previous decision in Rangachari ratio. The decision in Mandal case postponing the operation for five years from the date of the judgment is an instance of, and an extension to the principle of prospective overruling following the principle evolved in Golak Nath case."

14. Dealing with the nature of the power exercised by the Supreme Court under Article 142, this Court held that the expression "complete justice" are words meant to meet myriad situations created by human ingenuity or because of the operation of statute or law declared under Articles 32, 136 or 141 of the Constitution. The Hon'ble Supreme Court observed: (Ashok Kumar Gupta case, SCC pp. 250-51, para 60)

"60. ... The power under Article 142 is a constituent power transcendental to statutory prohibition. Before exercise of the power under Article 142(2), the Court would take that

prohibition (sic provision) into consideration before taking steps under Article 142(2) and we find no limiting words to mould the relief or when this Court takes appropriate decision to mete out justice or to remove injustice. The phrase "complete justice' engrafted in Article 142(1) is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of statute law or law declared under Articles 32, 136 and 141 of the Constitution and cannot be cribbed or cabined within any limitations or phraseology. Each case needs examination in the light of its backdrop and the indelible effect of the decision. In the ultimate analysis, it is for this Court to exercise its power to do complete justice or prevent injustice arising from the exigencies of the cause or matter before it. The question of lack of jurisdiction or nullity of the order of this Court does not arise. As held earlier, the power under Article 142 is a constituent power within the jurisdiction of this Court. So, the question of a law being void ab initio or nullity or voidable does not arise."

15. ***In Somaiya Organics (India) Ltd. v. State of U.P.,*** *this Court held that the doctrine of prospective overruling was in essence a recognition of the principle that the court moulds the relief claimed to meet the justice of the case and that the Apex Court in this country expressly enjoys that power under Article 142 of the Constitution which allows this Court to pass such decree or make such order as is necessary for doing complete justice in any case or matter pending before this Court. The Hon'ble Court observed: (SCC p. 532, para 27)*

"27. In the ultimate analysis, prospective overruling, despite the terminology, is only a recognition of the principle that the court moulds the reliefs claimed to meet the justice of the case -- justice not in its logical but in its equitable sense. As far as this country is concerned, the power has been expressly conferred by Article 142 of the Constitution which allows this Court to ''pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it''. In exercise of this power, this Court has often denied the relief claimed despite holding in the claimants' favour in order to do ''complete justice'."

16. The "doctrine of prospective overruling" was, observed by this Court as a rule of judicial craftsmanship laced with pragmatism and judicial statesmanship as a useful tool to bring about smooth transition of the operation of law without unduly affecting the rights of the people who acted upon the law that operated prior to the date of the judgment overruling the previous law."

12. The Hon'ble Supreme Court in the case of ***B.A. Linga Reddy vs. Karnataka State Transport Authority; reported in*** (2015) 4 SCC 515, observed as under:-

34. The view of the High Court in Ashrafulla has been reversed by this Court. The decision is of retrospective operation, as it has not been laid down that it would operate prospectively; more so, in the case of reversal of the judgment. This Court in P.V. George v. State of Kerala held that the law declared by a court will have a retrospective effect if not declared so specifically. Referring to Golak Nath v. State of Punjab it had also been observed that the power of prospective overruling is vested only in the Supreme Court and that too in constitutional matters. It was observed: (P.V. George case, SCC pp. 565 & 569, paras 19 & 29) "19. It may be true that when the doctrine of stare decisis is not adhered to, a change in the law may adversely affect the interest of the citizens. The doctrine of prospective overruling although is applied to overcome such a situation, but then it must be stated expressly. The power must be

exercised in the clearest possible term. The decisions of this Court are clear pointer thereto.

* **

29. Moreover, the judgment of the Full Bench has attained finality. The special leave petition has been dismissed. The subsequent Division Bench, therefore, could not have said as to whether the law declared by the Full Bench would have a prospective operation or not. The law declared by a court will have a retrospective effect if not otherwise stated to be so specifically. The Full Bench having not said so, the subsequent Division Bench did not have the jurisdiction in that behalf."

35. In Ravi S. Naik v. Union of India, it has been laid down that there is retrospective operation of the decision of this Court. The interpretation of the provision becomes effective from the date of enactment of the provision. In M.A. Murthy v. State of Karnataka, it was held that the law declared by the Supreme Court is normally assumed to be the law from inception. Prospective operation is only exception to this normal rule. It was held thus: (M.A. Murthy case, SCC pp. 520-21, para 8)

"8. The learned counsel for the appellant submitted that the approach of the High Court is erroneous as the law declared by this Court is presumed to be the law at all times. Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in Golak Nath v. State of Punjab. InECIL v. B. Karunakar the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (See Ashok Kumar Gupta v. State of U.P. and Baburam v. C.C. Jacob.) It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs. That being the position, the High Court was in error by holding that the judgment which operated on the date of selection was operative and not the review judgment in Ashok Kumar Sharma case. All the more so when the subsequent judgment is by way of review of the first judgment in which case there are no judgments at all and the subsequent judgment rendered on review petitions is the one and only judgment rendered, effectively and for all purposes, the earlier decision having been erased by countenancing the review applications. The impugned judgments of the High Court are, therefore, set aside."

13. The Hon'ble Supreme Court in the case of ***P.V. George vs. State of Kerala; reported in*** (2007) 3 SCC 557 has held as under:-

"27. The rights of the appellants were not determined in the earlier proceedings. According to them, merely a law was declared which was prevailing at that point of time; but

the appellants were not parties therein. Thus, no decision was rendered in their favour nor any right accrued thereby."

14. Thus, it is clear that the principle of prospective overruling would not apply in respect of the judgment passed by the Supreme Court unless and until it is expressly so mentioned in the judgment. Furthermore, there cannot be an estoppel against the statute.

15. The Hon'ble Supreme Court in the case of ***Bengal Iron Corpn. vs. CTO; reported in*** 1994 Supp (1) SCC 310 has held as under:-

"18. ... . There can be no estoppel against the statute. ... . Law is what is declared by this Court and the High Court -- to wit, it is for this Court and the High Court to declare what does a particular provision of statute say, and not for the executive. Of course, the Parliament/Legislature never speaks or explains what does a provision enacted by it mean. (SeeSanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.)"

16. Thus, where the question of law has been settled by the Courts, then it has to be held that the said question of law was in existence right from day one.

17. However, where the rights of a party have been considered and declared, then the said proceedings cannot be reopened on the ground that the judgment on the basis of which, the rights were declared, has been overruled. The Hon'ble Supreme Court in the case of ***Union of India v. Madras Telephone SC & ST Social Welfare Assn., reported in (2006) 8 SCC 662;*** has held as under:-

"21. Having regard to the above observations and clarification we have no doubt that such of the applicants whose claim to seniority and consequent promotion on the basis of the principles laid down in the Allahabad High Court's judgment inParmanand Lal case have been upheld or recognised by the Court or the Tribunal by judgment and order which have attained finality will not be adversely affected by the contrary view now taken in the judgment in Madras Telephones. Since the rights of such applicants were determined in a duly constituted proceeding, which determination has attained finality, a subsequent judgment of a court or tribunal taking a contrary view will not adversely affect the applicants in whose cases the orders have attained finality. We order accordingly."

18. Thus, it is clear that the judgment passed by the Hon'ble Supreme Court in the case of ***Pranay Sethi (supra)*** would apply in the present case as the order passed by the Tribunal has been challenged. It is not a case where the claimants have tried to reopen a case which has already been finalized. It goes without saying that it is settled proposition of law that an appeal is continuation of original proceedings.

19. Sri Mishra on the issue of multiplier also submitted that multiplier has correctly been applied by the Tribunal. In this regard he placed reliance upon the judgment passed by the Hon'ble Supreme Court in the case of ***Shakti Devi Vs. New India Insurance Company Limited And Another; reported in 2011 (1) TAC 4 (SC)***. On this aspect the view of this Court is that the latest view of Constitution Bench of Hon'ble Supreme Court would prevail over the view taken in the judgment passed in the case of ***Shakti Devi (Supra)*** as such also the argument of the Counsel for the Company on the issue of multiplier has no force.

20. Considering the aforesaid, on the issue of multiplier, this Court after taking note of age of deceased i.e. 20 years at the time of accident, is of the view that in the instant case for grant of compensation the multiplier of 18 is the correct

multiplier and has to be applied and the Tribunal based upon the age of father of the deceased has wrongly applied the multiplier of 11.

21. It is next submitted by the learned Counsel for the appellants that notional income of Rs. 3,000/- per month i.e. Rs. 36,000/- per annum of deceased, who was black smith (yksgkj) and at the time of death was earning about Rs. 5,000/- per month as pleaded in the claim petition, has wrongly been considered by the Tribunal for grant of compensation. He submitted that accident took place on 07.03.2013 and on account of injury sustained the son of the appellant no. 1 expired on spot. As such, considering the date of death of the son of the appellant no. 1 as also the law on this issue, the notional income of the deceased should be considered as Rs. 6,000/- per month.

22. Opposing the aforesaid, Sri Mishra learned Counsel for the Insurance Company, submitted that in the claim petition the income of the deceased, per month, has been shown as Rs. 5,000/-, as such, beyond this amount the income cannot be enhanced.

23. The Hon'ble Apex Court in the judgment passed in the case of ***Magma General Insurance Company Ltd. vs. Nanu Ram and Others; reported in 2018 SCC Online SC 1546;*** observed as under:-

"8.3 With respect to the income of the deceased, as the family could not produce any evidence to show that the income of the deceased was Rs 15,000 per month, as claimed, the High Court took his income to be Rs 6000, which is marginally above the minimum wage of an unskilled worker at Rs 5342.

This finding is also not being interfered with.

8.4. The Insurance Company has submitted that the father and the sister of the deceased could not be treated as dependents, and it is only a mother who can be dependent of her son. This contention deserves to be repelled. The deceased was a bachelor, whose mother had pre-deceased him. The deceased's father was about 65 years old, and an unmarried sister. The deceased was contributing a part of his meagre income to the family for their sustenance and survival. Hence, they would be entitled to compensation as his dependents.

8.5. The Insurance Company has contended that the High Court had wrongly awarded Rs. 1,00,000 towards loss of love and affection, and Rs. 25,000 towards funeral expenses.

The judgment of this Court in Pranay Sethi (supra) has set out the various amounts to be awarded as compensation under the conventional heads in case of death. The relevant extract of the judgment is reproduced herein below :

"(54)....Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years." (Emphasis supplied)

As per the afore-said judgment, the compensation of Rs. 25,000 towards funeral expenses is decreased to Rs. 15,000.

The amount awarded by the High Court towards loss of love and affection is, however, maintained.

8.6 The MACT as well as the High Court have not awarded any compensation with respect to Loss of Consortium and Loss of Estate, which are the other conventional heads under which compensation is awarded in the event of death, as recognized by the Constitution Bench in Pranay Sethi (supra).

The Motor Vehicles Act is a beneficial and welfare legislation. The Court is duty-bound and entitled to award "just compensation", irrespective of whether any plea in that behalf was raised by the Claimant.

In exercise of our power under Article 142, and in the interests of justice, we deem it appropriate to award an amount of Rs. 15,000 towards Loss of Estate to Respondent Nos. 1 and 2.

8.7 A Constitution Bench of this Court in Pranay Sethi (supra) 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. Rajesh v. Rajbir Singh, (2013) 9 SCC 54.

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, co-operation, affection, and aid of the other in every conjugal relation."Black's Law Dictionary (5th ed. 1979).

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."

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.

Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of Filial Consortium.

Parental Consortium is awarded to children who lose their parents in motor vehicle accidents under the Act.

A few High Courts have awarded compensation on this count. Rajasthan High Court in Jagmala Ram @ Jagmal Singh v. Sohi Ram 2017 (4) RLW 3368 (Raj); Uttarakhand High Court in Smt. Rita Rana v. Pradeep Kumar 2014 (3) UC 1687; Karnataka High Court in Lakshman v. Susheela Chand Choudhary, (1996) 3 Kant LJ 570 (DB).

However, there was no clarity with respect to the principles on which compensation could be awarded on loss of Filial Consortium.

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 (supra).

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.

9. In light of the abovementioned discussion, Respondents 1 and 2 are entitled to the following amounts:

Head	*Compensation awarded*
(I) Income	*Rs 6000*
(ii) Future prospects	*Rs 2400 (i.e. 40% of the income)*
(iii) Deduction towards personal expenditure	*Rs 2800 i.e. ⅓rd of (Rs 6000 + Rs 2400)*
(iv) Total income	*Rs 5600 i.e. ⅔rd of (Rs 6000 + Rs 2400)*
(v) Multiplier	*18*
(vi) Loss of future income	*Rs 12,09,600 (Rs 5600 × 12 × 18)*
(vii) Loss of love and affection	*Rs 1,00,000 (Rs 50,000 each)*
(viii)Funeral expenses	*Rs 15,000*
(ix) Loss of estate	*Rs 15,000*
(x) Loss of filial consortium	*Rs 80,000 (Rs 40,000 payable to each of Respondents 1 and 2)*
Total compensation awarded	*Rs 14,25,600 along with interest @ 12% p.a. from the date of filing of the claim petition till payment.*

Out of the amount awarded, Respondent 1 is entitled to 60% while Respondent 2 shall be granted 40% along with interest as specified above."

24. In the case of ***Chameli Devi and Others vs. Jivrail Mian and Others; reported in 2019 (4) TAC 724 (S.C.)***, the Hon'ble Supreme Court observed as under:-

"Keeping in view the fact that the accident took place in 2001 and the deceased was a carpenter, it would not be unjustified to assess his income at Rs.200/- per day. It is true that carpenter may not get per work every day, hence, we access the income at Rs.5000/- per month. Adding 40% for future prospects Rs.2,000/-, the total income works out to Rs.7,000/-. Deducting 1/5 for personal expenses, keeping in view a large number of dependents, the datum figure comes out to Rs.5,600/- per month or Rs.67,200/- per year. Applying multiplier of 16, the compensation works out to Rs.10,75,200/-. Rs.70,000/- is added towards other non-conventional heads as laid down in National Insurance Co. Ltd. v. Pranay Sethi & Ors. (2017) 16 SCC 680 : 2017 (4) T.A.C. 673. The total compensation comes out to Rs.11,45,200/-."

25. In the case of ***Syed Sadiq And Others vs. Divisional Manager, United India Insurance Company Limited; reported in (2014) 2 SCC 735***, the deceased was Vegetable Vendor and the Hon'ble Supreme Court, for the

purposes of granting of compensation, after considering the state of economy and rising prices in agriculture products held that a vegetable vendor is reasonably capable of earning Rs. 6,500/- per month.

"9. There is no reason in the instant case for the Tribunal and the High Court to ask for evidence of monthly income of the appellant claimant. On the other hand, going by the present state of economy and the rising prices in agricultural products, we are inclined to believe that a vegetable vendor is reasonably capable of earning Rs 6500 per month."

26. In the judgment dated 10.12.2014 passed in ***F.A.F.O. (D) No. 748 of 2011 (Smt. Sheela Pandey W/O Late Surendra Kumar Pandey & 4 Others. vs. The New India Insurance Co. Ltd. Bena Ghabar Branch & 2 Others)***, this Court, for granting compensation, assessed the notional income of the deceased, who was doing business of selling milk/ diary business, at Rs. 6,500/- per month.

27. In the case of ***New India Assurance Co. Ltd. Vs. Resha Devi and Others; reported in 2017 (4) T.A.C. 288 (All.),*** this Court, in para 8, observed that "there can be no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations. Obviously award of damages would depend upon the particular facts and circumstances of the case but the element of fairness in the amount of compensation so determined is the ultimate guiding factor. In such view of the matter, presumption of Rs. 100/- per day as notional income even for a unskilled labour in the year 2014 appears to us to be frugal and by no stretch of imagination to be just even the minimum wages fixed by the State Government is much higher than that looking to the rise in cost index. We are of the considered upon that notional income of an unskilled labour could not be less than Rs. 200/- per day."

28. This Court feels that reference to the judgment of the Hon'ble Supreme Court passed in the case of ***New India Assurance Company Limited vs. Smt. Somwati and Others; reported in 2020 (3) T.A.C. 711 (S.C.),*** is also relevant. In this case, the Hon'ble Supreme Court considered the issue as to whether both consortium and loss of love and affection could have been awarded. The Hon'ble Supreme Court on the issue aforesaid observed as under:-

"38. The three-Judge Bench in United India Insurance Co. Ltd. [United India Insurance Co. Ltd. v. Satinder Kaur, (2021) 11 SCC 780 : 2020 SCC OnLine SC 410] has categorically laid down that apart from spousal consortium, parental and filial consortium is payable. We feel ourselves bound by the above judgment of the three-Judge Bench. We, thus, cannot accept the submission of the learned counsel for the appellant that the amount of consortium awarded to each of the claimants is not sustainable.

39. We, thus, found the impugned judgments [Somwati v. Dharmendra Kumar, 2019 SCC OnLine All 3897] , [Sangita Devi v. New India Assurance Ltd., 2019 SCC OnLine Del 10877] , [New India Assurance Co. Ltd. v. Azmati Khatoon, 2019 SCC OnLine Del 10530] , [Cholamandalam MS General Insurance Co. Ltd. v. Umarani, 2019 SCC OnLine Mad 29630] , [Pinki v. Rajeev, 2019 SCC OnLine Del 11882] , [Nanak Chand v. New India Assurance Co. Ltd., 2020 SCC OnLine Del 62] , [Oriental Insurance Co. Ltd. v. Rinku Devi, 2019 SCC OnLine Del 10493] of the High Court awarding consortium to each of the claimants in accordance with law which does not warrant any interference in this appeal. We, however,

accept the submissions of the learned counsel for the appellant that there is no justification for award of compensation under separate head "loss of love and affection". The appeal filed by the appellant deserves to be allowed insofar as the award of compensation under the head "loss of love and affection".

40. We may also notice the three-Judge Bench judgment of this Court relied upon by the learned counsel for the appellant i.e. Sangita Arya v. Oriental Insurance Co. Ltd. [Sangita Arya v. Oriental Insurance Co. Ltd., (2020) 5 SCC 327 : (2020) 3 SCC (Civ) 254 : (2020) 2 SCC (Cri) 905] The counsel for the appellant submits that this Court has granted only Rs 40,000 towards "loss of consortium" which is an indication that "consortium" cannot be granted to children. In the above case, Motor Accidents Claims Tribunal has awarded Rs 20,000 to the widow towards loss of consortium and Rs 10,000 to the minor daughter towards "loss of love and affection". The High Court has reduced [Oriental Insurance Company Ltd. v. Sangita Arya, 2016 SCC OnLine Utt 970] the amount of consortium from Rs 20,000 to Rs 10,000. Para 16 of the judgment is to the following effect : (Sangita Arya case [Sangita Arya v. Oriental Insurance Co. Ltd., (2020) 5 SCC 327 : (2020) 3 SCC (Civ) 254 : (2020) 2 SCC (Cri) 905] , SCC p. 330, para 10)

"10. The consortium payable to the widow was reduced [Oriental Insurance Company Ltd. v. Sangita Arya, 2016 SCC OnLine Utt 970] by the High Court from Rs 20,000 (as awarded by MACT) to Rs 10,000; the amount awarded towards loss of love and affection to the minor daughters was reduced from Rs 10,000 to Rs 5000. However, the amount of Rs 5000 awarded by MACT towards funeral expenses was maintained."

41. This Court in the above case confined its consideration towards the income of the deceased and there was neither any claim nor any consideration that the consortium should have been paid to other legal heirs also. There being no claim for payment of consortium to other legal heirs, this Court awarded Rs 40,000 towards consortium. No such ratio can be deciphered from the above judgment that this Court held that consortium is only payable as a spousal consortium and consortium is not payable to children and parents.

42. It is relevant to notice the judgment of this Court in United India Insurance Co. Ltd. [United India Insurance Co. Ltd. v. Satinder Kaur, (2021) 11 SCC 780 : 2020 SCC OnLine SC 410] which was delivered shortly after the above three-Judge Bench judgment of Sangeeta Arya [Sangita Arya v. Oriental Insurance Co. Ltd., (2020) 5 SCC 327 : (2020) 3 SCC (Civ) 254 : (2020) 2 SCC (Cri) 905] specifically laid down that both spousal and parental consortium are payable which judgment we have already noticed above.

43. We may also notice one more three-Judge Bench judgment of this Court in M.H. Uma Maheshwari v. United India Insurance Co. Ltd. [M.H. Uma Maheshwari v. United India Insurance Co. Ltd., (2020) 6 SCC 400 : (2020) 3 SCC (Cri) 274 : (2020) 3 SCC (Civ) 744] decided on 12-6-2020. In the above case, the Tribunal had granted the amount of rupees one lakh towards loss of consortium to the wife and rupees three lakhs for all the appellants towards loss of love and affection. The High Court in the above case had reduced the amount of compensation in the appeal filed by the insurance company. The High Court held [United India Insurance Co. Ltd. v. M.H. Uma Maheshwari, 2017 SCC OnLine Kar 6258] that by awarding the amount of rupees one lakh towards loss of consortium to the wife, the Tribunal had committed error while awarding rupees one lakh to the first appellant

towards the head of "loss of love and affection". Allowing the appeal filed by the claimant, this Court maintained the order of MACT.

44. In the above judgment although rendered by the three-Judge Bench, there was no challenge to award of compensation of rupees one lakh towards the consortium and rupees three lakhs towards the loss of love and affection. The appeal was filed only by the claimants and not by the insurance company. The Court did not pronounce on the correctness of the amount awarded under the head "loss of love and affection".

45. We may also notice the additional submission advanced in Civil Appeal No. 3099 of 2020 [arising out of SLP (C) No. 8250 of 2020], Oriental Insurance Co. Ltd. v. Rinku Devi & Others. As noted above, we have taken the view that the order [Oriental Insurance Co. Ltd. v. Rinku Devi, 2019 SCC OnLine Del 10493] of the High Court awarding compensation towards "loss of love and affection" @ Rs 50,000 to each of the claimants is unjustified which is being set aside in this appeal. We, further, in the above appeal also set aside the directions of the High Court in para 9 by which statutory amount along with interest accrued thereon was directed to be deposited in Aasra fund.

46. In result, all the appeals are partly allowed. The award of compensation under the conventional head "loss of love and affection" is set aside. Motor Accidents Claims Tribunals shall recompute the amount payable and take further steps in accordance with law.

47. All the appeals are partly allowed accordingly. No costs."

29. Considering the date of accident i.e. 07.03.2013, monthly income of the deceased mentioned in the claim petition as also observations of the Hon'ble Supreme Court and this Court in the judgments referred above, this Court is of view that notional income of the deceased for the purpose of calculating compensation should be considered as Rs. 5,000/- per month.

30. Learned Counsel for the appellants next submitted that the future prospects were demanded in the claim petition, which has not been disputed by the other side, however, the Tribunal failed to grant any amount towards future prospect and as such, as per law laid down by the Hon'ble Supreme Court in the case of ***Pranay Sethi (Supra)***, the amount towards future prospect is also liable to be granted.

31. Learned Counsel for the respondents could not dispute the settled position of law as also the fact that the Tribunal did not granted any amount towards future prospects. Accordingly, this Court is of the view that claimant/appellant no. 1 is entitled for future prospect as held by the Hon'ble Apex Court in the judgment passed in the case of ***Pranay Sethi (Supra).***

32. Learned Counsel for the appellants further stated that under the conventional head(s) i.e. miscellaneous expenses and loss of Estate, the Tribunal has awarded Rs. 5,000/- each. Thus this amount is also liable to be enhanced in view of the judgment passed in the cases of ***Pranay Sethi (Supra) and Magma General Insurance Company Ltd. (Supra).***

33. Considering the amount awarded by the Tribunal in the light of judgment referred hereinabove, this Court is of the view that appellants are entitled to the enhanced amount under conventional heads such as loss of estate, funeral expenses, loss of consortium.

34. In view of the aforesaid, this Court is of the view that appellants are entitled to an amount to the tune of Rs. 8,66,000/- as detailed hereinunder,

with interest @ 7%, as awarded by the Tribunal, from the date of filing of claim petition till realization.

Calculation Chart

Sl. No.	Heads	Compensation awarded
1.	Income-Rs. 5,000/- P.M. X 12	Rs. 60,000/- P.A.
2.	Deduction towards personal expenses in case of Bachelor	50%
3.	Dependency	Rs. 30,000/-
4.	Multiplier as per age of the deceased i.e. 20 years	18
5.	Future Prospect at 40%	Rs. 12,000/-
6.	Total income 30,000 + 12,000	Rs. 42,000/-
7.	Compensation Total = 42,000 X 18	Rs. 7,56,000/-
8.	Loss of Estate	Rs. 15,000/-
9.	Loss of Funeral expenses	Rs. 15,000/-
10.	Loss of Consortium to both appellants	Rs. 40,000 + Rs. 40,000 =Rs. 80,000/-
Total Compensation		**Rs. 8,66,000/-**

35. It is made clear that this Court has modified the judgment and award dated 22.10.2014, under appeal, passed by the Tribunal, with respect to the amount awarded by the Tribunal as also that out of above amount awarded to the appellant No.2, Priti, sister of the deceased, would be entitled to Rs. 40,000/-, which is the amount awarded to her under the head of loss of consortium. The Tribunal while providing the amount in terms of this judgment shall adjust the amount, if any, already paid/ provided to the appellants.

36. The appeal is ***disposed of*** finally in above terms.

37. Let records be returned to Court concerned along with the copy of this judgment for necessary compliance.

(2021)12ILR A1084
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.11.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 140 of 2021

U.O.I. ...Appellant
Versus
Harish Chandra Tiwari ...Respondents

Counsel for the Appellant:
Mahendra Kumar Misra

Counsel for the Respondents:
Dhiraj Chaurasiya, Keshav Ram Chaurasia, Om Hari Tripathi

A. Civil Law - Railway Accident Claim - The Railways Act, 1989 - Section 124 A- Railway

Claims Tribunal Act, 1987- Section 16 - Claim Petition - Compensation - bona fide passenger - Ticket - no travelling ticket was recovered/found on the deceased's person - deceased's ticket was not produced by the claimant as well - Held - once it is asserted on affidavit by the claimant that the deceased was travelling on a valid ticket, the burden of proof would shift on the Railways and the issue has to be decided on the basis of attending circumstances - There is an eye-witness account about the accident coming from the grandson of the deceased - possibility of loss of a small paper ticket is high in the case a person who dies as a result of a fall from train and then being crushed under its wheels – Court affirmed finding of Tribunal that the deceased was a bona fide passenger on board the train & that the deceased died in consequence of a fall that occurred due to a sudden jerk, as the deceased was emerging from the toilet (Para 11, 12)

B. Railway Claims Tribunal Act, 1987 - Section 16 - Claim Petition - Compensation - Interest - claimant was held entitled to compensation in the sum of Rs. 8 lacs, as the accident occurred prior to 01.01.2017 - Tribunal awarded 9% per annum from the date of judgment - Held - Tribunal rightly awarded the higher of the two amounts of compensation, one worked according to the rate applicable on the date of accident together with the accrued interest, and the other according to the rate on the date of award, rightly choosing the higher amount of compensation - High Court directed interest shall be payable at the rate of 9% per annum after expiry of a period of ninety days from the date of judgment passed by the Tribunal till realization, if within the aforesaid period of time, the awarded compensation is not paid to the claimant or deposited with the Tribunal (Para 16)

Allowed. (E-5)

Cases Relied on :

1.U.O.I. Vs Rina Devi, (2019) 3 SCC 572

2. National Insurance Com. Vs Balakrishnan & anr., (2013) (1) SCC 731

3. U.O.I. through General Manager, Northern Railway Vs Smt. Gayatri Devi, First Appeal From Order No. 166 of 2018, decided on 14.08.2018. In Gayatri Devi

(Delivered by Hon'ble J.J. Munir, J.)

This is an appeal by the Union of India through the General Manager, Northern Railways from a judgment and order of the Railway Claims Tribunal, Lucknow Bench, Lucknow, in Case No. OA/II/U/384/2013, Harish Chandra Tiwari v. Union of India, awarding compensation to the claimant-respondent on account of his father's death in a

2. The claimant, Harish Chandra Tiwari, instituted proceedings under Section 16 of the Railway Claims Tribunal Act, 1987 with allegations that on 17.03.2011, his father, Ram Prasad Tiwari, died in a railway accident, while travelling on board the Ganga Gomti Express from Lucknow to Prayag. It was pleaded by the claimant that his father boarded the Ganga Gomti Express at Lucknow with Prayag as the destination on a Second Class ticket, on 17.03.2011. As the train was moving near the Up Advance Signal at the Lalgopalganj Railway Station, the deceased suddenly fell off the train. In consequence of the injuries sustained in the accident, Ram Prasad Tiwari died. The petitioner filed a written statement, wholesomely denying the respondent's claim. The claim was particularly resisted on the plea that the deceased was neither travelling on the train in question nor did he suffer injury in consequence of a railway accident. It was averred that the claim is baseless and founded on concocted facts. The petitioner pleaded that the claim was barred by Section 124A of the Railways Act, 1989.

3. On the pleadings of parties, the Tribunal framed the following issues (rendered into English from Hindi vernacular) :

(i) Whether the deceased was a bona fide passenger on board the train in question?

(ii) Whether the accident resulting in the deceased's death fell within the definition of an unexpected incident within the meaning of Section 123(c)(ii) read with Section 124A of the Railways Act, 1989?

(iii) Who are the dependents of the deceased?

(iv) To what relief is the claimant entitled?

4. The claimant filed his affidavit in support of the claim, testifying as A.W.1. Another affidavit of Sanjeev Kumar was filed, who deposed as A.W.2. Documentary evidence comprising photostat copies of the Station Master's memo, the Panchnama, Police Form No. 13, Police Form No. 379, the Postmortem Report, the Final Report put in by the Police and the Voter ID Card was filed. The petitioner, by way of documentary evidence, placed a copy of the Divisional Railway Manager's report regarding the accident. Issue nos. 1 and 2 were decided together by the Tribunal, holding that the deceased was a bona fide passenger on board the Ganga Gomti Express train. It was further held that the deceased died in consequence of a fall that he had from the train, that occurred due to a sudden jerk, as the deceased was emerging from the toilet. The accident occurred on 17.03.2011 at 09:45 p.m. near the Up Advance Signal of the Lalgopalganj Railway Station. It was held that there was no evidence about the deceased sustaining injuries on account of being run over by a train or a self-inflicted injury or one sustained as a result of criminal negligence. Issue Nos. 1 and 2 were decided in favour of the claimant and against the petitioner. The Tribunal held that the claimant was the deceased's son, drawing that inference from the Voter Id Card. He was held entitled to dependency, in view of provisions of Section 123B of the Railways Act, 1989. The claimant was held entitled to compensation in the sum of Rs. 8 lacs, as the accident occurred prior to 01.01.2017, but, with the award being pronounced after that date, where higher of the two compensations would be that to which the claimant was entitled on the date of award, compared to his entitlement on the date of accident with the accrued interest. To adopt this principle of quantification, the Tribunal relied on the Supreme Court in ***Union of India v. Rina Devi, (2019) 3 SCC 572.***

5. Heard Mr. Mahendra Kumar Mishra, learned Counsel for the petitioner and Mr. Dhiraj Chaurasai, learned Counsel appearing for the claimant-respondent.

6. It was strenuously argued before us that there is no evidence on record to indicate that the deceased was a bona fide passenger on board the Ganga Gomti Express on the fateful day and that he died as a result of a railway accident while travelling as such. Mr. Mishra invited the attention of the Court to the fact that the testimony of the claimant that the deceased was travelling on board the train in question with a valid travelling ticket is based on no evidence. He says that the Tribunal has failed to notice the fact that no travelling ticket was recovered/found on the deceased's person during the Panchnama. Also, the deceased's ticket was not produced by the claimant as well. It has been pointed out by Mr. Mishra that the claimant's case was that his father boarded the train in question on a Second Class railway ticket, accompanied by Sanjeev Kumar, the claimant's son. It is then pointed out that though A.W.2 Sanjeev Kumar has said in his testimony that he was travelling with the deceased on board the train in question and that he had the travelling tickets for himself as well as his grandfather, but there is no pleading in the claim petition regarding the presence of Sanjeev Kumar with his grandfather in the train or at the railway station. Also, there is no evidence of Sanjeev Kumar's presence at the Lalgopalganj Railway Station.

7. Learned counsel for the claimant-respondent Mr. Chaursiya, on the other hand, has repelled the above submissions and urged that there is no reason to disbelieve the eye-witness account of A.W.2 Sanjeev Kumar, who is the grandson of the deceased. It is submitted that so far as non-recovery of the deceased's travelling ticket from his body at the time of Panchnama is concerned, the possibility of loss of a small paper ticket is high in the case a person who dies as a result of a fall from train and then being crushed under its wheels. It is pointed out that the said fact was pleaded in Column 7 of the claimant's application, where it is specifically mentioned that the journey ticket from Lucknow to Prayag railway station was lost somewhere at the site of the accident, along with other belongings of the deceased. So far as this part of the submission of learned counsel for the appellant is concerned, it must be remarked that there is no dispute about the fact that the deceased died as a result of injuries sustained in a railway accident near Lalgopalganj Railway Station. The fact whether he was a *bona fide* passenger on board train or a man wandering on the tracks, who was crushed under its wheels, or still more, an unfortunate man, who cannot be regarded as a bona fide passenger for travelling on board the train in question without a valid travelling ticket, is a matter to be wholesomely assessed. It has been asserted by Sanjeev Kumar that he purchased journey tickets for himself and his grandfather at the Lucknow railway station to secure a passage from Lucknow to Prayag railway station. It has been testified by Sanjeev Kumar in Paragraph 4 that his grandfather placed the journey ticket in the upper pocket of his shirt *(kurta)* which was lost in the accident. It could not be recovered despite best efforts.

8. This Court has perused the lower court records, and what we find is that about this categorical assertion of Sanjeev Kumar in Paragraph Nos. 3 and 4 of his affidavit, he has not been cross-examined or contradicted in any manner by the appellant. The Tribunal has remarked that the deceased was neither a native of Lalgopalganj, nor was he employed there. Thus, according to the Tribunal, he had no business to be on the railway tracks in Lalgopalganj, except as a passenger on board train. The assertion of the deceased's grandson that he was travelling with his grandfather on a valid ticket and the fact that the deceased died on the railway tracks as a result of a fall from a jerky movement of the train, followed by a crush injury under its wheels, has a wholesome truth to it, which the Tribunal has rightly believed. It is accordingly held that the deceased was a bona fide passenger on board the train in question, when he suffered the fatal accident giving rise to this claim.

9. There is then this contention urged on behalf of the appellant that the story about A.W.2 Sanjeev Kumar, being a co-passenger with his grandfather, is not believable, inasmuch as, soon after the accident, he neither gave information to his parents nor the G.R.P. or the local Police nor reached the site of accident. As such, his testimony is of no worth. It has also been argued that the deceased's son and father of A.W.2, that is to say, the claimant, reached the spot and participated in the Panchnama, but there is no evidence that A.W.2 did anything to establish his presence on the spot along with his grandfather. The affidavit of A.W.2 carries a categorical assertion that after the deceased's fell off the train, Sanjeev Kumar was left shell-shocked. He raised an alarm and pulled the emergency chain to stop the train. The train did not stop; rather it moved on and halted at the next scheduled stop, that is to say, Prayag Railway Station. It is also testified in the affidavit by A.W.2 that he went to the G.R.P. Chowki to report the matter, but the policemen on duty said that the control room had already sent out that information, and that the witness should proceed to Lalgopalganj.

These assertions in the affidavit have not been contradicted by the appellant through any kind of cross-examination or other evidence in rebuttal.

10. The appellant has largely sought to challenge the respondent-claimant's case about the deceased being a victim of a railway accident while travelling on board train as a bona fide passenger on the basis of documents, such as the Station Superintendent's memo dated 17.03.2011, who has said that he had received information from gateman Ram Bahadur that an old man, aged about 70 years, had been crushed under the wheels of the train near the Up Advance signal at the Lalgopalganj Railway Station. Besides the statutory inquiry report of the Divisional Railway Manager, these documents project the accident to be a case of death, with the deceased being run over by the train while moving about the tracks. This Court must remark that the manner in which the accident has been described by A.W.2, the deceased's grandson, inspires confidence and is a plausible version that coalesces with the circumstances. It is not unnatural for an old grandfather to travel along with his grandson. The stand of A.W.2 that he was shocked to see his grandfather fall off the train as a result of a jerk as he was emerging from the toilet is a fact that is, in no way, fantastic or incredible. The further assertion by A.W.2 that he attempted to halt the train by pulling the emergency chain, which did not work, is also something quite possible. These are experiences that are commonplace, where alarm chains installed in railway bogies, particularly general bogies of the Second Class unreserved compartment, are often not in working order. The assertion by A.W.2 that the train did not halt when he pulled the emergency chain, but proceeded to Lalgopalganj, is quite a natural happening. The fact that this information was conveyed to the Police by A.W.2, who told witness that it had already been flashed by the control room and that the witness should proceed to Lalgopalganj, is also logical.

11. The claimant, on the other hand, has asserted in his affidavit that he had received information, at midnight, from sources of the Police, who conveyed it through the claimant's neighbours. This version corroborates the account of A.W.2. The further assertion in the affidavit of A.W.2 that he set out to the place of accident along with 8-10 natives of his village is also a behaviour that is quite logical in the settings of rural India. The grandson apparently proceeded from Prayag Railway Station to Lalgopalganj, after being advised by the Police there, whereas the claimant-son of the deceased proceeded from his native village on information by the Police. These facts, all fit into a chain of connected circumstances, which speak for themselves. Not much reliance can be placed on the report of the Divisional Railway Manager or the reports of Railway Protection Force or other communications between the Railway Authorities, all of which are not based on any dependable evidence as to how the deceased landed on the railway tracks at Lalgopalganj. The Tribunal has rightly held that the deceased had no business at Lalgopalganj to be about the tracks there. The Tribunal has believed evidence about the deceased being a *bona fide* passenger on board the train in question and suffering a fatal railway accident, while travelling as such. Here, reference may be made to the law about burden of proof vis à vis the victim being a *bona fide* passenger, laid down in **Rina Devi** (supra). In **Rina Devi** the law relating to burden of proof on this count has been laid down by the Supreme Court thus :

29. We thus hold that mere presence of a body on the railway premises will not be conclusive to hold that injured or deceased was a bona fide passenger for which claim for compensation could be maintained. However, mere absence of ticket with such injured or deceased will not negative the claim that he was a bona fide passenger. Initial burden will be on the claimant which can be discharged by filing

an affidavit of the relevant facts and **burden will then shift on the Railways and the issue can be decided on the facts shown or the attending circumstances. This will have to be dealt with from case to case on the basis of facts found. The legal position in this regard will stand explained accordingly.**

(Emphasis by Court)

12. It would, thus, be seen that once it is asserted on affidavit by the claimant that the deceased was travelling on a valid ticket, the burden of proof would shift on the Railways and the issue has to be decided on the basis of attending circumstances. There is an eye-witness account about the accident coming from the grandson of the deceased. There is no unnatural inertia or lack of action attributable to A.W.2, on the basis of which, his presence at the scene of accident or his presence along with his grandfather on the fateful journey may be doubted. The findings of the Tribunal, therefore, on issues nos. 1 and 2, receive our affirmation.

13. The other point on which the judgment of the Tribunal has been assailed is about the rate of interest that has been awarded. It is 9% per *annum* from the date of judgment. It is argued again on the strength of the law laid down by the Supreme Court in **Rina Devi** that compensation cannot carry interest over and above what is payable on the date of award, that is to say, Rs. 8 lacs. In this connection, reference may be made to paragraph 19 of the report in **Rina Devi**, where it is held :

19. Accordingly, we conclude that compensation will be payable as applicable on the date of the accident with interest as may be considered reasonable from time to time on the same pattern as in accident claim cases. If the amount so calculated is less than the amount prescribed as on the date of the award of the Tribunal, the claimant will be entitled to higher of the two amounts. This order will not affect the awards which have already become final and where limitation for challenging such awards has expired, this order will not by itself be a ground for condonation of delay. Seeming conflict in *Rathi Menon [Rathi Menon v. Union of India,* (2001) *3 SCC 714, para 30 : 2001 SCC (Cri) 1311]* and *Kalandi Charan Sahoo [Kalandi Charan Sahoo v. South-East Central Railways, (2019) 12 SCC 387 : 2017 SCC OnLine SC 1638*] stands explained accordingly. The four-Judge Bench judgment in *Pratap Narain Singh Deo [Pratap Narain Singh Deo v. Srinivas Sabata, (1976) 1 SCC 289 : 1976 SCC (L&S) 52]* holds the field on the subject and squarely applies to the present situation. Compensation as applicable on the date of the accident has to be given with reasonable interest and to give effect to the mandate of beneficial legislation, if compensation as provided on the date of award of the Tribunal is higher than unrevised amount with interest, the higher of the two amounts has to be given.

14. It is submitted that higher of the two amounts being the revised compensation payable on the date of award, which is one made after 01.01.2017, whereas the accident occurred prior to it, no further interest is payable. It is trite that the Tribunal has awarded the higher of the two amounts of compensation, one worked according to the rate applicable on the date of accident together with the accrued interest, and the other according to the rate on the date of award, rightly choosing the higher amount of compensation according to the principles in **Rina Devi.** The Tribunal, however, has directed payment of interest at the rate of 9% per annum on the compensation awarded from the date of judgment until realization, without providing for a period of time after expiry whereof and persisting default by the Railways, interest would be payable over and above the sum of Rs. 8 lacs. However, this does not mean that the appellant can pay the compensation awarded whenever they like, and yet not be liable to pay

any interest. The question whether over and above the sum of Rs.8 lacs interest, if any, would be payable and reckoned from what date, fell for consideration of a Division Bench of this Court in Union of India through General Manager, **Northern Railway v. Smt. Gayatri Devi, First Appeal From Order No. 166 of 2018, decided on 14.08.2018. In Gayatri Devi** *(supra)*, it was held:

In Rina Devi's case [supra] while dealing with grant of interest on compensation amount (issue no.4), the Apex Court held that interest can be awarded from the date of accident itself when the liability of the Railway arises upto the date of payment without any difference in the stages. The relevant paragraph reads as under:-

"As already observed, though this Court in Thazhathe Purayil Sarabi (supra) held that rate of interest has to be at the rate of 6% from the date of application till the date of the award and 9% thereafter and 9% rate of interest was awarded from the date of application in Mohamadi (supra), rate of interest has to be reasonable rate at par with accident claim cases. We are of the view that in absence of any specific statutory provision, interest can be awarded from the date of accident itself when the liability of the Railways arises upto the date of payment, without any difference in the stages. Legal position in this regard is at par with the cases of accident claims under the Motor Vehicles Act, 1988. Conflicting views stand resolved in this manner."

As far as the case at hand is concerned, in view of the proposition of law as propounded in Rina Devi's [supra] it is necessary to calculate the total amount i.e. amount of compensation plus interest to ascertain whether the amount so calculated is less than the amount prescribed as on the date of the award. In the event the amount of compensation with interest was less than the amount prescribed on the date of award, then the amount which is higher is to be paid to the claimants.

For the reasons aforesaid, we are of the view that the ends of justice will be secured by awarding Rs. Eight lac in all as compensation to the claimants. **It may be added that provisions for compensating monetarily either under the Railways Act or Motor Vehicles Act is a beneficial piece of legislation and the purpose for award of interest is to put pressure on the relevant person not to delay in making the payment. In other words, when any amount is due to a creditor and the same is not paid by the debtor over a certain period, the creditor is deprived of the use of the said amount for the period during which the amount remains unpaid for which he is entitled to be compensated by way of payment of interest. Therefore, in the event the appellants fails to pay the aforesaid amount of Rs. Eight lacs within a period of 90 days, then interest @ 9% shall be payable till the date of actual payment.**

(Emphasis by Court)

15. Going by the principle laid down in **Gayatri Devi,** the direction to pay interest on the compensation awarded ought to be modified by ordering interest to be payable at the rate of 9% per annum after expiry of a period of ninety days from the date of judgment till realization.

16. The appeal **partly succeeds** and stands ***allowed in part.*** The impugned award is **modified** to the extent that on the sum of compensation ordered to be paid by the Tribunal, interest shall be payable at the rate of 9% per annum after expiry of a period of ninety days from the date of judgment passed by the Tribunal till realization, if within the aforesaid period of time, the awarded compensation is not paid to the claimant or deposited with the Tribunal.

17. There shall be no order as to costs.

(2021)12ILR A1091
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.11.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 163 of 2001

The New India Assurance Co. Ltd. ...Appellant
Versus
Mohd. Iliyas & Anr. ...Respondents

Counsel for the Appellant:
Anand Mohan, Asit Srivastava

Counsel for the Respondents:
D.K. Agarwal

A. Motor Vehicles Act, 1988 - Claim petition - comprehensive policy / package policy - Liability of insurer - comprehensive/package policy distinct from Act policy or third party policy - Occupant in car and pillion rider of scooter/motor cycle are covered under comprehensive policy - comprehensive policy / package policy of two wheeler covers the risk of the pillion rider as much as it does of the rider/ insured - Insurer can hardly wriggle out of their liability to indemnify & satisfy the award (Para 22, 23)

B. Motor Vehicles Act, 1988 - Section 166 - Claim petition - Non registration of FIR - claimant's failure to lodge an information with the Police - Effect - claimant entered the witness-box and proved his case - rider also proved the factum of accident - After the claimant and the rider, both testified to the factum of accident, its time, place and the manner of occurrence, burden lay upon the Insurer to rebut by cogent evidence that the accident never happened in the manner described - mere absence of an FIR would not shroud an accident under any kind of doubt - It is well-nigh settled that mere non-registration of an FIR concerning the accident, would not be decisive about the accident ever happening (Para 15, 16)

Dismissed. (E-5)

Cases Relied on :

1. National Insurance Company Vs Balakrishnan & anr., (2013) (1) SCC 731

(Delivered by Hon'ble J.J. Munir, J.)

1. This is an Appeal by the Insurer from an award of the Motor Accident Claims Tribunal, Sitapur, under Section 173 of the Motor Vehicles Act, 1988. The claim petition, giving rise to this Appeal, being Motor Accident Claim Petition no.325 of 1995 was instituted on 25.12.1997 before the District Judge/ Motor Accident Claims Tribunal, Sitapur by Mohd. Iliyas, respondent no.1 to this Appeal. Pankaj Shukla, the second respondent here, and the New India Assurance Co. Limited, were arrayed as the two opposite parties to the claim petition. The New India Assurance Co. Limited is the appellant here.

2. As facts would show in greater detail, Pankaj Shukla, respondent no.2 here, was operating the motor scooter, with whom respondent no.1, Mohd. Iliyas, the claimant was a pillion rider, when the vehicle met with the accident, giving rise to this claim. The claimant-respondent no.1 sustained serious injuries in the accident and claimed compensation under various heads, which has been granted by the Tribunal vide the award impugned. Since the appellant was the Insurer, who had insured the two wheeler that the two respondents were riding, they have been ordered to indemnify and satisfy the award. That is what has led the Insurance Company to prefer the present Appeal.

3. Mohd. Iliyas, the claimant-respondent no.1, shall hereinafter be referred to as 'the

claimant', whereas Pankaj Shukla, the second respondent, who was operating the scooter, that met with the accident, shall hereinafter be referred to as 'the rider'. The appellant, New India Assurance Co. Limited, shall hereinafter be called 'the Insurer'.

4. Shorn of unnecessary details, on May the 4th, 1997 the claimant was riding pillion with the rider on the latter's scooter, bearing registration no. UP 34A 5623. Both these men are employees of the District Court, Sitapur. At about 9:45 a.m. as the scooter, carrying the two, approached the Bus Stand at Sitapur, the scooter swerved, to prevent a collision with a rickshaw that suddenly appeared from the left hand side. In consequence, the scooter hit a truck on its backside, causing both the rider and the claimant to be thrown to the ground. The scooter, of course, had tripped. In consequence, the claimant sustained serious injuries, that are indicated to be four fractures in the pelvis and rupture of the urethra. He had a long and repeat stay in hospitals, in a non-ambulatory condition for three months and suffered extreme physical pain. He had to attend the call of nature while being on his bed. The claimant had to undergo prolonged treatment and multiple surgical procedures, involving substantial expenditure in the treatment. The accident, according to the medical certification, has left the claimant permanently impotent. The claimant instituted the claim petition, as already detailed hereinbefore, asking the rider and the Insurer to pay him compensation in the sum of Rs.5,75,150/-. These expenses have been claimed under thirteen different heads, set out in paragraph no.22 of the claim petition. There is a detailed statement of the medical management, hospitalization, non-ambulatory period when the claimant was bed ridden and the repeat surgery that the claimant had to undergo, besides a future darkened by impotency and a prolonged medical supervision; may be life long.

5. The rider put in a written statement, saying that the accident did not take place due to his negligence. It happened because of the sudden appearance of the rickshaw on the wrong side, and a collision with it had to be prevented. It was pleaded that he held a valid driving licence and his vehicle was duly insured with the Insurer. The compensation, if any payable, had to be borne by the Insurer.

6. The Insurer put in their written statement, traversing the claim. It was pleaded that the claim was not verifiable, inasmuch as there was no site-plan. No cause of action had arisen against the Insurer. The rider had not intimated the Insurer of the accident. The claim petition was based on false and concocted facts in order to wrench compensation from the Insurer. It was also said that they would have been liable, if the vehicle was insured and that the policy had not been disclosed. It was also said that if the rider did not have a valid driving licence, they would not be liable. The further case was that the claimant had to establish his case by documentary evidence. An objection was also taken that the truck owner and the driver were not impleaded, and, therefore, the claim was bad for non-joinder of necessary parties. It was also the Insurer's case that the scooter was not being operated according to the terms and conditions of the Insurance Policy.

7. On the pleadings of parties, the following issues were framed by the Tribunal (translated into English from Hindi):

"(1) Whether on 04.05.1997 at 9:45 a.m. near the Bus Stand at Sitapur, the scooter bearing Registration No. UP 34A 5623 met with an accident involving a truck and the claimant received injuries in the accident?

(2) Whether the accident happened because of both the drivers driving the vehicles at high speed and negligently? If yes, its effect?

(3) Whether on account of non-joinder of the truck owner, driver and the truck insurer, the claim is bad for non-joinder?

(4) Whether the two vehicles were insured and operated according to the terms of the insurance policy?

(5) Whether the drivers of the two vehicles had valid and effective driving licences at the time of the accident? If yes, its effect?

(6) To what amount of compensation is the claimant entitled?"

8. The claimant examined himself in support of his claim as PW-1, besides another Raja Bux Sngh as PW-2. On behalf of the opposite parties to the claim petition, the rider examined himself as OPW-1. The claimant filed voluminous documentary evidence, which includes X-ray reports, treatment cards of various doctors and specialist doctors, discharge slips from hospitals, nursing home discharge slips, case-sheets from hospitals, nursing home bills and cash memos of the medicines purchased, ambulance bills and receipts, bills and payment receipts relating to surgeries undergone at the Blue Cross Hospital, Lucknow, the information given to the Civil Judge (Sr. Div.), with whom the claimant was working as a Munsarim, the order of the District Judge, sanctioning him an advance from the GPF, the claimant's salary certificate and report of the Medical Board, recommending special medical leave for the claimant. There is a very detailed description of all this documentary evidence set out in the impugned award, which need not be further listed, except where the relevant document is required to be referred to. The Insurance Company, as part of their documentary evidence, filed their surveyor's report, the rider's driving licence, the insurance cover note/ policy. The rider, for his part, filed his driving licence, the scooter's registration certificate and the insurance policy/ cover note.

9. On issues nos.1 and 2, the Tribunal, after an extensive review of evidence and the law applicable, held that the accident took place on the date, time and place alleged, involving the scooter and the truck. Both the drivers were rash and negligent, but the rider of the scooter was largely guilty of negligent driving. The Tribunal found contributory negligence on the part of the driver of the truck and the rider of the scooter, apportioning the liability between them as 20% and 80% respectively. The truck driver, its owner or insurer could not be found, and, therefore, issue no.3 was also answered in favour of the claimant by holding that to the extent of contributory negligence found for the driver of the truck, the claimant would be deprived of the compensation that he could recover from the owner, the driver or the insurer of the truck.

10. Issue no.4 was decided in the manner that it was held that the truck having escaped traceless with no identity about its owner, driver or insurer known, it would be assumed that it was insured.

11. The fifth issue was decided in the manner that the rider had filed his driving licence, which was found to be valid on the date of the accident and the Insurer could not dispel the validity of the licence. About the truck, it was said that there was no licence lodged on behalf of the truck driver or the owner, and, therefore, it would be assumed that he had no valid driving licence at the time of the accident.

12. On the sixth issue, the Tribunal did a minute examination of the compensation claimed under various heads, with reference to the documentary evidence and held, under different heads, that the claimant was entitled to a total compensation of Rs.1,98,300/-. Of this

amount, 80% would be payable to the claimant because he would lose 20% that was the apportioned share of the negligent truck driver, who could not be located or brought before the Tribunal. Thus, the liability of the Insurer would be 80% of Rs.1,98,300/- payable with interest at the rate of 12% per annum reckoned from the date of presentation of the claim.

13. Heard Mr. Asit Srivastava, learned Counsel for the appellant in support of this Appeal. No on appears on behalf of the respondents.

14. It must be remarked that the claimant has not raised any issue about the finding on the point of contributory negligence and apportionment of liability between the two vehicles, to wit, the scooter and the fugitive truck. In substance, therefore, whatever be the law about the right of the claimant to recover compensation, where one of the vehicles cannot be identified, and there is contributory negligence held with apportionment, the case here is limited to judging the validity of the award made by the Tribunal, for whatever it is.

15. So far as the factum of accident, its date, time and place is concerned, it has been sought to be assailed on the basis of the claimant's failure to lodge an information with the Police or to summon the GD Entry from Police Station, Kotwali, Sitapur about the accident. It has been emphasized that the claimant's father was a Munsarim in the Civil Court, and so is the claimant. They are men well acquainted with legal procedures and ought to have lodged a First Information Report. The suggestion is that the claimant received the injuries in question in some other motor accident or under different circumstances, not involving the insured vehicle. The claimant has entered the witness-box and proved his case. The rider, who was examined as OPW-1, has also proved the factum of accident. The mere absence of an FIR would not shroud an accident of this magnitude under any kind of doubt. After the claimant and the rider, both testified to the factum of accident, its time, place and the manner of occurrence, burden lay upon the Insurer to rebut by cogent evidence that the accident never happened in the manner described.

16. The Insurer has not led any evidence to dispel the factum of accident or its time, place and manner of occurrence. In the absence of any evidence produced by the Insurer, the findings of the Tribunal about the accident have to be upheld. It is well-nigh settled that mere non-registration of an FIR concerning the accident, would not be decisive about the accident ever happening. It was a non-fatal accident, where the claimant was severely injured and the rider was rash and negligent. Both are employees of the Civil Court, Sitapur. If they have chosen not to lodge an FIR about the accident, where the rider dashed against the truck from the backside, there is nothing so unnatural about their failure that may detract from the truth of the accident or its time, place and manner of occurrence.

17. There is some evidence that information was given to the police station by the claimant's brother, who serves in a foreign country, on account of which, a copy of that information could not be produced. The fact that the Police did not register that information is also not of much consequence, inasmuch as invariably informations about accidents, where one party is not out to prosecute the other, are often not registered as crimes. The Tribunal, in the opinion of this Court, has rightly believed the accident to have happened in the manner and on the date, time and place as alleged by the claimant; and not disputed by the rider. The finding about the rider being negligent and rash while operating his scooter is also far from exceptionable. Learned Counsel for the appellant has not raised much issue about the said finding, though he says that the truck driver

ought to have been held liable for more contribution to the negligence, because he was operating the larger vehicle. We do not think so. The manner, in which the accident took place, is not a very complex episode. It appears that some rickshaw suddenly appeared on the scene when the scooter operated by the rider and pillion ridden by the claimant was moving towards the Sitapur Bus Stand. In order to save the rickshaw from being hit by the scooter, the rider swerved to one side. That sent the vehicle on the path of accident, leading it to dash on to the rear side of the unknown truck.

18. From these facts, the Tribunal has inferred that the rider was driving rashly and negligently. This finding appears to be unexceptionable. The reason is that careful driving envisages the foresight of another's foolishness or incompetence on the road. A careful driver has to operate his vehicle in the manner that he can avert an accident, notwithstanding another's mistake or negligence. This is, particularly, true of the road conditions in small towns, where rule of the road and other niceties of traffic management do not come to the aid of a disciplined driver or check the recalcitrant one. The road conditions in small towns, unregulated by traffic signals, are a multi-dimensional movement of vehicles or traffic, with a mix of all kinds of mobile entities on the same pathway. It could include pedestrians, very slow moving vehicles and the presence of animals as well. A driver who chooses to operate his vehicle in this kind of traffic has to condition his driving instincts, and, particularly, regulate his speed to a degree where an unexpected movement by another may be negotiated to avert an accident.

19. What would be careful driving in the regulated conditions of a metropolis may not be so in a small *mofassil* town. The rider in this case, assessing from what appears in evidence, seems to have committed the mistake of moving at a speed that prevented him from bringing his vehicle to a halt or negotiate to safety, when the rickshaw suddenly appeared on the wrong side. The speed of the scooter was certainly so much, that the sudden appearance of the rickshaw caused the driver to swerve and dash his two-wheeler on the rear side of the truck. This is certainly a case, where the rider was largely negligent and responsible for the accident. There is no case that the accident occurred because the truck had suddenly applied brakes, bringing the bigger vehicle to a halt. The accident was perpetuated by the unforeseen intrusion of the rickshaw. Therefore, the learned Counsel for the Insurer, Mr. Srivastava is not right in his submission that the bigger vehicle ought to have been apportioned with more liability towards contributory negligence.

20. So far as the quantum of compensation is concerned, this Court has gone through the documents relating to the treatment that the claimant received. No doubt, he has suffered debilitating fracture to his pelvic bone and rupture of the urethra. He has undergone multiple surgical operations in various hospitals at Lucknow. He has turned impotent in consequence of the accident, of which there is a certificate on record from Dr. Rajeshwar Krishnan of Blue Cross Hospital, Faizabad Road, Maha Nagar, Lucknow, paper no. 17ग/30. There is no reason to disbelieve the said certificate. Quite apart, there are consistent records about the repeat surgical procedures undergone by the claimant at the Blue Cross Hospital, Lucknow and the treatment that he had received at Neera Nursing Home, Mahanagar Extension, Lucknow. The case-sheets relating to that treatment and the medicines administered, while an indoor, are there. Of foremost importance is Paper No. 60ग, which is a copy of the report of the Divisional Medical Board, Lucknow, comprising three Senior Government Doctors. The report certifies that the claimant was examined and found to be a case of urethral

dispersion with fracture in the pelvis. The aforesaid Medical Board, by their report dated 27.08.1997 (paper no.60ग) recommended sanction of special medical leave to the claimant. There is also on record paper no.16ग1/59 and 16ग/60, which are orders dated 05.07.1997 and 17.07.1997 passed by the District Judge of Sitapur, sanctioning Earned Leave and Medical Leave to the claimant. By the order dated 05.07.1997, the learned District Judge sanctioned Earned Leave from 01.07.1997 to 31.07.1997 and by the order dated 17.09.1997, medical leave on full average pay was sanctioned, from 01.08.1997 to 31.10.1997. There are tomes of medical bills and receipts, apart from medical reports, that go to show the extensive nature of injuries and the consequent pain and suffering the claimant has evidently suffered. The Insurer has not brought on record any evidence to dispel the truth of these well connected and sequenced documents, evidencing the medical procedures and treatment undergone by the claimant. The Insurer cannot, therefore, dispute the validity of the various medical records by insisting that these records have not been proved by examining the various doctors, who have been involved in treating the claimant across a protracted period of time.

21. The Tribunal, in our opinion, has awarded him compensation, marshalled into different heads, on a modest scale. It is by no means extravagant, as the learned Counsel for the Insurer urges.

22. There is one point that was, particularly, argued with much emphasis by Mr. Asit Srivastava, learned Counsel for the Insurer. He submitted that the Insurance Policy did not cover the risk of the pillion rider. Evidently, this point was not urged before the Tribunal and no issue was framed about it. Nevertheless, this Court has looked into the xerox copy of the Insurance Policy, that is on record as Paper No. 18ग/28. The Insurance Policy covers the risk of any person, including the insurer. The policy is clearly a comprehensive policy or what is called, in current times, as package policy. A policy of this kind, in our opinion, covers the risk of the pillion rider as much as it does of the rider/ insured. It was not disputed before this Court that the policy involved in this case is a comprehensive policy/ package policy. It is not a mere Act policy or a third party policy. The position about the occupants in a car or a pillion rider on a two wheeler, where the policy is a comprehensive/ package policy, is well settled in view of the decision of the Supreme Court in **National Insurance Company v. Balakrishnan & another, (2013) (1) SCC 731. In National Insurance Company v. Balakrishnan & another,** it has been held:

"24. It is extremely important to note here that till 31-12-2006 the Tariff Advisory Committee and, thereafter, from 1-1-2007 IRDA functioned as the statutory regulatory authorities and they are entitled to fix the tariff as well as the terms and conditions of the policies issued by all insurance companies. The High Court had issued notice to the Tariff Advisory Committee and IRDA to explain the factual position as regards the liability of the insurance companies in respect of an occupant in a private car under the "comprehensive/package policy". Before the High Court, the competent authority of IRDA had stated that on 2-6-1986, the Tariff Advisory Committee had issued instructions to all the insurance companies to cover the pillion rider of a scooter/motorcycle under the "comprehensive policy" and the said position continues to be in vogue till date. It had also admitted that the "comprehensive policy" is presently called a "package policy". It is the admitted position, as the decision would show, the earlier Circulars dated 18-3-1978 and 2-6-1986 continue to be valid and effective and all insurance companies are bound to pay the compensation in respect of the liability towards an occupant in a car under the "comprehensive/ package policy"

irrespective of the terms and conditions contained in the policy. The competent authority of IRDA was also examined before the High Court who stated that the Circulars dated 18-3-1978 and 2-6-1986 of the Tariff Advisory Committee were incorporated in the Indian Motor Tariff effective from 1-7-2002 and they continue to be operative and binding on the insurance companies. Because of the aforesaid factual position, the Circulars dated 16-11-2009 and 3-12-2009, that have been reproduced hereinabove, were issued.

25. It is also worthy to note that the High Court, after referring to individual circulars issued by various insurance companies, eventually stated [2011 ACJ 1415 (Del)] thus: (Yashpal Luthra case [2011 ACJ 1415 (Del)] , ACJ p. 1424, para 27)

"27. In view of the aforesaid, it is clear that the comprehensive/ package policy of a two-wheeler covers a pillion rider and comprehensive/package policy of a private car covers the occupants and where the vehicle is covered under a comprehensive/package policy, there is no need for the Motor Accidents Claims Tribunal to go into the question whether the insurance company is liable to compensate for the death or injury of a pillion rider on a two-wheeler or the occupants in a private car. In fact, in view of the TAC's directives and those of the IRDA, such a plea was not permissible and ought not to have been raised as, for instance, it was done in the present case."

26. In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act policy" stands on a different footing from a "comprehensive/package policy". As the circulars have made the position very clear and IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a "comprehensive/package policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act policy" which admittedly cannot cover a third-party risk of an occupant in a car. But, if the policy is a "comprehensive/package policy", the liability would be covered. These aspects were not noticed in Bhagyalakshmi [(2009) 7 SCC 148 : (2009) 3 SCC (Civ) 87 : (2009) 3 SCC (Cri) 321] and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same."

23. In this view of the matter, the Insurer can hardly wriggle out of their liability to satisfy the award.

24. In the result, the appeal **fails** and is **dismissed with costs.** The interim order dated 19.09.2001 is hereby vacated.

25. It is further directed that in case accounts of the Motor Accident Claims Tribunal have been assigned to the newly established Motor Accident Claims Tribunal, the learned District Judge, Sitapur and the learned Presiding Officer, Motor Accident Claims Tribunal, Sitapur shall together take necessary steps for disbursement of compensation to the claimant.

26. Let a copy of this order be communicated to the Motor Accident Claims Tribunal/ Additional District Judge, Sitapur through the learned District Judge, Sitapur and to the Presiding Officer, Motor Accident Claims Tribunal, Sitapur by the Senior Registrar.

(2021)12ILR A1098
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2021

BEFORE

THE HON'BLE SUBHASH CHANDRA SHARMA, J.

First Appeal From Order No. 443 of 2006

Karan Singh ...Appellant
Versus
Mandaliya Prabandhak, National Insurance Co. Muzaffar Nagar & Ors. ...Respondents

Counsel for the Appellant:
Sri N.D. Shukla

Counsel for the Respondents:
Sri Jitendra Kumar, Sri Mangla Prasad Rai, Sri R.P. Ram, Sri S.M.Upadhyay, Sri Shyam Murari Upadhyay, Smt Archana Singh, Sri Sudhir Dixit, Ms. Manjima Singh, Ms. Pragya Pandey.

Motor Vehicles Act, 1988 – Sections 166 & 173 - Compensation - Enhancement - Income of deceased - income of deceased Rs. 3500/- per month which he earned from work in Bartiks Courier - Tribunal presumed his notional income as Rs. 15,000/-p.a - Held - Court assessed notional income of deceased to be Rs. 100/- per day i.e. Rs. 3000/- per month which amounts to Rs. 36,000/- p.a. - Future Prospect - age of the deceased being between 21-25 years at the time of accident an additional amount of 40 % be added to the income as future prospect - Personal Expenses - deduction in the head of personal expenses of the deceased who was bachelor at the time of accident : 50 % - Multiplier – Tribunal wrongly applied the multiplier on the basis of the age of parents - multiplier of 18 should be applied because the age of deceased was between 21-25 years at the time of accident - conventional head - conventional head namely loss of estate and funeral expenses should be Rs. 15000/- and 15000/- respectively - aforesaid amount should be enhanced @ 10 % in every three years - Since, deceased was unmarried, therefore, no amount in the head of loss of consortium can be given - claimants/appellants shall be entitled to 7% simple interest from the date of filing of application till the date of actual payment (Para 8, 12, 14, 17, 18, 21)

Partly Allowed. (E-5)

Cases Relied on:

1. Mohd. Unus Vs Rais Najnien Begum & ors. 2015(2)TAC526

2. St. of Har. & anr. Vs Jasbir Kaur & ors. (2003)7 SCC 484

3. Sarla Verma & ors. Vs Delhi Tranport Corporation & anr., (2009)6SCC 121

4. National Insurance Company Limited Vs Pranay Sethi & ors., 2017 5 Supreme(SC) 1050

(Delivered by Hon'ble Subhash Chandra Sharma, J.)

1. Heard Shri D.N. Shukla, learned counsel for appellant as well as Ms. Manjima Singh, Advocate holding brief of Ms. Archana Singh, learned counsel for Insurance Company and perused the record.

2. This appeal u/s 173 of the Motor Vehicles Act has been filed by the claimant/appellant challenging the judgment and award dated 08.11.2005 passed by the Additional District Judge/M.A.C.T., Court No. 6, Aligarh by which a sum of Rs. 85,000/- along with 6% interest has been awarded as compensation on account of death of deceased.

3. Facts in brief are that an application under Section 166 Motor Vehicles Act was filed by the claimant/appellant seeking compensation to the tune of Rs. 8,00,000/- with 12 % interest alleging that on 15.09.2000, deceased Vivek Kumar Singh son of appellant was traveling by bus bearing no. UP14B2331 from Delhi, as it arrived in the limit of police station Gabhana, a truck bearing no. H.N.V.9465 coming from

opposite direction (Aligarh) driven rashly and negligently by its driver collided with the bus in which deceased Vivek Kumar Singh sustained injuries and died. F.I.R. in this regard was lodged by one Prem Pal r/o Anoop Sahar as Crime No. 218 of 2000 under Sections 279, 338, 304-A and 427 IPC. Deceased was aged about 21 years and earned Rs. 3500/- by working in Courier Company. Proceedings were contested by truck owner & driver as well as Insurance Company by filing written statement and denying the allegations made by the claimant/appellant.

4. Learned Tribunal on the basis of pleadings and after appreciating the evidence brought on record by the parties, both oral and documentary held that accident took place due to rash and negligent driving of the drivers of both the offending vehicles and determined the liability 50-50%. Learned Tribunal recorded the finding on the basis of oral testimony of eye witness P.W. 2 Lakkhi who proved the manner and mode of accident. It was stated by him that he is Chaukidar in the police station concerned and his village is located near place of accident. Accident took place in his presence on 15.09.2000 at about 12-1 o'clock in the night. A bus bearing no. UP14B2331 was coming from the side of Delhi and truck coming from the side of Aligarh collided. The driver of truck was driving it rashly and negligently in which Vivek Kumar Singh s/o Karan Singh aged about 21-22 years died. He informed to the police station. O.P.W.1 Vijaypal Singh, conductor of the bus bearing no. UP14B2331 stated that on 15.09.2000, he was plying the bus from Khurja to Kanpur. At about 2 o'clock in the night near Gabhana bridge, a truck bearing no. H.N.V.9465 driven by its driver rashly and negligently came from the side of Aligarh and collided with the bus causing damages to it and passengers also got injuries. O.P.W. 2 Brijpal, the driver of the bus bearing no. UP14B2331 has also made similar statement. The testimony of P.W. 2, O.P.W.1 & O.P.W.2 was unshakable in cross-examination. After investigation of the case, charge sheet was submitted by the police. This fact was also taken into account by learned Tribunal.

5. On the question of quantum, learned Tribunal found that appellant failed to lead any evidence about income of deceased as Rs. 3500/- per month which he earned from work in Bartiks Courier, so presumed his notional income as Rs. 15,000/-p.a, deducted 1/3 towards personal expenses and after applying multiplier of 08 at the age of claimant (father) determined the compensation to the tune of Rs. 80,000/- (eighty thousand) and further awarded a sum of Rs. 5000/- funeral expenses. In this manner, a total sum of Rs. 85,000/- was determined as compensation payable to the claimant/appellant.

6. Learned counsel for appellant submits that the Tribunal has wrongly assessed the notional income of the deceased as Rs. 15,000/- p.a. and also applied the multiplier on the basis of the age of parents. No amount has been assessed for future prospect, loss of estate, love & affection. Very less amount has been assessed for funeral expenses. In this way award is very meagre. Learned counsel for respondent opposed the above arguments.

7. Considered the arguments advanced by learned counsel for the appellant as well as learned counsel for Insurance Company and perused the record.

8. The submission of learned counsel for appellant is that notional income of Rs. 15000/- p.a. of deceased as presumed by the tribunal is very meagre. In this regard, it is noteworthy that deceased was unskilled person whose income was not proved. In the case of ***Mohd. Unus; Vs. Rais; Najnien Begum and others2015(2)TAC526,*** this court enhanced the notional income of Rs.15000/- to Rs.36000/- p.a.

Likewise, in the case of ***State of Haryana and another Vs. Jasbir Kaur and others (2003)7 SCC 484***. Hon'ble the Apex Court has fixed the notional income to be Rs. 3000/- per month where death of deceased aged about 25 years took place in the year 1999. In the present case, incident took place in the year 2000, therefore, as per observation made by the Hon'ble Apex Court as well as this court in the aforesaid cases, the notional income of deceased be assumed as Rs. 100/- per day i.e. Rs. 3000/- per month which amounts to Rs. 36,000/- p.a.

9. In my considered opinion, the Tribunal cannot be said to be right in presuming the notional income of the deceased Rs. 15000/- p.a. on the place of Rs.36000/- .

10. In the case of ***Sarla Verma and others Vs. Delhi Tranport Corporation and another, (2009)6SCC 121,*** it was held that multiplier to be used should be as provided in column 4 of the judgment. Multiplier prescribed for the age group of 21-25 years is 18. It may be relevant to quote para 42 of the said judgment which reads as under:

"We therefore hold that the multiplier to be used should be as mentioned in column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

11. The scheme of multiplier has been again affirmed by Hon'ble the Apex Court in the case of ***National Insurance Company Limited Vs. Pranay Sethi and others, 2017 Supreme(SC) 1050.***

12. In the view of the dictum of Hon'ble the Apex Court in the case of *Sarla Verma (Supra)* and *Pranay Sethi (Supra),* the multiplier of 18 should be applied at the age of 21-25 because the age of deceased was between 21-25 years at the time of accident as per record. In this regard the multiplier applied by the learned tribunal seems to be incorrect.

13. So far as the amount to be deducted towards personal expenses in the case of bachelor is concerned, it has been held by Hon'ble the Apex Court in the case of *Pranay Sethi (Supra)* that for determination of the multiplicand, the deduction for personal and living expenses, the Tribunals and the Courts shall be guided by Paragraphs no. 30 to 32 of Sarla Verma (supra) case. Para 31 deals with the deduction in the case of bachelor. Para 30 to 32 are quoted below:

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra4, the general practice is to apply standardised deductions. Having considered several subsequent decisions of this (2003) 3 SLR (R) 601 Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is

assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non- earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

14. In view of the above, deduction in the head of personal expenses of the deceased who was bachelor at the time of accident are to be made to the extent of 50 % on the place 1/3 of the amount of the income.

15. Further submitted by learned counsel for the appellants that no compensation has been determined in the head of future prospects. Hon'ble the Apex Court has held in the case of ***National Insurance Company Vs. Pranay Sethi (Supra)*** that while determining the income, an addition of 40 % of the established income should be awarded where the deceased being self employed or on the fixed salary was below the age of 40 years and an addition of 25 % where the deceased was between the age of 40-50 years and 10 % where the deceased was between the age of 50-60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

16. Learned tribunal has not determined any amount of compensation in the head of future prospects as provided by Hon'ble the Apex Court in the aforesaid case. In this regard, it has committed the manifest error of law in not determining any amount in future prospects of the deceased.

17. In view of the above the age of the deceased being between 21-25 years at the time of accident, the additional amount of 40 % be added to the income as future prospect.

18. As the submission of the learned counsel for the appellants in support of amount for conventional head is concerned, Hon'ble the Apex Court has held in the case of Pranay Sethi (supra) that reasonable figure for conventional head namely loss of estate, consortium and funeral expenses should be Rs. 15000/-, 40000/- and 15000/- respectively. The aforesaid amount should be enhanced @ 10 % in every three years.

19. In this way , learned tribunal is not right on the point of making determination of amount for loss of estate and funeral expenses. Since, deceased was unmarried, therefore, no amount in the head of loss of consortium can be given.

20. In view of the above facts and discussions, the compensation to be paid to the claimant/appellant has to be redetermined as under:

S.No.	Heads	Calculation
i	Income	Rs. 3000/- per month

ii	40 % of (i) above to be added as future prospects	(Rs. 3000 + 1200) = Rs. 4200/- per month
iii	50 % of (ii) deducted as personal expenses of deceased	(Rs. 2100/-)
iv	Compensation after multiplier of 18	(2100 x 12 x 18) = 4,53,600/-
v	Loss of Estate	Rs. 15,000/-
vi	Funeral Expenses	Rs. 15000/-
	Total compensation awarded	Rs. 4,83,600/-

21. The claimants/appellants shall also be entitled to 7% simple interest as awarded by tribunal on the amount from the date of filing of application till the date of actual payment.

22. Accordingly, the appeal filed by the claimant/appellant is ***Partly Allowed*** and award stands modified to the extent directed above and the claimant/appellant shall be entitled for payment of Rs. **483,600/- (four lacs eighty three thousand six hundred)** as determined above from the opposite parties no 1 & 2 in the same proportion as directed by the learned tribunal.

23. No order as to costs.

(2021)12ILR A1102
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.12.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 570 of 2015

United India Insurance Co. Ltd. ...Appellant
Versus
Sri Niyamatullah & Anr. ...Respondents

Counsel for the Appellant:
T.J.S. Makker

Counsel for the Respondents:
Anshul Baranwal

Motor Vehicles Act, 1988 – Section 163A - Compensation on structured formula basis - grant of compensation under Section 163-A of the Act on the basis of the structured formula is in the nature of a final award - adjudication thereunder is required to be made without any requirement of any proof of negligence of the driver/owner of the vehicle(s) involved in the accident - *in a proceeding under Section 163-A of the Act it is not open for the Insurer to raise any defence of negligence on the part of the victim* - award under Section 163-A of the Act is not open to be assailed on the ground that the claimant was a tortfeasor or one guilty of negligence (Para 11, 13)

Dismissed. (E-5)

Cases Relied on :

1. National Insurance Company Ltd. Vs Sinitha Vs & ors., (2012) 2 SCC 356

2. United India Insurance Co. Ltd. Vs Sunil Kumar & anr., (2019) 12 SCC 398

3. Shivaji & anr. Vs Divisional Manager, United India Insurance Co. Ltd. & ors., AIR 2018 SC 3705.

(Delivered by Hon'ble J.J. Munir, J.)

1. This case was directed to be listed in the additional cause list vide order dated 02.12.2021, but it has appeared in the daily

cause list. Nevertheless, it is on the day's list and is, accordingly, taken up.

2. Heard Mr. T.J.S. Makker, learned counsel for the appellant and Mr. Anshul Baranwal appearing on behalf of the respondents.

3. The appellant was a driver of a truck bearing Registration No. UP 77 A 7454. He was employed to operate the said vehicle by one Mangali Prasad Gupta, who was the owner of the truck. On 15.05.2013, he was plying the vehicle between Sitapur and Kanpur. When the truck was somewhere about the Police Station-Hasanganj in District-Unnao, a wild animal suddenly jumped onto the road. The driver endeavoured to save the animal, which led him to collide with another truck. The accident led the driver to suffer serious injuries. He sustained fractures to both his lower limbs and presumably to his spine (described in vernacular as 'kamar'). He was rushed to the Medical College at Lucknow. The driver remained admitted to the hospital from 29.05.2013 to 05.06.2013. By the time, he preferred this claim, he was still undergoing treatment. It was pleaded that as a result of the accident, he was completely handicapped. One of his legs was amputated above the knee and now, he is not fit to do any work in consequence of the injuries that he sustained. He suffered mentally, physically and economically, besides the heavy medical expenditure that the treatment entailed. It is on the foot of the aforesaid facts that the petitioner instituting Claim Petition No. 334 of 2013 under Section 163-A of the Motor Vehicles Act, 1988 (for short *'the Act')*.

4. Shorn of unnecessary detail, it must be recorded that the owner of the truck, who was impleaded as opposite party no. 1 to the claim petition, denied the accident as also his liability. It is further pleaded that the vehicle was insured with the New India Insurance Co. Ltd., who were impleaded as opposite party no. 2 to the claim petition.

5. The Insurance Company, on their part, denied all the assertions in the claim petition. It was further asserted that the claim was, in any case, exaggerated and brought on facts that were concocted. The registration certificate, permit, fitness of the vehicle etc. were questioned with the assertion that if all those documents were not in order, the insurance company would not be liable, in any case. The validity of the driver's licence was also put in issue.

6. The Tribunal, after framing as many as seven issues and answering each, on the basis of the evidence on record, found for the driver and against the owner as well as the Insurance Company. By the impugned judgment and award, the claim was decreed for a sum of Rs. 6,23,292/- with 7% simple interest, payable annually from the date of presentation of the petition, till realization.

7. Aggrieved, the present appeal has been preferred by the Insurance Company.

8. The only ground urged in support of the appeal by Mr. T.J.S. Makker is that the claimant being the Driver of the truck that met with the accident was a tortfeasor and could not capitalize on his own fault or negligence by preferring a claim petition under Section 163-A of the Act. He places reliance on the decision of the Supreme Court in ***National Insurance Company Ltd. vs. Sinitha vs. Others, (2012) 2 SCC 356,*** where it has been held:

"27. Thus, in our view, it is open to a concerned party (owner or insurer) to defeat a claim raised under Section 163-A of the Act, by pleading and establishing anyone of the three "faults", namely, "wrongful act", "neglect" or "default". But for the above reason, we find no plausible logic in the wisdom of the legislature, for

providing an additional negative bar precluding the defence from defeating a claim for compensation in Section 140 of the Act, and in avoiding to include a similar negative bar in Section 163-A of the Act. The object for incorporating sub-section (2) in Section 163-A of the Act is, that the burden of pleading and establishing proof of "wrongful act", "neglect" or "default" would not rest on the shoulders of the claimant. The absence of a provision similar to sub-section (4) of Section 140 of the Act from Section 163-A of the Act, is for shifting the onus of proof on the grounds of "wrongful act", "neglect" or "default" onto the shoulders of the defence (owner or the insurance company). A claim which can be defeated on the basis of any of the aforesaid considerations, regulated under the "fault" liability principle. We have no hesitation therefore to conclude, that Section 163-A of the Act is founded on the "fault" liability principle.

33. From the preceding paragraphs (commencing from para 22), we have no hesitation in concluding, that it is open to the owner or insurance company, as the case may be, to defeat a claim under Section 163-A of the Act by pleading and establishing through cogent evidence a "fault" ground ("wrongful act" or "neglect" or "default"). It is, therefore, doubtless, that Section 163-A of the Act is founded under the "fault" liability principle. To this effect, we accept the contention advanced at the hands of the learned counsel for the petitioner."

9. Mr. Anshul Baranwal has submitted that the law in ***National Insurance Company Ltd. vs. Sinitha and Others (supra),*** is no longer good law in view of the subsequent three-Judge Bench decision of their Lordships of the Supreme Court in ***United India Insurance Co. Ltd. vs. Sunil Kumar and Another, (2019) 12 SCC 398.***

10. In ***United India Insurance Co. Ltd. vs. Sunil Kumar and Another (supra)***, a three-Judge Bench, of their Lordships has answered a question referred by a two-Judge Bench, for decision by a larger Bench, disagreeing with the principle in ***National Insurance Company Ltd. vs. Sinitha and Others (supra)***. In ***United India Insurance Co. Ltd. vs. Sunil Kumar and Another (supra)***, the question referred was noted thus:

" 1. Unable to agree with the reasoning and the conclusion of a two judge bench of this Court in National Insurance Company Limited vs. Sinitha and others, a coordinate bench of this Court by order dated 29th October, 2013 has referred the instant matter for a resolution of what appears to be the following question of law.

"Whether in a claim proceeding under Section 163-A of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act") it is 1 [(2012) 2 SCC 356]open for the Insurer to raise the defence/plea of negligence?"

11. The question was answered in ***United India Insurance Co. Ltd. vs. Sunil Kumar and Another (supra),*** which is as under:

".....8. From the above discussion, it is clear that grant of compensation under Section 163-A of the Act on the basis of the structured formula is in the nature of a final award and the adjudication thereunder is required to be made without any requirement of any proof of negligence of the driver/owner of the vehicle(s) involved in the accident. This is made explicit by Section 163-A(2). Though the aforesaid section of the Act does not specifically exclude a possible defence of the Insurer based on the negligence of the claimant as contemplated by Section 140(4), to permit such defence to be introduced by the Insurer and/or to understand the provisions of Section 163-A of the Act to be contemplating any such situation would go contrary to the very legislative object

behind introduction of Section 163-A of the Act, namely, final compensation within a limited time frame on the basis of the structured formula to overcome situations where the claims of compensation on the basis of fault liability was taking an unduly long time. In fact, to understand Section 163-A of the Act to permit the Insurer to raise the defence of negligence would be to bring a proceeding under Section 163-A of the Act at par with the proceeding under Section 166 of the Act which would not only be self-contradictory but also defeat the very legislative intention.

9. For the aforesaid reasons, we answer the question arising by holding that in a proceeding under Section 163-A of the Act it is not open for the Insurer to raise any defence of negligence on the part of the victim."

12. The view in ***United India Insurance Co. Ltd. vs. Sunil Kumar and Another (supra)*** has been followed by a subsequent three-Judge Bench in ***Shivaji and Another vs. Divisional Manager, United India Insurance Co. Ltd. and Others, AIR 2018 SC 3705.***

13. In view of the aforesaid position of law, that has now come to be settled, this Court is of the opinion that the impugned award is not open to be assailed on the ground that the claimant was a tortfeasor or one guilty of negligence on his part, and, therefore, could not maintain a petition under Section 163-A of the Act.

14. No other point was pressed.

15. Therefore, this appeal **fails** and stands **dismissed.** There shall be no order as to costs.

16. The compensation deposited with the Tribunal shall be disbursed to the claimant, forthwith.

(2021)12ILR A1105
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.12.2021

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

First Appeal From Order No. 901 of 2016

Executive Engineer, Aasthai Yantrik Khand ...Appellant

Versus

Ram Kali & Ors. ...Respondents

Counsel for the Appellant:
Standing Counsel

Counsel for the Respondents:
Rajesh Trivedi

A. Motor Vehicles Act, 1988 – Section 163A - Claim petition - Driver not necessary party - claim-petition u/s 163 A maintainable even if the driver of the offending vehicle had not been impleaded as a defendant - in proceedings under Section 163-A, claimants is not required to plead or establish any wrongful act, doing or negligence on the part of either the owner or the driver of the vehicle - driver of the offending vehicle is not a necessary party and proceedings shall not be vitiated because the driver was not impleaded in the claim petition if the owner of the vehicle had been impleaded as a party - under Section 163-A, the liability to pay compensation is of the owner and the Insurance Company, the proceedings under Section 163-A of the Act, 1988 will not be vitiated merely because the driver of the Vehicle was not impleaded as a party in the claim case (Para 14, 15, 17, 19)

B. Civil law - Claim Petition - Motor Vehicles Act, S.163A - U.P Motor Vehicles Rules, 1998, Chapter IX, Rule 207, 208, 221 - Rules 9 to 13 and 15 to 30 of Code of Civil Procedure, 1908 shall, so far as may be, apply to proceedings before the claims Tribunal - Civil Procedure Code, O.5 R.9(3) - Delivery of summons by court - where summons issued by the Court are properly addressed, pre-paid and duly sent by

registered post acknowledgement due, then the Court issuing the summons shall declare that the summons had been duly served on the defendant notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within 30 days from the date of issue of summon (Para 12)

Dismissed. (E-5)

Cases Relied on :

1. Shivaji & anr. Vs Divisional Manager, United India Insurance Co.Ltd. & ors. 2018(3) T.A.C. 673(S.C.)

2. New India Insurance Co.Ltd., Vs Lalawmpuia (Minor) & ors. 2010(4) T.A.C. 500 (Gau.)

3. Machindranath Kernath Kasar Vs D.S.Mylarappa & ors. (2008) 13 SCC 198

4. Uma Kant Tewari Vs Jai Prakash Srivastava & ors. (2019) 5 ADJ 640

5. United India Insurance Company Ltd. Vs Sunil Kumar & anr. (2019) 12 SCC 398

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. Heard counsel for the appellant and Shri Rajesh Trivedi representing the claimants-opposite party nos. 1 to 6.

2. The present First Appeal From Order has been filed by the defendant under Section 173 of the Motor Vehicles Act, 1988 ***(hereinafter referred to as, ''Act') a***gainst the award dated 25.2.2013 passed by the Motor Accident Claims Tribunal, Lucknow in Motor Accident Claim Petition No. 431 of 2012 ***Ram Kali versus Executive Engineer*** (Aasthai Yantrik Khand (Temporary Mechanical Division), Lok Nirman Vibhag, District Agra).

3. The facts of the case are that respondent/opposite party nos. 1 to 6 filed a Claim Petition under Section 163-A of the Act alleging that Ram Asrey died in an accident caused due to rash and negligent driving of the vehicle (Registration No. U.P 80A 9846) by its driver. The defendant-appellant is the owner of the offending vehicle. The driver of the vehicle was not impleaded as a defendant in the claim petition. A First Information Report regarding the aforesaid incident was also filed and Case Crime No.124/2012 under Section 279/304-A I.P.C was registered against the driver of the vehicle.

4. The respondent/opposite party no. 1 is the wife of the deceased Ram Asrey while the respondent/opposite party nos. 2 to 6 are the sons of the deceased Ram Asrey. In their claim petition, the respondent/opposite parties claimed a compensation of Rs.10,66,000.00 alleging that the deceased was earning Rs.3000/- per month at the time of his death.

5. The Tribunal issued summons to the defendant-appellant on 4.9.2012 by registered post with acknowledgment due but the acknowledgments were not received by the Court by 10.10.2012 and therefore, the Tribunal declared that the summons had been duly served on the appellant/defendant. The defendant-appellant did not put in appearance in the case and no written statement was filed by it till 22.10.2012. Consequently, by order dated 22.10.2012, the Tribunal passed an order to proceed ex parte against the appellant-defendant.

6. In the claim-petition, the opposite party no. 1 appeared as plaintiff-witness no.1 to prove her case regarding the accident. The Postmortem Report, the First Information Report registering Case Crime No.124 of 2012, the spot inspection report prepared by the Police during investigation and the charge sheet submitted by the Police against the driver of the offending vehicle were also filed as evidence to prove the case of the claimant. The Tribunal, after considering the evidence on record, held that as the claim-petition was filed under Section 163-A

of the Act, therefore, the negligence of the driver in causing the accident was not required to be proved and the claimants-opposite parties were entitled to compensation from the defendant-appellant as it was proved from the oral and documentary evidence on record that Ram Asrey had died due to an accident arising out of the use of the offending vehicle. The Tribunal determined the compensation on minimum wages payable to a daily wage labour, i.e., Rs.3000/- per month and after holding that the age of the deceased at the time of his death was between 35 to 40 years, applied a multiplier of 16 to determine the total compensation payable to the claimants-opposite parties. The Tribunal by its award dated 25.2.2013 determined the compensation payable to the claimants-opposite parties as Rs.3,93,500.00 with six percent simple interest from the date of filing the claim petition.

7. It was argued by the counsel for the appellant that the award dated 25.2.2013 has been passed without serving notice to the appellant and without giving any opportunity of hearing to the appellant. It was argued by the counsel for the appellant that the claim-petition was not maintainable because the driver of the offending vehicle had not been impleaded as a defendant in the said case. It was argued that for the aforesaid reasons, the impugned award passed by the Tribunal is liable to be set aside.

8. Rebutting the argument of the counsel for the appellant, the counsel for the claimants-opposite parties has argued that notices had been issued to the appellant by registered post and the appellant deliberately avoided to appear before the Tribunal and therefore, vide its order dated 22.10.2012, the Tribunal proceeded to hear the case ex parte against the appellant. It was argued that in the circumstances of the case, the appellant had been given an opportunity to represent his case before the Tribunal which they failed to avail of and no illegality has been committed by the Tribunal in proceeding ex parte against the appellant. It was further argued that the claim-petition was filed under Section 163-A of the Act and the award has also been computed on the structured formula basis in accordance with Schedule-II of the Act, therefore, the negligence of the owner or the driver of the offending vehicle was not required to be proved by the claimants-opposite parties and thus, the driver of the offending vehicle was not a necessary party in the claim petition. It was argued that for the aforesaid reasons, the appeal has no merit and is liable to be dismissed. In support of his contention, the counsel for the claimants-opposite parties has relied on the judgment of the Supreme Court reported in ***Shivaji and Another versus Divisional Manager, United India Insurance Co.Ltd. and others 2018(3) T.A.C. 673(S.C.)*** and the judgment of ***Gauhati High Court reported in New India Insurance Co.Ltd., versus Lalawmpuia (Minor) and others 2010(4) T.A.C. 500 (Gau.).***

9. I have considered the submissions of the counsel for the parties and also perused the records.

10. The procedure to be followed by the Tribunal in a claim-petition filed under Sections 163-A and 166 has been prescribed in Chapter IX of the U.P Motor Vehicles Rules, 1998.

11. Rule 207 of the Rules 1998 provides that the Claims Tribunal shall send to the owner of the Motor Vehicle involved in the accident and its insurer, a notice of the date on which it will hear the application. Rule 208 of the Rules 1998 provides that the owner of the Motor Vehicle and the insurer, may at or before the first hearing or within such further time as the claims Tribunal may allow, file a written statement dealing with the claim raised in the application. Rule 208(3) of the Rules, 1998 provides that the date of first hearing for filing written statement under sub rule (1) shall not be

more than one month from the date of issuance of notices to the owner/driver and insurer of the Motor Vehicle and no further time, more than one month shall be given for that. Rule 221 of the Rules 1998 provides that Rules 9 to 13 and 15 to 30 of Code of Civil Procedure, 1908 ***(hereinafter referred to as, "C.P.C.')*** shall, so far as may be, apply to proceedings before the claims Tribunal.

12. Order V Rule 9(3) of C.P.C. provides that amongst other modes, summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due addressed to the defendant or his agent empowered to accept the service of summons. Order V Rule 9(5) of C.P.C provides that where summons issued by the Court are properly addressed, pre-paid and duly sent by registered post acknowledgement due, then the Court issuing the summons shall declare that the summons had been duly served on the defendant notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within 30 days from the date of issue of summons. Order V Rule 9 of C.P.C is reproduced below:-

"Rule 9 Order V of Code of Civil Procedure 1908 "Delivery or transmission of summons for service"

9. Delivery of summons by Court.- (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and where he is such an officer, the summons may be sent to him in such manner as the Court may direct.

(3) **The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court:**

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

(4) Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgment due), the provisions of rule 21 shall not apply.

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, **the Court issuing the summons shall declare that the summons had been duly served on the defendant:**

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of courier agencies for the purposes of sub-rule (1).

13. It is not the case of the appellant that notice/summons in the case issued to the appellant were not properly addressed and were not duly sent by registered post with acknowledgment due. The records of the case indicate and the said fact has also been been recorded in the award of the Tribunal that summons were issued by registered post to the appellant. The summons were issued on 4.9.2012. The acknowledgment was not received by the Tribunal till 10.10.2012 i.e., after 30 days from the date of issue of the summons. In the circumstances, by virtue of Order V Rule 9 (5) - Proviso, the Tribunal had, rightly, by its order dated 10.10.2012 declared that the summons had been duly served on the defendant. In view of the aforesaid, it shall be deemed that the appellant had been served summons/notice in the case. The appellant did not appear before the Tribunal and did not file any written statement contesting the claim petition. Therefore, the Tribunal vide its order dated 22.10.2012 directed that the proceedings be heard ex-parte against the appellant-defendant. For the aforesaid reasons, the contention of the defendant-appellant that no opportunity of hearing was given to the defendant and no notice was served on him is unfounded and is rejected.

14. So far as the arguments of the counsel for the appellant that the claim-petition was not maintainable because the driver of the offending vehicle had not been impleaded as a defendant in the case, is concerned, the same for reasons stated presently is also without substance.

15. A reading of the grounds raised in the memo of appeal shows that the appellant has not disputed the fact that Ram Asrey died in an accident arising out of the use of the offending Vehicle and has filed the appeal contesting only the allegations made in the claim petition regarding the negligence of the driver of the offending vehicle in causing the accident. It is also not the case of the appellant that he is not the owner of the vehicle. The claim petition was filed and was registered under Section 163-A of the Act in which the claimant is not required either to plead or establish any wrongful act, or neglect or default of the owner of the Vehicle or of any other person. Section 163-A of the Act, is reproduced below:-

"**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 or 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".

16. The Supreme Court in ***Machindranath Kernath Kasar versus D.S.Mylarappa and others (2008) 13 SCC 198*** which was regarding a case regarding a claim petition filed under Section 166 of the Act (in which the negligence of the driver of the vehicle has to be pleaded and established by the claimants) held that the driver may not be a necessary party in the claim proceedings in the sense that in his absence, the entire proceedings shall not be vitiated as the owner of the vehicle was a party in his capacity as a joint tortfeasor. The observations of the Supreme Court in Paragraph -30 of the said reports is reproduced below-

"30. It is, however, of some interest to note the provisions of Section 168 of the Motor Vehicles Act. In terms of this aforementioned provision, the Tribunal is mandatorily required to specify the amount which shall be paid by the owner or driver of the vehicle involved in the accident or by or any of them. As it is imperative on the part of the Tribunal to specify the amount payable inter alia by the driver of the vehicle, a fortiori he should be impleaded as a party in the proceeding. ***He may not, however, be a necessary party in the sense that in his absence, the entire proceeding shall not be vitiated as the owner of the vehicle was a party in his capacity as a joint tortfeasor."***

17. As noted earlier in cases filed under Section 166 of the Act, the claimants have to plead and establish the negligence of the driver in causing the accident. The role of a driver in any claim proceedings under the Act is to contest the allegations of negligence made against him as also the allegation that the accident was caused by use of the vehicle driven by him. As noted earlier, the allegation of the claimants and the findings of the Tribunal that the accident happened due to use of the vehicle owned by the appellant is not challenged in the present appeal. A driver is sufficiently represented in proceedings under Section 166 even if he appears as a witness to deny and contest the allegations of negligence made against him (***Machindranath Kernath Kasar (Supra) and Uma Kant Tewari versus Jai Prakash Srivastava and others. (2019)*** 5 ADJ 640. If that is the situation under Section 166, then obviously in proceedings under Section 163-A, where the claimants are not required to plead or establish any wrongful act, doing or negligence on the part of either the owner or the driver of the vehicle, the driver of the offending vehicle is not a necessary party and proceedings shall not be vitiated because the driver was not impleaded in the claim petition if the owner of the vehicle had been impleaded as a party. It was observed by the Supreme Court in ***United India Insurance Company Ltd. versus Sunil Kumar and another (2019) 12 SCC 398***. Paragraph 8 & 9 are reproduced below:-

"8. From the above discussion, it is clear that grant of compensation under Section 163-A of the Act on the basis of the structured formula is in the nature of a final award and the adjudication thereunder is required to be made without any requirement of any proof of negligence of the driver/owner of the vehicle(s) involved in the accident. This is made explicit by Section 163A(2). Though the aforesaid section of the Act does not specifically exclude a possible defence of the Insurer based on the negligence of the claimant as contemplated by Section140(4), to permit such defence to be introduced by the Insurer and/or to understand the provisions of Section 163A of the Act to be

contemplating any such situation would go contrary to the very legislative object behind introduction of Section 163A of the Act, namely, final compensation within a limited time-frame on the basis of the structured formula to overcome situations where the claims of compensation on the basis of fault liability were taking an unduly long time. ***In fact, to understand Section 163A of the Act to permit the Insurer to raise the defence of negligence would be to bring a proceeding under Section 163A of the Act on a par with the proceeding under Section 166 of the Act which would not only be self-contradictory but also defeat the very legislative intention.***

9. For the aforesaid reasons, we answer the question arising by holding that in a proceeding under Section 163A of the Act, it is not open for the Insurer to raise any defence of negligence on the part of the victim."

18. The aforesaid judgment was also referred and followed by the Supreme Court in ***Shivaji and another (Supra).***

19. As the negligence of the driver of the offending vehicle is not to be pleaded or proved in proceedings under Section 163-A of the Act and under Section 163-A, the liability to pay compensation is of the owner and the Insurance Company, the proceedings under Section 163-A of the Act, 1988 will not be vitiated merely because the driver of the Vehicle was not impleaded as a party in the claim case.

20. For the aforesaid reasons, the appeal lacks merit and is ***dismissed.*** Interim order, if any, passed in favour of the appellant, is vacated.

(2021)12ILR A1111
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

First Appeal From Order No. 1092 of 2008

Ram Kumar Awasthi ...Appellant
Versus
Rajeshwar & Ors. ...Respondents

Counsel for the Appellant:
Sri Ramendra Asthana, Sri M.L. Maurya

Counsel for the Respondents:
Sri Bimal Prasad, Sri K.N.Saxena, Sri Pankaj Saksena, Sri Vijay Kumar Ojha, Sri Vijay Prakash Pandey , Sri Anupam Laloriya

Civil Law - Civil Procedure Code,1908 - O.41 R. 23, O.41 R.25 - Remand of case by Appellate Court - first appellate court remanded the matter with a direction to the trial court to issue additional commission for assessing the value of the construction after deducting depreciation value and after obtaining the Amin report about market value of the land as well as the construction and after giving opportunity of evidence to both the parties, determine the valuation of the plaintiff's share - Held - There was no sufficient evidence before the first appellate court to determine the issues involved and hence, the order of remand passed by the first appellate court is well justified. (Para 8, 9, 10)

Allowed. (E-5)

Cases Relied on:

1. Ram Bali Singh & ors. Vs Ram Sakal (F.A.F.O. No. 560 of 1989-Decided on March 13, 1989

2. Chaturghun Vs Dhanpati Rai & ors. 2007 (69) ALR 861

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. This First Appeal From Order has been filed against the judgment and order dated 6.12.2007 passed by the First Appellate Court of

Additional district Judge, Court No. 9/Special Judge, E.C. Act, Shahjahanpur in Civil Appeal No. 25 of 2003 Raj Kumar and another Vs. Rajeshwar and others.

2. The first appeal was filed against the judgment and final decree dated 31.5.2003 passed in Original Suit No. 373 of 1979 Ram Kumar Vs. Rajeshwar by the Court of Civil Judge (Sr. Div.), Shahjahanpur.

3. The trial court in the proceeding of final decree of O.S. No. 373 of 1979 in compliance of the judgment and order of the First Appellate Court dated 19.9.2001 by which the matter was remanded to the trial court with the observation that the trial court shall make valuation of the share of defendants in such manner as he thinks fit and directed the sale of share to such defendants-appellants and make a necessary and proper directions in that behalf as envisaged under section 4 of the Partition Act, issued a commission to assess the valuation and on the basis of commission report has determined the value of the half share of the plaintiff as Rs. 1,74,000/- and further ordered defendant to deposit the amount within two months for execution of sale deed.

4. Learned counsel for the appellant mainly contended that the appellate court can remand the matter only according to provision of Order 41 Rule 23 and Rule 25 of the C.P.C. The conditions of aforesaid provisions are not fulfilled in the present matter and hence, the first appellate court should not have remanded the matter but instead himself has decided the points involved after taking evidence. Learned counsel further contended that first appellant court has all the powers of taking additional evidence and the first appellate court should have exercised that power and after taking additional evidence should have decided the matter finally. The first appellate court has failed to exercise the jurisdiction vested in it and hence, the impugned order is not sustainable .

5. Learned counsel for the appellant placed reliance on the judgment in the case of ***Ram Bali Singh and others Vs. Ram Sakal (F.A.F.O. No. 560 of 1989-Decided on March 13, 1989) and Chaturghun Vs. Dhanpati Rai and others [2007 (69) ALR 861].***

6. On the other hand; learned counsel for the respondents contended that the Amin report on the basis of which the trial court has fixed the valuation was objected by the plaintiff-appellant himself before the trial court. In his objection he has disputed the market value of the land as well as the constructions thereupon. Learned counsel further contended that it is not function of the appellate court to decide objections against Amin Report. The factual aspect as taken in para 5 of the aforesaid objections can only be determined by the trial court. Learned counsel for the appellant further contended that Under Order 41 Rule 24 C.P.C. the appellate court may after resettling the issue if necessary finally determined the suit if the evidence upon the record is sufficient to enable the appellate court to pronounce the judgment. There is no sufficient evidence on record to enable the appellate court to pronounce the judgment, hence, the first appellate court has rightly remanded the matter to the trial court for taking necessary evidence to determine the points in issue. The order of the first appellate court is just and proper and appeal has no merits.

7. By the impugned order the first appellate court has remanded the matter with a direction to the trial court to issue additional commission for assessing the value of the construction after deducting depreciation value and after obtaining the Amin report about market value of the land as well as the

construction and after giving opportunity of evidence to both the parties determine the valuation of the plaintiff's share. The first appellate court has also observed that the market value for sale and purchase can be determined on the basis of prevalent circle rate and after taking evidence of the parties on the point. it has also observed that Amin has assessed the value of the land on the basis of neighbours statements about the rate of the land. Amin has also not assessed the quantity of construction material used in the construction, hence, the trial court ought to obtain the objections on the Amin report and after giving opportunity of evidence to both the parties should have determined the valuation of the disputed property on the date on which the defendant has offered to purchase the disputed property. On the aforesaid grounds the first appellate court has remanded the matter and has given directions as mentioned above.

8. From the material on record it appears that the trial court has only got the report of Amin about the value of the disputed property which has construction as well. The plaintiff has filed detailed objection against it and some of the objections are factual in nature. Learned trial court without taking into consideration the relevant basis of valuation and without giving any opportunity of evidence to the parties has determined the valuation of the property solely on the basis of Amin report. It is also clear that additional Amin report is required in the matter and parties have also to be given opportunity of producing evidence on the point of valuation as observed by the learned appellate court. There was no sufficient evidence before the first appellate court to determine the issues involved and hence, the order of remand passed by the first appellate court is well justified. The order 41 Rule 23 A C.P.C. also provides that if the suit is decided otherwise on preliminary point and decree reversed in appeal and retrial is necessary the appellate court have the same powers as it has under Rule 23. In this case on the points involved, evidence will be required, so it will be in form of a re-trial.

9. In the light of the aforesaid provision also the order of remand of the first appellate court is just.

10. In **Chaturghun Vs. Dhanpati Rai and others (Supra)** the matter was remanded with categorical direction to the lower court to give opportunity to the plaintiff to file the map of the consolidation proceeding so as to prove the existence of "Nali' and further to clarify the dimensions, area and number of the public land if any left out in the consolidation proceeding for the purpose of Nali. On the aforesaid this court has held that the purpose of remand was to enable the plaintiff to adduce sufficient evidence to fill the lacunas which have been pointed out by the lower appellate court and was not permissible under law. While in **Ram Bali Singh and others Vs. Ram Sakal (Supra)** the matter was remanded as the appellate court found that case be decided as a fresh after getting its survey map prepared. On this it was held that the appellate court can get the survey map prepared itself remand only for this purpose amounts to illegal exercise of jurisdiction. In the present case as observed above additional commission is to be issued, objections are to be invited against the Amin Report and the parties are to be provided opportunity of leading evidence and thereafter matter can be decided. So the rulings cited by the learned counsel for the appellants are distinguishable.

11. From the above discussion it is clear that the impugned order is just and reasonable and there is no ground to interfere in it. The first appeal is liable to be dismissed.

12. Accordingly, the First Appeal From Order is **dismissed.**

(2021)12ILR A1114
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.12.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Habeas Corpus W.P. No. 9307 OF 2020

Master Devansh Agarwal (Detenue)
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Arun Sinha, Siddhartha Sinha

Counsel for the Respondents:
Sri Anurag Singh Chauhan (Govt. Adv.), Deepak Agarwal, Gavrav Mishra, Lalit Mohan Singh, Mr. Nirmit Srivastava, Mr. Prabhjit Jauhari, R.P. Shukla, Vivek Sonkar

Civil Law - Custody of Minor - Constitution of India, Article 226 - Habeas Corpus Petition - Illegal abduction of minor by the father from custody of mother - Mother sought custody of her minor child from father - Held - act of the father of the child of deceitfully taking away the child out from custody of mother amounts to parental kidnapping which is not only illegal but criminal also - as the child has been illegally snatched away from mother, writ of habeas corpus petition maintainable - Bench of High Court Allahabad, at Lucknow has jurisdiction as the child was born in Lucknow and resided there with the mother till he was fraudulently taken away by father from Lucknow to Dhanbad - father, who fraudulently took away the custody of the child, from an area falling within the jurisdiction of the court to Dhanbad, cannot take stand that petition is not maintainable at Lucknow - in the present case several orders of the court with regard to facilitate the meeting of the mother with the child, were flouted over by the father - there is reason to believe that father in furtherance of his malice towards mother will brain wash the child towards his mother that would not be in the interest and welfare of the child - mother is competent enough to take care and upbring the child with love and affection - mother deserves to have custody of the child removing the same from the father - father will be at liberty to get finally decided his rights of exclusive custody as guardian by the family court or court of Guardians and Wards Act (Para 39, 45, 49, 84, 85)

Disposed Off. (E-5)

Cases Relied on:

1. Roxann Sharma Vs Arun Sharma (2015) 8 SCC 318

2. Meenakshi & anr. Vs St. of U.P. & ors.(2020) 143 ALR 841

3. Shigorika Singh Thru. her mother Vs Dr. Abhinandan Singh & ors. Habeas Corpus No.8820 of 2020 (All.) decided on 22.2.2021

4. Vahin Saxena (Minor Corpus) & anr. Vs St. of U.P. & ors. Habeas Corpus No.467 of 2021 (All.) decided on 27.8.2021

5. Reshu @ Nitya & ors. Vs St. of U.P. & ors. Habeas Corpus No.9 of 2020 (All.) decided on 22.10.2021

6. Ruchi Majoo Vs Sanjeev Majoo (2011) 6 SCC 479

7. Anil Kumar Pradhan & ors. Vs Madhabi Pradhan FAO No. 254 of 2014 decided on 15.10.2015

8.Tejasvini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors. (2019) 7 SCC 42

9. Kusheshwar Prasad Singh Vs St. of Bihar & ors. (2007) 11 SCC 447

10. Mrs. Elizabeth Dinshaw Vs Arvind M. Dinshaw & anr. (1987) 1 SCC 42

11. Gippy Arora Vs St. of Pun. & ors.(2008) SCC Online P & H 1483

12. Githa Hariharan Vs Reserve Bank of India and Vandana Shiva Vs Jayanta Bandopadhyaya (1999) 2 SCC 228

13. Yashita Sahu Vs St. of Raj. (2020) 3 SCC 67

14. Manjit Kaur Vs St. of Pun. Crl. W.P No.608 of 2008 (P & H) decided on 14.8.2008

15. Manju Tiwari Vs Rajendra Tiwari AIR 1990 SC 1156

16. S.P. Chengalvarajna Naidu (dead) by Lrs Vs Jagannath 1994 1 SCC 1

17. Capt. Dushyant Somal Vs Sushma Somal (1981) 2 SCC 277

18. Eugenia Archetti Abdullah Vs St. of Kerala 2005 (1) RCR (Clr.) 259

19. Gaurav Nagpal Vs Sumedha Nagpal (2009) 1 SCC 42

20. Anjali Kapoor (Smt.) Vs Rajiv Baijal (2009) 7 SCC 322

21 Sumedha Nagpal Vs St. of Delhi & Ors. (2000) 9 SCC 745

22. Rosy Jacob Vs Jacob A. Chakramakkal (1973) 1 SCC 840

23. Mausami Moitra Ganguli Vs Jayant Ganguli (2008) 7 SCC 673

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. Heard learned counsel fort the petitioner, Sri Siddhartha Sinha, Advocate, learned counsel for the opposite party No.3 to 6, Ms. Rose Mary Raju, Advocate and learned A.G.A. for the State, Sri Anurag Singh Chauhan, Advocate.

2. The instant petition in hand is filed under Article 226 of the Constitution of India seeking issuance of writ in the nature of habeas corpus for production of a minor infant child, the petitioner no.1, namely, Master Devansh Agarwal (the detenue) through his mother, Smt. Deepti Goyal (daughter of Sri K.K. Agarwal), both resident of B-47, Sector-H, Aliganj, District-Lucknow. Smt. Deepti Goyal herself is arrayed in the petition as petitioner no.2.

3. The relief claimed in the petition is reproduced hereunder:-

(i) Issue a writ, order or direction in the nature of Habeas Corpus directing the opposite parties to produce the petitioner No.1/ Detenue and handover his custody to the petitioner No.2.

(ii) Issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

A. <u>Factual Matrix</u>

4. The pleadings indicate the relation between opposite party no.3 Dr. Dinesh Agarwal and petitioner no.2 as husband and wife. They have serious differences which lead to cleavage in their matrimonial life, resulting their non judicial separation from matrimonial home situated at Katras Bazar Rajbari Road, Katras, Dhanbad, Jharkhand. The petition discloses that petitioner No.2 and opposite party No.3 married on 30.6.2017. Soon after marriage Dr. Dinesh Agarwal, opposite party no.3 and his family members started demanding Rs.40 lacs in dowry from the petitioner no.2 as opposite party no.3 came to know that she has a P.P.F. account worth more than Rs.40 lacs. Apart from the said demand of dowry, the opposite party no.3 and his family members namely petitioner's father-in-law, Sri Jeewan Lal Agrawal and others started torturing her mentally and physically in connection with the said demand. Due to the harassment, petitioner no.1 was compulsed to live in Lucknow most of the time where the petitioner no.1, detenue was born on 3.7.2018. Petitioner no.1 and 2 were brought by the opposite party no.3 to Dhanbad after birth of detenue but due to constant harassment petitioner no.2 forced to come back to Lucknow with petitioner no.1 by the end of February, 2020 and had been staying in Lucknow ever since.

5. On 6.6.2020, the opposite party no.3 suddenly came to the house of the petitioner no.2 and pretended that he wants to reconcile with the petitioner no.2. He stayed there, but on the next morning at about 9 O'clock, the opposite party no.3 pretended to take the child out from the house. He taken away the detenue, petitioner no.1 assuring the petitioner no.2 to come back after having a short drive with him. Opposite party no.3 even left his luggage at the house of petitioner no.2 to assure and keep her into impression that he will return with the petitioner no.1 but actually he ran away and kidnapped the petitioner no.1 detenue with the help of his driver. After that petitioner no.2 through their common friend came to know that the opposite party no.3 have reached at Katras, District- Dhanbad, State of Jharkhand taking away the detenue with him illegally from the custody of petitioner no.2. Petitioner no.2 when contacted the opposite party no.3, he told that petitioner no.2 should give access of her P.P.F. account to him if she wants petitioner no.1, detenue back.

6. Since the incident dated 7.6.2020 of abduction of petitioner no.1, the child is by his father (the opposite party no.3), he is in custody of father in Katras, District Dhanbad in the State of Jharkhand. This gave rise to the inter parental custody dispute pertaining to their minor child. For the purpose of brevity and convenience hereinafter in foregoing paras wherever contextually needed the opposite party no.3, the petitioner no.2 and the petitioner no.1 shall be addressed also as "father' "mother' and "the child/detenue' respectively.

7. At the time of incident the child detenue (petitioner no.1) was an infant of about 1 year and 9 months' age. The mother has stated that the detenue child is dependent on mother's milk and needs such care and protection which father cannot provide. She is highly educated lady, qualified in M.B.A. Finance and Human Resources, had worked as Assistant Professor in B.B.D. University at Lucknow but quit her job to take care of her child. She has been taking care of her child financially or otherwise since his birth and petitioner no.1, the detenue has never been parted from the petitioner no.2. She has a constant source of income being generated from her savings and residing with her parents in their own house at Lucknow. In support of her claim as to the financial competence, the petitioner no.2 has filed Income Tax Return of year 2019-20 issued by the Income Tax Department as Annexure-2, wherein the gross income is shown Rs.5,16,328/-. In the night of 6.6.2020, the opposite party no.3 landed at the house of the petitioner no.2 and virtually snatched away and kidnapped the child in the morning of 7.6.2020 pretending to come back after a short drive with the child.

8. The petition was filed on 15.6.2020 and was first taken up on 18.6.2020. On 13.7.2020, this court has observed, relevant portion of the order is extracted and reproduced hereunder:-

"Hon'ble Virendra Kumar Srivastava, J.

Learned counsel for the petitioner submits that detenue aged about two years has been illegally snatched from the custody of petitioner no.2 and herculean effort was made by the concerned police to trace out the detenue but since the opposite party nos.3 and 4 are residents of Jharkhand State, the concerned local police is not cooperating with the U.P. Police in absence of any specific direction of this Court.

Learned AGA submits that effort was made to search out the detenue but the detenue could not be traced out.

In view of the above, issue notice to opposite party nos.3 to 6 through opposite party no. 2 i.e. Station House Officer, Police Station Aliganj, Lucknow to produce the detenue Master Devansh on 05.08.2020."

9. Again on 5.8.2020, the court has observed, relevant portion is extracted and reproduced hereunder:-

"Hon'ble Abdul Moin,J.

Sri R.P. Shukla, learned counsel for respondent nos. 3 to 6, submits that in pursuance to the order of this Court dated 13.07.2020, the child Master Devansh Agarwal could not be produced today as he is not well. A copy of the medical prescription dated 03.08.2020 has been produced today in Court. Sri Shukla prays for and is granted a week's time for bringing on record the said medical prescription and he would also indicate the medical condition of the child. The medical condition to be indicated on behalf of respondent nos. 3 to 6 would also indicate the medical certificate from a doctor as to whether the child is fit to travel from Jharkhand to Lucknow and in case the certificate does not indicate so then the child shall be produced before this Court on 14.08.2020."

10. The order dated 5.8.2020 of this court recorded the appearance of the opposite parties no. 3 to 6 for the first time through Sri R.P. Shukla and Gaurav Mishra Advocates with filing of the counter affidavit on their behalf.

11. On 20.1.2021, this court has passed following order:-

"Hon'ble Alok Mathur,J.

1. Heard Sri Siddhartha Sinha, learned counsel for the petitioners as well as learned A.G.A. for the State while Sri Vivek Sonkar, Advocate has put in appearance on behalf of opposite party No.s 3 to 6.

2. An application for recall of order dated 11.1.2021 along with vakalatnama has been filed in the registry by Sri Vivek Sonkar on 19.11.2020. Office has reported that it has not been able to trace any such application for recall of order dated 11.1.2021. In absence of the application for recall, I proceed with the matter.

3. It has been submitted by Sri Siddhartha Sinha that this Court by means of order dated 17.3.2020 had directed opposite party No.s 3 and 6 to produce the detenue Master Devansh Agrawal on 5.8.2020. A perusal of the order sheet dated 5.8.2020 indicates that on 5.8.2020 the detenue could not be produced and, therefore, by means of the order dated 5.8.2020 this Court directed for production of the detenue on 14.8.2020. It has been submitted that there was no sitting of this Court on the said date due to COVID 19 lock-down, therefore, this Court by means of order dated 27.8.2020 directed the detenue to be produced on 8.9.2020, on which date also there was no Court sitting due to the pandemic. It has been submitted that in the meanwhile opposite party No.2 in order to avoid producing the detenue moved an application for recall of the order dated 27.8.2020 which was rejected on 14.10.2020. Subsequently, on 11.1.2021 this Court directed for production of the detenue today i.e. 20.1.2021.

4. When the matter has been taken up Sri Vivek Sonkar, the new counsel appearing for opposite parties No.3 to 6, could not show any cogent reason for non-appearance of the detenue as directed by this Court vide its order dated 20.1.2021 today. He, however, submits that opposite party No.3 is in Jharkhand and they will appear on any date fixed by this Court. It has also been informed that as per direction of this Court a sum of Rs.30,000/- has already been deposited in this Court to show the bonafide and also to enable opposite party No.3 along with the detenue to appear before this Court.

5. In view of above, I see no reason as to why opposite party No.3 is not appearing before this Court along with the detenue. As, such, list this case on 28.1.2021 on which date opposite party No.3 shall appear before this Court along with the detenue Master Devansh Agarwal.

6. It is made clear that if this order is not complied with, the Court will have no option except to adopt coercive methods for their appearance."

12. Hon'ble Apex Court in **Special Leave to Appeal (Crl.) No.586 of 2021** moved against the order dated 20.1.2021 has held as under:-

"The High Court directed the petitioner No.1 to be present in Court on 20.1.2021 along with the child in a writ of Habeas Corpus filed by the respondent No.3. We are informed by the learned counsel for the petitioners that the matter is now listed for hearing on 28.01.2021.

Learned counsel for the petitioners brought to our notice an order passed by this court on 11.01.2021 in Transfer Petition (c) Nos.1371-1372 of 2020 filed by Respondent No.3 by which the matrimonial dispute has been referred to the Supreme court Mediation Centre.

We are not inclined to interfere with the order impugned in the special leave petition. However, the petitioner is at liberty to bring to the notice of the High Court that the entire dispute is referred to the Supreme Court Mediation Centre and the transfer petition was directed to be listed after eight weeks.

The special leave petition is dismissed.

Pending application (s), if any, shall stand disposed of."

13. Though, counter affidavit was filed by the opposite party no. 3 to 6 but in compliance of the order of this court the detenue, 'Master Devansh Agrawal' was not produced before the court. It would be relevant to quote the order dated 28.1.2021, where the conduct of counsel appearing for the opposite party no.3 to 6 was observed by this court

"Hon'ble Alok Mathur,J.

1. Today when the matter has been taken up Sri Deepak Agrawal, Advocate has put in appearance on behalf of respondent no. 3. He has placed an order of Hon'ble Supreme Court dated 25.01.2021, passed in SLP (Civil) No. 586 of 2021. According to which it seems that one transfer application has been preferred before the Apex Court where the present matrimonial dispute has been referred to the Mediation Center of the Apex Court. The aforesaid SLP was filed against the earlier order of this Court dated 20.01.2021, where this Court had directed respondent no. 3 to appear before this Court alongwith detenue Master Devansh Agarwal.

2. Perused the order of Apex Court dated 25.01.2021.

3. Today, attention of this Court has been drawn towards the order of the Apex Court dated 11.01.2021, passed in Transfer Petition (Civil) No. 1371 of 2020.

4. The conduct of the counsel appearing for opposite party no. 3 is highly regrettable inasmuch as, the earlier orders passed by the Hon'ble Apex Court were never brought to the notice of this Court, which lead this Court to pass the order dated 20.01.2021.

5. In the light of the apology made by learned counsel appearing for respondent no. 3, this Court is not passing any further order in this regard.

6. Looking into the order of the Apex Court dated 11.01.2021, as well as 25.01.2021, list this case after two month's.

7. Learned counsel for the parties shall inform this Court, on the next date of listing, about the outcome of the mediation proceedings at Supreme Court."

14. The petitioner by way of supplementary affidavit has furnished information as to the proceeding of Hon'ble Apex Court stating that the opposite party no.3 challenged the order dated 20.1.2021 passed by this court. Hon'ble Supreme Court in Special Leave to Appeal No. 586 of 2021 referred the matter to Supreme Court's Mediation Center and

dismissed the aforesaid Special Leave to Appeal vide order dated 25.1.2021. The order dated 25.1.2021 of the Apex Court is made annexure to the petition. In pursuance of order dated 25.1.2021, the parties appear before the Mediation Center of Hon'ble Supreme Court and after several rounds of single and joint session of mediation and after considering options available with them parties could not arrive at any amicable solution to resolve their dispute, as such, the mediation failed. The true copy of the Mediation Report is made annexure no.2 to the supplementary affidavit, which is reproduced hereunder:-

"Comprehensive mediation sessions were held with parties on 01.02.21, 02.01.21 & 04.02.21 through virtual mode and on 08.02.21 physical mediation at Supreme Court Mediation Centre.

However, after several rounds of single and joint session of mediation and after considering options available with them parties could not arrive at any amicable solution to resolve their dispute."

15. The petitioner has informed this court by way of the supplementary affidavit about two original suits of the opposite party no.3 against petitioner no.2 in para 6, which is reproduced hereunder:-

"6. That the opposite party no.3 to this Writ Petition filed two frivolous cases against the petitioner no.2 at Dhanbad vide O.S. No.333/2020 and O.S. No.385/2020. The petitioner no.2 challenged the same in Hon'ble Supreme Court in Transfer Petition Nos (Civil) Nos.1371-1372/2020. The Hon'ble Supreme Court was pleased to say the proceedings of the cases O.S. No.333/2020 and O.S. No.385/2020. The true copies of the order dated 7.12.2020 and 11.01.2021 passed in Transfer Petition (Civil) No.1371-1372/2020 is being filed herewith as Annexure No.SA-3."

16. Despite the orders passed by this court the child was not produced by the opposite party no.3 in the court. On 24.9.2021, this court has ordered for facilitating a meeting between the detenue and mother by the opposite party number 3, the order is quoted hereunder:-

"Hon'ble Manish Mathur,J.

Adjourned on account of request made of Mr. Prabhjit Jauhar, learned counsel for the respondents No.3 to 6 due to his personal engagement.

Heard learned counsel for the petitioner and Mrs. Rose Mary Raju on behalf of the respondents No.3 to 6.

Due to adjournment of the matter, learned counsel for appellants submits that the mother of the alleged detenue is not being permitted to meet the detenue aged about three years. With regard to the matter pertaining to mediation or any settlement between the parties, it has been informed that mediation proceedings before the Hon'ble the Supreme Court have failed.

Considering submissions of learned counsel for the appellant/mother of the detenue, learned counsel for the parties were provided time to obtain instructions for facilitating a meeting between the detenue and the mother. Upon obtaining instructions from the clients, learned counsel appearing for respondents no.3 to 6 submits that no hindrance will be caused in meeting of the mother with the detenue and for that purpose the mother of the detenue can travel to Dhanbad (where the detenue is staying with his father). It is submitted that the father of the detenue shall take care of the burden of financial expenditure pertaining to travel as well as stay of the mother at Dhanbad, where she will have unrestricted excess to the detenue during the day time, commencing from 10:00 AM to 05:00 PM. For the purpose of the such meeting, a person of the Bal Kalyan Samiti, Dhanbad shall be present during the meeting which shall

be facilitated by the Superintendent of Police, Dhanbad.

As per the arrangements, meeting shall take place at a mutually agreeable place and may take place in Lucknow itself with the mutual consent of parties, if possible. In case the meeting take place at Lucknow, the same procedure shall be followed, for which the Concerned SHO, Lucknow shall ensure presence of a person from the Bal Kalyan Samiti.

List this case on 01.11.2021."

17. In the petition, petitioner no.2 has also stated about lodging of the first information report with regard to the abduction of the petitioner No.1, detenue by the opposite party no.3 as Case Crime No. 178 of 2020 under sections 498-A, 336, 506 I.P.C. and Section 3/4 Dowry Prohibition Act.

18. The counter affidavit filed on behalf of the opposite party no.3 to 6 has set forth a defence against the allegation made in the petition pertaining to illegally taking away the detenue (petitioner no.1), the child from the custody of mother, (petitioner no.2). In para 25, it is stated that petitioner no.1 was neither kidnapped nor taken away forcibly, the petitioner no.1 is not in the illegal custody of his natural guardian, petitioner no.2 has not invoked the remedy provided under the law to declare the guardianship which can be decided on the facts and evidences adduced by the parties. Further para 26 of the counter affidavit is reproduced hereunder:-

"26. That the contents of paragraph 13 of the writ petition are denied as incorrect. Since the opposite party no.3 is also the natural guardian therefore no FIR could have been lodged questioning his guardianship. The delay in lodging the FIR itself speaks that the same is being thought and false. Moreover, the falsity of the FIR is apparent on the face of it as avernments made in paras 11 and 12 of the writ application and that in the FIR are completely different versions. In the writ application she has averred that the deponent with her permission took the child but did not return and in the FIR she has alleged that the child was snatched from her custody and kidnapped by the deponent."

19. With regard to the relief prayed by the petitioner no.2 in her petition for handing over the custody of minor child, the petitioner no.1 to her from the custody of opposite party no.3, the father, in para 7 of the counter affidavit it is objected that according to the law laid down by Hon'ble Apex Court and High Courts, the principal consideration for the court is to ascertain whether the custody of the children requires that the present custody should be changed, and the children should be left in the care and custody of somebody else. The principle is well settled, that in a matter of custody of a child, the welfare of the child is of paramount consideration for the court.

20. Further, father of the detenue child (opposite party no.3) claims himself according to the Section 6 of the Hindu Minority and Guardianship Act, 1956 his natural guardian and is capable of looking after the child. The child in his parental place getting love and affection of father, grand parents and cousins as he lives in joint family. To the contrary petitioner no.2 does not take proper care of the child as for the care of child she totally depend on maid and servants of nuclear family in her house at Lucknow. She is also suspected to be suffering from "Paranoid Personality Disorder" and often remain socially withdrawn. The opposite party no.3 claimed himself reputed Orthopedic and Spine Surgeon practicing in Katras, Dhanbad in the State of Jharkhand, is capable of care of child and also financially sound to do so. With a view to clarify why the opposite party no.3 and petitioner no.2, the husband and wife living separately, he stated in para 12 and 13 of the counter affidavit that

due to her obstinate behaviour, petitioner no.2 was forced to take separate accommodation out of the joint family and shifted on 5.11.2018 against his conscience but instead of living there, petitioner no.2 left the matrimonial house on 7.3.2020 without any cause and information to the opposite party no.3, efforts were made to convince the petitioner no.2 to return to matrimonial home but she patently refused. Petitioner no.2 lodged an First Information Report No.178 of 2020 arraigning the entire family members on baseless allegations. He filed a writ petition bearing number 9964 (MB) of 2020 before this court which was disposed of vide order dated 19.6.2020, in view of the law laid down by Hon'ble Supreme court in the case of Arnesh Kumar 2006 SCC 2622. Further, entire dispute have been referred to the Mediation Center of the Family Court by the police and the case has been fixed for appearance of the parties.

21. It is further stated in para 17 of the counter affidavit that opposite party no.3 is inclined to restore his matrimonial ties, therefore, he has filed a suit before Family Court, Dhanbad invoking the provisions of Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights. The child is in fact an essential bridge between the opposite party no.3 and petition no.2, copy of the plaint is made annexure to the petition.

22. Admittedly, the petitioner no.1, the detenue taken birth in the city of Lucknow. In para 22 the opposite party no.3 in his counter affidavit explained it by saying that petitioner no.2 has been in regular habit of living in Lucknow at her parents house and she never own responsibility of her husband and child. The allegation regarding the birth of child at Lucknow at her expenses is also false and unfounded. The deponent being a doctor made all arrangement for delivery of child in Katras, Dhanbad but the wife insisted to deliver the child in Lucknow, she is under the influence of mother all the time and very rigid. He further states in the same para that even after the delivery she refused to come back with opposite party no.3, however, he paid in cash Rs.50,000/- to her for child expenses. In para 23 of the counter affidavit, he has stated that petitioner no.2 has herself deserted the matrimonial house.

23. Apart of the aforesaid factual pleas, the said opposite party no.3 has challenged the maintainability of the writ petition on the ground that he being natural guardian of the petitioner no.1 in view of Section 6 of the the Hindu Minority and Guardianship Act, 1956 the father has paramount right for the custody of child and he cannot be deprived of the custody of minor child, his custody is not unlawful or conducive to the interest and welfare of child so as to warrant interference by the court. The habeas corpus petition shall not be the appropriate proceeding to make a decision as to who between the husband and wife shall be entitled to the custody of child. It needs elaborate enquiry on the basis of evidences to be led by both the parties which can be conveniently done only in civil or family court.

24. The opposite party no.3 has taken an objection as to the maintainability that under Article 226(1) of the Constitution of India. The power to issue writ to the government authority or the person concerned is to be exercise by the High Court having the territorial jurisdiction. In the instant case, the permanent residence of the child in Dhanbad and falls within the jurisdiction of Jharkhand High Court, therefore, this court has no territorial jurisdiction to entertain the petition for removal of custody from father and to handover the child to the mother.

25. For the purpose of considering paramount consideration of child in not disturbing the present position of custody of the child with father, he has setforth his financial

capacity and social status and family status also. Despite having been filed a huge and lengthy counter affidavit dealing all aspects of the case, legal and factual, the opposite party no.3 has not stated or explained why he has not produced the detenue before the court in compliance of the order in this regard. Though, admittedly he has taken away the child with him (according to him with the consent of mother of the child) from Lucknow to Dhanbad. On the direction of this court issued vide order dated 5.8.2020. He filed a supplementary counter affidavit annexing medical certificate as to the medical advice and opinion of a doctor in Dhanbad, Jharkhand, the same is reproduced hereunder:-

"This is to certify that I have examined Master Devansh Agarwal, aged 2 years on 3rd and 8th August 2020. He was suffering from upper respiratory tract infection (URI) and was diagnosed as Pharyngitis after clinical evaluation. This is an allergic and seasonal type of disorder. I have treated him with antibiotic and anti-allergic.

He has recovered well from the ailment and doing well.

I have advised him to stay away from cold weather and drinks. It is not advisable for him to travel to long distance in AC care or train in view of the prevailing COVID 10 Epidemic."

26. In the aforesaid context, it would be relevant to quote certain para of the counter affidavit filed by the State of U.P. in the present petition. The said counter affidavit is sworn by Manoj Kumar, Sub Inspector, Police Station, Aliganj, Lucknow, Investigating Officer of the Case Crime No.178 of 2020 referred hereinabove. The relevant paras from para no.7 to 15 of the counter affidavit are quoted hereunder:-

"7. That on 24.6.2020, the deponent alongwith one male and a female constable and also with complainant and her brother proceeded for P.S. Kartas, Dist. Dhandbad, Jharkhand and intimated his arrival/visit in P.S. Kartas, Dist. Dhanbad on 25.06.2020. He had submitted an application to the SHO and along with him contacted to the deputy S.P., who had called Dr. Dinesh Agrawal for mediation but he did not turn up. For getting the judicial custody of detenue, the deponent personally requested to SSP, who had suggested to contact-Bal Kalyan Samit. A copy of proceedings recorded in CD-7 is being annexed as Annexure No.SCA 4 to this affidavit.

8. That on 26.06.2020 the deponent and his police team along with the complainant also with the help of S.H.O.- P.S. Kartas, Dist. Dhanbad visited to the house of Dr. Dinesh Agrawal where Bhabhi of Dinesh Agrawal and his cousin brother were present but Dr. Dinesh Agarwal and his parents were not available. Dr. Dinesh Agrawal was telephonically contacted, and he was asked to bring the detenue at police station Kartas. Dinesh Agrawal then replied that he was in Bokaro at that time and it was not possible for him to reach there. The police team and the complainant once again approached to the S.S.P. Dhanbad and requested for ensuring the recovery of detenue, who in response assured that S.H.O. and D.S.P. will help us. The Deputy S.P. had assured that Dinesh Agarwal will appear before the Hon'ble Court at Lucknow. Our police team had also approached to the Commissioner/DM for recovery of detenue. The true copy of notice under Section 41 (1) AB of the Cr.P.C., pasted over the house of Dr. Dinesh Agrawal and the preceding recorded in case diary with the heading CD-8 are being annexed as ***Annexure Nos. SCA 5 and 6.****, to this affidavit.*

9. That on 27th June 2020, the police party of P.S. Aliganj alongwith local police reached to the permanent house of Dr. Dinesh Agarwal situated in Kartas Bazar Rajwadi Road, Dhanbad. His house was locked from outside and no information could be gathered. Thereafter the clinic of Dr. Dinesh Agrawal was

also visited where it was revealed that Dr. Dinesh Agrawal had lastly visited on 23 Jan 2020 and since then he did not visit the hospital/clinic.

10. That Bal Kalyan Samiti, Dhanbad was also approached for recovery of the child. Members of said Samiti assured that a notice will be sent to Dr. Dinesh Agrawal for production of child and after recovery of the detenue the police team of Lucknow will be intimated in this regard. CD-9 of the case diary is being annexed as ***Annexure No.SCA-7*** *to this affidavit.*

11. That on 27.07.2020, Mr. Vivek Kumar Singh, Advocate handed over an application alongwith the orders passed by this Hon'ble Court in Writ Petition No.9964/2020 and requested to fix the date of 29.06.2020 for appearance of accused persons.

12. That on 29.06.2020, Dr. Dinesh Agarwal appraoched to P.S. Aliganj and had given his application/undertaking that he will abide by the order passed by this Hon'ble Court in present Habeas Corpus Petition. A true copy of proceedings recorded in CD-11 and the application submitted by Dr. Dinesh Agarwal is being collectively and annexed as ***Annexure No.-SCA 8*** *to this affidavit.*

13. That a detailed report dated 05.07.2020 mentioning the steps taken by police of P.S. Aliganj, District Lucknow was submitted to the office of Ld. Government Advocate, Lucknow Bench. A copy of report dated 05.07.2020 is being and annexed as ***Annexure No.-SCA*** *to this affidavit.*

14. That on 27.07.2020, the deponent posted a letter to the opposite parties 3-6, mentioning there in that in present Habeas Corpus petition this Hon'ble Court vide it's order dated 13th of July 2020, has been pleased to direct them to appear before this Hon'ble Court and to produce detenue on 05.08.2020. A true copy of letter dated 27-07-2020 is being annexed as ***Annexure No.-SCA-10*** *to this affidavit.*

15. That in compliance of the orders passed by this Hon'ble Court and also in furtherance of letter dated 31 July 2020 issued by C.J.M. Lucknow, for ensuring the personal appearance of opposite party number 3 to 6 in present Habeas Corpus petition, constable Vikas Sehgal of police station- Aliganj, was deputed to serve the notice personally, upon opposite party number 3 to 6. The said notice was served upon the opposite party 3 to 6. The said notice was served upon the opposite party 3-6 on 02.08.2020 at their Dhanbad address."

B. Arguments.

27. Heard the learned counsels for the parties. It is argued by the learned counsel for the petitioner No.2 that out of the wedlock between the father and mother of the child, he borne on 3.7.2018 in Lucknow. It is further argued that the mother who carried the child in her womb for 9 months and then gave birth to him, the child used to reside in the house B-47, Sector H, Aliganj, District-Lucknow. The child was never parted from her mother before 7.7.2020 when he was illegally taken away from her custody. The mother is well educated having M.B.A. in Finance and Human Resource, she is physically, financially and emotionally very much eligible for taking care of child in every way. It is further argued that there was repeated demand of dowry of Rs. 40 lacs by father of the child (opposite party no.3) since before his birth. When the atrocities and cruelties of the father of the child in connection with the demand of dowry increased day by day, she was compulsed to leave her matrimonial home in Dhanbad, Jharkhand and to go to Lucknow before delivery of the child. All the cost and expenses of delivery of the child were incurred by her. She has a constant source of earning accrued from the interest over her savings in the Bank. It is further argued that mother was in a reputed job of teaching but since birth of child only for the purpose of looking after him and care she left

that job. It is argued that the way in which the custody of the minor infant child of approximately 21 months was snatched deceitfully from mother and he was abducted by the father who taken away him from Lucknow to Dhanbad in the State of Jharkhand itself amount not only immoral but a criminal act also. Further despite several orders of the court to appear in person and produce the child before the court, father intentionally defied the order and thus maliciously stopped the child to see her mother. It is evident from the order of this court also passed to facilitate the meeting of the mother with the child but the same was disobeyed. Even the mother has deposited Rs.30,000/- in the High Court in compliance of the order of the court as expenses for arriving at Lucknow from Dhanbad with the child and companion, if any. The money still remain unexhausted in the court's account but that order was also made futile by the father. All these shows the instinct of the father to illegally confine the child with him and not permitting him to see his mother in anyway daringly. It is further argued that the detention of the child is not by the reason of love and affection of father towards the child but it is in vengeance of mother's leaving the matrimonial home, so as to teach her a lesson. Moreover, to bargain the demand of dowry of Rs.40 lacs in lieu of the child to go back to her mother.

28. Learned counsel had argued that the child is of much tender age, he needs his mother at this stage and nothing can replace the love affection and care of the mother to which he is entitled. If he is left in the custody of father and his relatives it is much possible for them to make his brain wash and influence him against her mother. Keeping into view all these facts it is emphasized that in the light of judgments of the Hon'ble The Apex Court and this court the welfare of the child be considered and child be removed from the custody of father to hand over him in the custody of mother. Reliance placed on the judgment of Apex Court in the case of ***Roxann Sharma Vs. Arun Sharma***1 and the judgment of this court in ***Meenakshi and Anr. Vs State of U.P. and Others***2 and in ***Shigorika Singh Thru. her mother Vs. Dr. Abhinandan Singh and Others***3.

29. Against the contention of of the counsel for the petitioner, counsel for the opposite party number 3 to 6 argued that the mother unreasonably left the matrimonial house when she was conceived, even on her insisting and denial to live in joint family separate accommodation was arranged by father of the child but she reached in Lucknow on the motivation of her mother who is a dominating lady. It is further contended that father is practicing doctor in Orthopedic and is a Spine Surgeon, belongs to a reputed family, has a clinic in Katras at Dhanbad, State of Jharkhand. He is permanent resident of the aforesaid place, therefore, child should reasonably be stayed with the father. So far as the present custody of the father is concerned, it is obtained with the consent of mother of the child when he went Lucknow with a purpose to reconcile the matrimonial differences with her. Under that reconciliation the mother of the child became ready to come at Dhanbad from Lucknow. A day after when she permitted on 7.6.2020 to carry the child with him from Lucknow to Dhanbad. It is argued that family of father of the child is a joint family comparingly, the mother of the child is in nuclear family. In the custody of father, the child is gaining much love, affection and care not only from father but also from other family members like grandparents, his cousins brother and sisters. To the contrary for the care of the child in Lucknow, his mother quite depend on her servants and maids and it is not possible for the mother to look after him at every point of time, as such, the child would feel loneliness and neglected which certainly would affect his upbringing and growth. Learned counsel relied on the judgment of this court in writ petition of ***Habeas Corpus No.467 of 2021 Vahin Saxena***

(Minor Corpus) and Another Vs. State of U.P. and 3 Others4 where the father's petition was dismissed and petitioner, the Corpus was set at liberty to go back along with respondent no.4, his mother to the place from where they have come. Further, reliance is placed on the judgment of ***Habeas Corpus No. 9 of 2020, Reshu @ Nitya and 2 Others Vs. State of U.P. and 3 Others***5. Further reliance has been placed on the judgment of Hon'ble The Apex Court in ***Ruchi Majoo Vs. Sanjeev Majoo***6 and a judgment of High Court of Orissa delivered on 15.10.2015 in ***Anil Kumar Pradhan and Others Vs. Madhabi Pradhan***7.

30. Learned counsel relied on the Judgment of ***Vahin Saxena (Minor Corpus) (Supra)*** emphasing its para-10 in which judgment of **Tejasvini Gaud & others Vs. Shekhar Jagdish Prasad Tewari & others**8 is relied on para 14 and 19, which is quoted hereunder:-

"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

x x x

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.

31. In the broad spectrum emerged from the pleadings of the parties namely the petitioner no.2 and private opposite party no.3 to 6 and that of the State opposite parties of the present writ of habeas corpus, this court has a duty to examine at the threshold whether the minor is in lawful custody of the private respondent no.3. In forthcoming paras of the judgment discussion will be made on the following aspects of the matter for the purpose of determination of right and entitlement of either of the parties to have custody of the child (detenue) subject to the consideration of best interest and welfare of the child:-

(i) Whether the custody of the minor child, Devansh Agrawal, the petitioner no.1 was taken away from the custody of his mother (the petitioner no.2) by the opposite party no.3 illegally, if so, its effect.

(ii) Jurisdiction of the Court and comity of courts.

(iii) Relevant provisions of Law- Maintainability of petition for habeas corpus.

(iv) Welfare of the child.

(v) Mother being a natural guardian, her importance in the life of petitioner no.1 (detenue, Devansh Agrawal) who is an infant child of approximately two years the legal rights

of the natural guardian and the paramount interest of the child.

(vi) Best interest of the child.

(vii) Conclusion.

(i) Whether the custody of the minor child, Devansh Agrawal, the petitioner no.1 was taken away from the custody of his mother (the petitioner no.2) by the opposite party no.3 illegally, if so, its effect.

32. The foregoing paras under the head "Factual Matrix", state the arrival of opposite party no.3 at the home of petitioners on 6.6.2020 in a car from Dhanbad to Lucknow pretending an offer to reconcile the disputes between them. On the next day, opposite party no.3 at about 9 O'Clock, left his luggage in petitioner's home pretending to go out with petitioner no.1, the child (Master Devansh Agrawal) for having a short drive with him and thereafter to come soon. But, he taken away the child to his home at Katras Dhanbad, in the State of Jharkhand. In his counter affidavit, the opposite party no.3 though has accepted bringing the child with him from Lucknow to Dhanbad but added that he did so with permission of the mother of the child, the petitioner no.2. In the wake of the pleadings with regard to the above incident of taking away the child (petitioner no.1) by father (the opposite party no.3) from the custody of mother (petitioner no.2) pretending that he will come soon after having a short drive with him whether amounts permission of mother for such taking away the child from Lucknow to Dhanbad. This is also material to keep into consideration the conduct of opposite party no.3 who left his luggage in the house of petitioners to keep petitioner no.1 under impression that he will come soon with the child after having a drive. The permission or consent of the mother for taking out the child (detenue) from her custody by the opposite party no.3 may be construed by all stretch of imagination only to the extent of near vicinity of the house or to a maximum within the territorial limits of District Lucknow and in no way upto the District-Dhanbad in the State of Jharkhand. Such acquiescence cannot be treated as consent of the mother to take away her child from Lucknow to Dhanbad in the State of Jharkhand by reason of her being in impression caused through the misrepresentation by the opposite party no.3 verbally as well as by his conduct. By leaving his luggage, the opposite party no.3 kept the petitioner no.2 under impression that he certainly will not leave her home or even the District Lucknow with the child. The act and conduct of the opposite party no.3 to go out of Lucknow with the child from his car traveling a long distance to his home at Katras Dhanbad in the State of Jharkhand shows that while he was seeking permission to take out the child for having a short drive and come soon thereafter he maliciously intended to leave even Lucknow with the child to bring him in Katras, District Dhanbad, State of Jharkhand. At that moment there seems no privity of mind between the petitioner no.2 and the opposite party no.3 on the same thought with regard to taking the child out of home in Lucknow only.

33. It would not be out of room to refer two provisions of law one from Indian Contract Act which creates civil liability against maker of an untrue statement and another from criminal law which punishes the maker of such statement. Section 18 of the Indian Contract Act, 1872 reads as under:-

18. "Misrepresentation" defined.-- "Misrepresentation" means and includes-- -- "Misrepresentation" means and includes--"

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

Section 415 of the Indian Penal Code, 1860 runs as under:-

415. Cheating.--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, ***or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property,*** *is said to "cheat". Explanation.--A dishonest concealment of facts is a deception within the meaning of this section. Illustrations*

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(c) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby, dishonestly induces Z to buy and pay for the article. A cheats.

(d) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonored, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e) A, by pledging as diamonds article which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money. A not intending to repay it. A cheats.

(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(i) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

34. The word "Misrepresentation" as defined in the Section 18 of the Indian Contract Act,1872 and the illustration in Sections 415 of the Indian Penal Code,1860 in the offences relating to the cheating is untrue statement of a material fact made by one party which affects the other party's decision in correspondence. Believing on the misrepresentation, the petitioner though never intended to loose her child (detenue) nor it was communicated to her that child will go permanently in the custody of the opposite party no.3 as and when she let the child to go with the opposite party no.3 out from the house for a drive. The petitioner no.2 in fact suffered loss of custody of her child who was given birth by her in Lucknow and since his birth upto the date of incident i.e. on 7.6.2020 approximately for one year nine months was naturally remain with his mother. The opposite party no.3 already have filed two civil suits relating for restitution of conjugal rights under Section 9 of Hindu Marriage Act, 1955 as well as under the Guardians and Wards Act, 1890 in

the court at District- Dhanbad, wherein mediation though ordered but was not succeeded, therefore, arrival of opposite party no.3 in Lucknow and entry in the house of petitioners was obviously for some interested purpose in planned way which reflects from the taking away the child (detenue) from the custody of mother with whom he was still under litigation. The taking out of the child or removing the child from the custody of mother (petitioner no.2) by the opposite party no.3 (father), even both of them are natural guardian of the child, but the father since snatched of the child from the custody of mother in a deceitful manner, therefore, his custody turned in unlawful detention of the child. Even he stopped the child to see her mother despite several orders passed by the court for production of child in the court and even facilitating the meeting of mother with the child by a blunt defiance of the order. Since then the petitioner no.2 could not see her child the petitioner no. 1, Master Devansh Agarwal in utter violation of the infant's fundamental right.

35. In a case before Supreme Court, ***Kusheshwar Prasad Singh Vs. State of Bihar & Ors.***9 it is held:-

"16. It is settled principal of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who pretends a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong".

36. In another case before Hon'ble Supreme Court ***Mrs. Elizabeth Dinshaw Vs. Arvind M. Dinshaw & Anr.***10 of which fact are somehow akin to the facts of the present case, the father abducted the minor illegally in India. On a writ petition filed by the mother for the custody of minor it was held that the mother was full of genuine love and affection for the child and she could be safely trusted to look after, educate him and attend in every possible way to his proper upbringing. The child's presence in India was held to be result of an illegal act of abduction and the father who was guilty of said act was held not entitled to get any advantage. Relying upon 1966(1) All England Reporter 886, it was observed that it is the duty of courts in all countries to see that the parent doing wrong by removing the children out of their country did not gain any advantage by his or her wrong doing.

37. In ***Gippy Arora Vs. State of Punjab and Others***11 the relevant portion of para-13 is quoted hereunder:-

"Similar question had arisen before this Court in Manjit Kaur v. State of Punjab, Crl. W.P No.608 of 2008, decided on August 14, 2008 where a minor child of 9 months was taken away by his grand-parents when their daughter-in-law , an NRI, had come from abroad for a short period. This court had held relying upon Manju Tiwari Vs. Rajendra Tiwari, AIR 1990 SC 1156 that habeas corpus perition was maintainable as the child has been illegally snatched away from the mother. Custody of the child was handed over to the mother leaving the parties to avail other remedies in accordance with law."

38. The instant matter under the petition for the writ in the nature of habeas corpus, pertaining to removal of minor infant child on 7.6.2020 from the custody of mother with whom he was residing in Lucknow since his birth till he was taken away by the father (Opposite Party No. 3) to Dhanbad in Jharkhand and detained in his custody clogging the parenting opportunities of mother and stopping her even from seeing the child, the father's custody of child is absolute unlawful.

39. The facts stated hereinabove cumulatively indicate the opposite party no. 3 who was separately living from the petitioners at Dhanbad (Jharkhand) reached Lucknow at the residence of petitioners and deceitfully won the custody of the child (Petitioner No. 1) from the sole custody of mother (petitioner no. 2) taking him away to Dhanbad instantly and then not only clogged her parenting rights but also stopped the child (petitioner No. 1) from seeing her. The act of opposite party no. 3 (the father of the child) is nonetheless a crime akin to kidnapping defined as an offence under Section 361 and 362 of the Indian Penal Code, 1860. His act of deceitfully taking away the child out from custody of mother amounts to parental kidnapping which is not only illegal but criminal also.

40. Concluding the above discussions the custody of the petitioner no.1 Master Devansh Agrawal (detenue) with opposite party no.3 is unlawful, illegal and criminal, therefore, he cannot be permitted to take undue advantage over the rights of custody as natural guardian of the child in the present writ.

A legal maxim states *"no man shall take advantage of his wrong; and this maxim, which is based on elementary principals, is fully recognized in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure". This is based on the latin maxim "commodum ex injuria sua nemo habere debet".*

(ii) Jurisdiction of the Court and comity of courts

41. Section 6(a) of the Act of 1956 provides that firstly father is the natural guardian of a minor, and, after him "the mother" would be the natural guardian. It does not mean that the guardianship to the mother accrued only after the death of the father or on his renouncing the world.

42. In ***Githa Hariharan Vs. Reserve Bank of India and Vandana Shiva Vs. Jayanta Bandopadhyaya***12 the Supreme Court held that during some circumstances the mother can act as a natural guardian of the child, even if the father is alive. The meaning of word "after him" was interpreted as "in the absence of". If both the parents are living separately for a long time and minor lives with mother then mother becomes natural guardian of the minor. If the father for any reason is physically not available to take care of the minor child, then he may be considered "absent" and mother can validly act on behalf of minor. In the proviso of Section 6(a) of the Act of 1956, it is stated that if the minor is below five years of age then mother is the natural guardian of the minor child. The meaning of the words used in the Section "ordinarily with the mother" is to be read with Section 9 of the Guardians and Wards Act, 1890 which deals with the jurisdiction of the court in which it states that the place where the minor ordinarily resides. The purpose of stating a mother as the natural guardian of the child who is below five years is that mother is the best person to look after the welfare of the child and father cannot afford sufficient time to the needs of the child as well as welfare of the child. The Phrase "the place where the minor ordinarily resides" when the child is below five years of age means that the court will have the jurisdiction where the mother resides and the child resides with the mother. It is thus clear that the "child' Devansh Agarwal is ordinary resides in house B-47, Sector-H, Aliganj, District-Lucknow where the mother lives.

43. It was argued vehemently by the learned counsel for the opposite party no.3 to 6 that the child being in the custody of father residing at Katras, Dhanbad in the State of Jharkhand relief sought in habeas corpus with regard to removal of child from the custody of father at Dhanbad to hand over the custody to the mother at Lucknow is not entertainable in

view of Article 226 (1) of the Constitution of India. It is not disputed that the child borne in Lucknow on 3.7.2018 and was residing there with her mother (petitioner no.2) till 7.6.2020 when he was brought by father from Lucknow to Dhanbad, Jharkhand. Much have been discussed in preceding paras pertaining to such taking away of the child by the father under the head " *Whether the custody of the minor child, Devansh Agrawal, the petitioner no.1 was taken away from the custody of his mother (the petitioner no.2) by the opposite party no.3 illegally".*

44. In ***Yashita Sahu v. State of Rajasthan***13 Hon'ble Supreme Court has held in para- 10 as under:-

"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."

45. Similar question had arisen before this Court in **Manjit Kaur v. State of Punjab**14 decided on August 14, 2008 where a minor child of 9 months was taken away by his grand-parents when their daughter-in-law, an N.R.I., had come from abroad for a short period. This court had held relying upon ***Manju Tiwari Vs. Rajendra Tiwari***15 that High Court can exercise jurisdiction vested in it under Article 226 of the Constitution of India with respect to the issuance of writ of habeas corpus when there is illegal detention or wrongful custody, as such, the writ of habeas corpus petition maintainable as the child has been illegally snatched away from mother.

46. In ***S.P. Chengalvarajna Naidu (dead) by Lrs v. Jagannath***16 Hon'ble Apex Court has observed as follows:-

"Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and honest in the eyes of law. Such a judgment/decree - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

47. For maintainability of writ for the Habeas Corpus the Apex Court in ***Capt. Dushyant Somal Vs. Sushma Somal***17 held:-

3. There can be no question that a writ of habeas corpus is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child..... ..... But all this does not mean that a writ of habeas corpus cannot or will not be issued against a parent who with impunity snatches away a child from the lawful custody of the other parent, to whom a court has given such custody.

..... The High Court was quite right in coming to the conclusion that the appellant-petitioner had taken away the child unlawfully from the custody

of the child's mother. The writ of habeas corpus was, therefore, rightly issued. In the circumstances, on the finding, impossibility of obeying the order was not an excuse which could be properly put forward.

48. In the case of ***Mrs. Elizabeth Dinshaw (Supra)***, in para-9, Hon'ble Apex Court has held as under:-

9.

.....

"The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing.

The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. This substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a Judge should, as I see it, pay regard to the orders of the proper foreign court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child."

49. The opposite party no.2 after having fraudulently taken away the custody of the child from an area falling within the jurisdiction of this court has taken stand that the petitioner is not entitled to maintain the petition of habeas corpus with regard to the custody of child which is not tenable in the eyes of law. Moreover, he plead that custody of the child cannot be removed from him does not lie in his mouth as he played a fraud with the petitioner and later on got a preferential right to keep the custody of the child. The manner in which the child has been taken away from the petitioner cannot have the approval and sanction of law. He should have adopt a legal procedure to take the custody of the child.

50. It is held, therefore, the Bench of High Court Allahabad, at Lucknow has jurisdiction over the matter of child's custody to be removed from father residing at Dhanbad, State of Jharkhand as he retain custody of child in illegal way and the child is in his illegal detention.

51. In the case of ***Yashita Sahu (Supra)***, it is held by Hon'ble Apex Court with regard to the comity of courts as under:-

"Comity of courts

In the fast shrinking world where adults marry and shift from one jurisdiction to another there are increasing issues of jurisdiction as to which country's courts will have jurisdiction. In many cases the jurisdiction may vest in two countries. The issue is important and needs to be dealt with care and sensitivity. Though the interest of the child is extremely important and is, in fact, of paramount importance, the courts of one jurisdiction should respect the orders of a court of competent jurisdiction even if it is beyond its territories. When a child is removed by one parent from one country to another, especially in violation of the orders passed by a court, the country to which the child is removed must consider the question of custody and decide whether the court should conduct an elaborate enquiry on the question of child's custody or deal with the matter summarily, ordering the parent to return the custody of the child to the jurisdiction from which the child was removed, and all aspects relating to the child's welfare be investigated in a court in his/her own country."

(iii) Relevant provisions of Law- Maintainability of petition for habeas corpus.

52. Section 6 of the Hindu Minority and Guardianship Act, 1956 if its proviso being quoted hereunder:-

"6. Natural guardians of a Hindu minor.-- The natural guardian of a Hindu minor, in

respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

....."

53. Section 6 (a) of the Hindu Minority and Guardianship Act, 1956 which shall hereinafter be called for the purpose of brevity and convenience as "Act of 1956" states that father is the natural guardian of minor, after him the mother becomes the natural guardian. The proviso to the Section 6 (a) states that if the minor is below five years of age then the mother is the natural guardian of the minor child.

54. The law for guardianship under Hindu law was codified under Act of 1956 enacted to define the relation of guardians with the minors their rights and power on the minors' person and property virtually the Act of 1956 is a extended part of the guardianship and Wards Act, 1890. It focuses on the type of guardians and custody of the child. Under the Act of 1956 out of the three types, first is the natural guardian. Section 6 of the Act 1956 states about the guardian of the minor i.e., father, mother or the husband. Father is the natural guardian, after him, mother becomes natural guardian of minor. Even under Section 19 of the Guardianship and Wards Act, 1890 also it is stated that a father cannot be deprived of natural guardianship of child unless he has been found unfit. When the father is alive, he is natural guardian and it is only after him, the mother becomes natural guardian.

55. The guardianship of the minor is not about legal rights of the guardians but it takes the welfare of child into consideration. Section 13 of the Act of 1956 runs as under:-

"13. Welfare of minor to be paramount consideration.--

(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

A bare reading of the aforesaid provision provides as a paramount consideration the welfare of the minor. It is stated that Section 6 should be always read with Section 13 of the Act of 1956.

56. There are two other provisions in Guardians and Wards Act, 1890 namely Section 7 and 17, which are quoted hereunder for easy reference:-

7. Power of the Court to make order as to guardianship.--

(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made--

(a) appointing a guardian of his person or property or both, or

(b) declaring a person to be such a guardian the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or

declared as aforesaid have ceased under the provisions of this Act.

17. Matters to be considered by the Court in appointing guardian.--

(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 minor is old enough to form an intelligent preference, the Court may consider that preference. 1[***]

(5) The Court shall not appoint or declare any person to be a guardian against his will.

57. This would be pertinent here to clarify that this court in the instant petition for issuance of writ of habeas corpus has no need to declare and appoint "Guardian' of the minor. The scope of the instant writ is confined to the custody of minor to either one of the parents the natural guardians of the minor child, keeping in consideration his best interest and welfare. The word "welfare" should not be weighed with money nor should be judged on the ground of mere physical comfort but it should also be a moral and ethical welfare of the child alongwith physical well being.

(iv) Welfare of the child.

58. In the case before High Court in Habeas Corpus petition **Shigorika Singh (Supra)**, the Corpus Shigorika Singh borne out of wedlock of Dr Ayushi Singh (mother) and opposite party no.1, Dr. Abhinandan Singh (father). By reason of some serious matrimonial differences they were separated including harassment and physical torture. The wife was dropped by father of the child with her minor daughter to her maternal home on 25.10.2018 and since then they were living together with the parents of mother, though father was visiting regularly to both of them without any objection from the mother's maternal family. In the facts involved in this case the father of Shigorika visited the maternal home of her mother on 10.1.2020 at about 7 to 8 p.m. and pretending that he wants to meet with his daughter sitting in the car, thus he taken the daughter from her mother's custody and drove away with the daughter. Mother seen the daughter being driven away with the father raised alarm but the father left the spot with the daughter, subsequently, on his denial the petition in the nature of Habeas Corpus was filed against father by the mother seeking custody of daughter. In that case also the court had relied on the judgment of Yashita Sahu Vs. State of Rajasthan. In a Habeas Corpus petition as aforesaid, the High Court must examine at the threshold, whether a minor is in lawful or unlawful custody of any person private respondents named in the writ petition. The court in the above case was of the opinion that the custody of daughter with his father was illegal, consequent thereupon writ petition was allowed with a direction that custody of daughter should be immediately handover to mother.

59. In another case before this court in ***Meenakshi and others (Supra)***, mother was the first petitioner and father was the respondent no.9, they were married on 20.4.2014, out of their wedlock for a period of four years throughout of her marriage she was tortured physically and mentally in connection with the demand of dowry. She went back to her mother's house on 4.6.2018 with a son born on 20.9.2016, the Court held in para-18 and 19 as under:-

18. There is little doubt about the issue that though both the mother and the father are natural guardians, a writ of habeas corpus may

issue, because the Court can still determine the legality of the custody with reference to the question of the minor's welfare. As it is said, it is not so much about the rights of the parents to an exclusive custody of the child, as it is about the child's welfare. It is, therefore, lawful for the Court to exercise its jurisdiction and issue a writ of habeas corpus to place the child in a custody, where his/ her welfare appears to the Court to have the best prospects. This petition is, therefore, held to be maintainable.

19. It must be remarked here that the mother has come up with serious allegations about her son being kidnapped by force, by none else than her brother and being delivered into her husband's custody. In their counter affidavit, filed by respondent nos. 6 to 8, that allegation has been vociferously denied. Meenakshi's attempts to put the process of criminal law in motion with regard to her allegations about the minor's kidnapping have failed with the police, and the Judicial Magistrate too, has declined to order the police to register and investigate the case; the Magistrate has directed the matter to proceed as a complaint case. Meenakshi's brother and husband have both denied allegations about the minor being kidnapped. So far as this Court is concerned, there is no tangible evidence about the minor's alleged forcible removable from the mother's custody. This Court is not inclined to probe the matter further, bearing in mind the relationship between parties, and the minor's welfare.

Further, in para-25 held as under:-

25. No doubt, the father and the mother, are both natural guardians, if one goes by Section 6(a) of the Act of 1956. The mother's right and that of the father, under Section 6(a) as to guardianship has been considered at par by the Supreme Court in Githa Hariharan (Ms) and another vs. Reserve Bank of India and another, (1999) 2 SCC 228. So far as custody goes, as distinct from guardianship, between the two natural guardians, the mother is to be preferred by virtue of the proviso to Section 6(a) of the Act of 1956, in the case of a child below five years of age.

60. Ultimately, the court held that generally speaking further the custody of a minor child of tender age below the age of 5 years ought to be with mother subject to several exceptions. This court allowed the writ petition of habeas corpus and ordered that minor who is presently in the custody of his father shall be delivered into the custody of mother within 3 days from receipt of copy of this order. In case minor's custody is not handover to his mother then that time the Chief Judicial Magistrate and the Superintendent of Police of the District acting in aid of Chief Judicial Magistrate shall cause the minor to be delivered into the custody of his mother after taking it out from the custody of his father.

61. In the case of ***Roxann Sharma (Supra)*** Hon'ble Supreme Court held about the custody of a Hindu child aged about 5 years considering the entitlement of father vis-a-vis mother, in para 10 to 15 as under:-

10. Section 6 of the HMG Act is of seminal importance. It reiterates Section 4(b) and again clarifies that guardianship covers both the person as well as the property of the minor; and then controversially states that the father and after him the mother shall be the natural guardian of a Hindu. Having said so, it immediately provides that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. The significance and amplitude of the proviso has been fully clarified by decisions of this Court and very briefly stated, a proviso is in the nature of an exception to what has earlier been generally prescribed. The use of the word "ordinarily" cannot be over-emphasised. It ordains a presumption, albeit a rebuttable one, in favour

of the mother. The learned Single Judge appears to have lost sight of the significance of the use of word "ordinarily" inasmuch as he has observed in paragraph 13 of the Impugned Order that the Mother has not established her suitability to be granted interim custody of Thalbir who at that point in time was an infant. The proviso places the onus on the father to prove that it is not in the welfare of the infant child to be placed in the custody of his/her mother. The wisdom of the Parliament or the Legislature should not be trifled away by a curial interpretation which virtually nullifies the spirit of the enactment.

11. We shall now consider the relevance of the precedents cited before us by the learned Senior Counsel for the Father. In Sarita Sharma vs. Sushil Sharma (2000) 3 SCC 14, in defiance of the orders passed by the Jurisdictional Court in the U.S., the mother, Sarita, had returned to India with two children from their matrimonial relationship. The High Court viewed that the divorce decree and custodial directions having emanated from a competent Court deserve to be honoured, and accordingly allowed the Habeas Corpus Petition and directed the mother to return the custody of the children to the father, Sushil. This Court was not persuaded that further consideration by Courts in India as to whether the interests of the children, which were paramount, stood foreclosed and could not be cogitated upon again. As regards Section 6 of the HMG Act, it opined that although it constitutes the Father as a natural guardian of a minor son it could not be considered as superseding its paramount consideration as to what is conducive to the welfare of the minor. These observations were reiterated and this Court reversed the decision of the High Court holding that the interests and welfare of the children dictated that the custody should be with their mother. This case, therefore, militates against the legal and factual position which the Father seeks to essay before us. It is also important to underscore the fact that both the children were over the age of five, a fortiori, the custody should not have been reversed in the case in hand by the High Court from the Mother to the Father since Thalbir was then around one year old and is presently still less than three years old.

12. Learned Senior Counsel has next drawn our attention to Mausami Moitra Ganguli vs. Jayant Ganguli, (2008) 7 SCC 673. In this case also, this Court was confronted with the custody conflict over 10 year male child. We must be quick to point out that the Court did not consider Section 6 of the HMG Act after detailing the factors which were indicative of the position that the welfare of the child lies with continuing the custody with the father, this Court dismissed the mother's appeal. The facts are totally distinguishable. The ratio continues to be that it is the welfare of a minor which has paramount importance.

13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the livelihood of the welfare and interest of the child being undermined or jeopardised if the custody retained by the mother. Section 6(a) of HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this Section or for that matter any other provision including those contained in the G&W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years.

14. We must not lose sight of the fact that our reflections must be restricted to aspects that are relevant for the granting of interim custody of an infant. The Trial is still pending.

The learned Single Judge in the Impugned Order has rightly taken note of the fact that the Mother was holding a Tenured College Professorship, was a post-graduate from the renowned Haward University, receiving a regular salary. Whether she had a Bi-polar personality which made her unsuitable for interim custody of her infant son Thalbir had not been sufficiently proved. In the course of present proceedings it has been disclosed that the Father has only passed High School and is not even a graduate. It has also not been denied or disputed before us that he had undergone drug rehabilitation and that he was the member of Narcotics Anonymous. This is compounded by the fact that he is not in regular employment or has independent income. As on date he is not an Income tax assessee although he has claimed to have earned Rupees 40,000 to 50,000 per month in the past three years. We must again clarify that the father's suitability to custody is not relevant where the child whose custody is in dispute is below five years since the mother is per se best suited to care for the infant during his tender age. It is for the Father to plead and prove the Mother's unsuitability since Thalbir is below five years of age. In these considerations the father's character and background will also become relevant but only once the Court strongly and firmly doubts the mother's suitability; only then and even then would the comparative characteristic of the parents come into play. This approach has not been adopted by the learned Single Judge, whereas it has been properly pursued by the learned Civil Judge.

15. In the course of the hearings before us temporary visitation rights were granted to the Mother under the provision of a social worker who had been appointed by the Maharashtra State Legal Service Authority. We have had the advantage of perusing her very diligent and detailed Reports which vividly recount the initial reluctance and antipathy of Thalbir to his Mother, which very quickly came to be naturalised because of the maternal affection of the Mother. The Reports of the Social Worker lucidly indicate that at present Thalbir is extremely comfortable and happy in the company of his Mother but becomes agitated at the sight of his Father when he has to return to him. The Social Worker has also fervently pleaded that her Reports should be kept sealed for fear of the Father. This is extremely disturbing to us just as we expect it should be to the Father also.

62. Learned counsel for the opposite party no.3 to 6 relied on the judgment of ***Vahin Saxena (Minor Corpus (Supra)***, wherein the petitioner corpus born in the year 2012, the mother of child as such to left her maternal home in the year 2012 alongwith minor child and since then he is with his mother, a divorce petition was also pending between husband and wife, para-22 has held as under:-

"22. In a child custody matter, a writ of habeas corpus would be entertainable where it is established that the detention of the minor child by the parent or others is illegal and without authority of law. In a writ court, where rights are determined on the basis of affidavits, in a case where the court is of a view that a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate forum. The remedy ordinarily in such matters would lie under the Hindu Minority and Guardianship Act, 195613 or the Guardians and Wards Act, 189014, as the case may be."

And, ultimately held that since the case involves a proceeding between husband and wife under the Hindu Marriage Act pending before the Family Court and all reliefs and claims are open to raise before the said forum and in other appropriate proceeding. The petitioner no.1, the minor at liberty to go back

along with the respondent, mother to the place from where they have come with dismissing the petition of father.

63. Likewise, in the judgement delivered by this court in ***Reshu @ Nitya (Supra)*** para 47 is relevant to quote here with regard to the character of the proposed guardian:-

47. Considering the facts of the case in particular the allegations against the respondent and pendency of a criminal case for an offence punishable under Section 498-A IPC, it was observed in the decision in the case of Nil Ratan Kundu that one of the matters which is required to be considered by a court of law is 'character' of the proposed guardian and that the same would be a relevant factor. It was observed thus :-

"63. In our considered opinion, on the facts and in the circumstances of the case, both the courts were duty-bound to consider the allegations against the respondent herein and pendency of the criminal case for an offence punishable under Section 498-A IPC. One of the matters which is required to be considered by a court of law is the "character" of the proposed guardian. In Kirtikumar10, this Court, almost in similar circumstances, where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with the maternal uncle.

64. Thus, a complaint against the father alleging and attributing the death of the mother, and a case under Section 498-A IPC is indeed a relevant factor and a court of law must address the said circumstance while deciding the custody of the minor in favour of such a person. To us, it is no answer to state that in case the father is convicted, it is open to the maternal grandparents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and an appropriate order ought to have been passed."

64. Further, in para 48 and 49 of the aforesaid judgment, the father's preferential rights to the custody of minor child was not given weight on the ground that it would not be in the interest of children to hand over the custody to father. The respective Paras are quoted here under:-

48. In an earlier decision in the case of Kirtikumar Maheshankar Joshi vs. Pradipkumar Karunashanker Joshi10, where in almost similar circumstances the father was facing a charge under Section 498-A I.P.C., it was held that though the father being a natural guardian, has a preferential right to the custody of the children, but in the facts and circumstances of the case, it would not be in the interest of the children to hand over their custody to the father.

49. It is, therefore, seen that in an application seeking a writ of habeas corpus for custody of a minor child, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires that the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody the child presently is.

65. Ultimately the petition of the father was dismissed with the finding recorded in para 59 that it would be relevant to bear in mind that in deciding questions relating to custody of a minor child, as in the present case, the paramount consideration would be welfare of the minor and not the competing rights with regard to guardianship agitated by the parties for which the proper remedy would be before the appropriate statutory forum.

66. Further, learned counsel for the opposite party no.3 to 6 relied on the judgment of ***Ruchi Majoo (Supra)*** wherein Hon'ble Apex Court has held as under:-

"A child of NRI parents was born in America. The wife on account of husband's alleged addiction in pornographic films, internet sex and adulterous behavior during the couple's stay in America, took a decision to educate the child in Delhi and the husband consented to it. But later the husband filed a case of abduction of minor child against the wife in America and an Interpol red corner notice was issued against the wife.

The wife took refuge udder an order passed by the District Court, Delhi in a petition filed under Section 7, 8, 10, 11 of the Guardian and Wards Act, 1890 granting interim custody of the minor ro her. A writ filed by the husband was allowed by the impugned order of the High Court, whereby the High Court set aside the order passed by the District Court and dismissed the custody case filed by the mother.

The main question in this appeal were: (I) whether the High Court was justified in dismissing the petition for custody of the minor on the ground that the court at Delhi had no jurisdiction to entertain the same, (ii) whether the High Court was right in declining exercise of jurisdiction on the principle of comity of courts, and (iii) whether the order granting interim custody to the mother of the minor called for any modification in terms of grant of visitation rights to the father, pending disposal of the petition by the trial court.

Allowing the appeal and answering the first two questions in the negative and the third question in the affirmative, the Supreme Court held:

The court of Delhi was in the facts and circumstances of the case competent to entertain the application filed by the appellant."

(v) Mother being a natural guardian, her importance in the life of petitioner no.1 (detenue, Devansh Agrawal) who is an infant child of approximately two years the legal rights of the natural guardian and the paramount interest of the child.

"Only mothers can think of the future because they give birth to it in their children.

Maxim Gorky"

There is a Sanskrit Shlok authored by **Maharshi Ved Vyas** in **Skand Purana** devoted to the importance and magnanimity of "Mother" which is quoted hereunder:-

नास्ति मातृसमा छाया
नास्ति मातृसमा गतिः।
नास्ति मातृसमा त्राणं
नास्ति मातृसमा प्रपा।

Means,

"there is no shelter like a mother,
no sustenance (support) like a mother,
no protection like a mother,
no vitaliser like a mother."

67. It is settled law by our courts that while deciding matters of custody of a child the only basis must be what would be in the best interest of child.

68. The role of the mother in the development of a child's personality can never be doubtful, a child receives the best shelter and protection through the mother, naturally mother is required for any child to grow up in her company neither the father nor any other person can give the same kind of love, affection, care and sympathies to a child as that of mother. The presence and company of mother is always in the welfare of the minor child.

69. In ***Eugenia Archetti Abdullah Vs. State of Kerala***18, a Division Bench of Kerala High Court observed that for an infant child of less than three years lap of the mother is a natural cradle where the safety and welfare of children can be assured and there is no substitute for the same.

70. The mothers role in the early childhood and development of the child is well recognized in the literature as well in the legal panorama of the nation. Mothers play a great role in their children's life, caring them, loving them, teaching them and so much more. A mother's role is important in developing a child's potential in his/her early age. Early childhood is that important part of life in which developmentally, a child is learning a lot from their surrounding and people around them which will impact their growing years. Therefore, as the main persons in a child's life at this stage, a mother's relationship with a child is crucial.

(vi) Best interest of the child

71. In ***Yashita Sahu Vs. State of Rajasthan (Supra),*** Hon'ble Apex Court held in para-18 and 19 as under:-

"18. Thereafter, another Bench of this Court in Lahari Sakhamuri [Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311 : (2019) 3 SCC (Civ) 590] , while interpreting the judgment in Nithya Anand Raghavan [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] held as follows : (Lahari Sakhamuri case [Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311 : (2019) 3 SCC (Civ) 590] , SCC p. 337, para 41)

"41. ... the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child, etc., cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child."

19. We are of the considered view that the doctrine of comity of courts is a very healthy doctrine. If courts in different jurisdictions do not respect the orders passed by each other it will lead to contradictory orders being passed in different jurisdictions. No hard-and-fast guidelines can be laid down in this regard and each case has to be decided on its own facts. We may, however, again reiterate that the welfare of the child will always remain the paramount consideration."

72. In the case of ***Gaurav Nagpal Vs. Sumedha Nagpal***19 Hon'ble Apex Court in cases of dispute between mother and father expected the courts to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. It is held in para-48 which runs as under:-

48. Merely because there is no defect in his personal care and his attachment for his children--which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a

just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

73. The word "welfare' is given meaning by the Hon'ble Apex Court in the case of ***Gaurav Nagpal (Supra)*** in para-51 which runs as under:-

51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases.

74. In ***Anjali Kapoor (Smt.) Vs. Rajiv Baijal***20 Hon'ble Apex Court further explained the word welfare as under:-

"21. In Walker v. Walker & Harrison [1981 New Ze Recent Law 257] the New Zealand Court (cited by British Law Commission, Working Paper No. 96) stated that:

"Welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."

(emphasis supplied)"

75. In deciding the question as to the custody of minor child to anyone of the parent the elements required to be considered is not only the absolute right of the guardian superseding the interest of the child. Hon'ble The Apex Court in para 2 and 5 of the judgment in ***Sumedha Nagpal Vs. State of Delhi & Ors***.21

"2. Both parties do recognise that the question of custody of the child will have to be ultimately decided in proceedings arising under Section 25 of the Guardians & Wards Act read with Section 6 of the Act and while deciding such a question, welfare of the minor child is of primary consideration. Allegations and counter-allegations have been made in this case by the petitioner and Respondent 2 against each other narrating circumstances as to how the estrangement took place and how each one of them is entitled to the custody of the child. Since these are disputed facts, unless the pleadings raised by the parties are examined with reference to evidence by an appropriate forum, a proper decision in the matter cannot be taken and such a course is impossible in a summary proceeding such as writ petition under Article 32 of the Constitution.

5. In deciding such a question, what we have to bear in mind is the welfare of the minor child and not decide such a question merely based upon the rights of the parties under the law. In the pleadings and the material placed before us, we cannot say that there is any, much less clinching, material to show that the welfare of the minor child is at peril and calls for an interference. The trauma that the child is likely to experience in the event of change of such custody, pending proceedings before a court of competent jurisdiction, will have to be borne in mind. We are conscious of the emphasis laid by the learned counsel for the petitioner that the lap of a mother is the natural cradle where the safety and welfare of the child can be assured and there is no substitute for the same, but still

we feel that at this stage of the proceedings it would not be appropriate for us to interfere in the matter and leave all matters arising in the case to be decided by an appropriate forum irrespective of whatever we have stated in the course of this order. Even though we have dealt with the contentions raised by Shri D.D. Thakur as to grant of interim custody to the petitioner, we should not be understood as having held that a petition would lie under Article 32 for grant of custody of a minor child; we refrain from examining or deciding the same."

76. In ***Rosy Jacob Vs. Jacob A. Chakramakkal*** 22 the Apex Court observed in para 7 as under:-

In his view the principle on which the Court should decide the fitness of the guardian mainly depends on two factors :(i) the father's fitness or otherwise to be the guardian and (ii) the interests of the minors. Considering these factors it was felt that both the parties in the present case loved their children who were happy during their stay with both of their parents.

77. In ***Anjali Kapoor (Smt.) (Supra)***, Hon'ble Apex Court relying on its two other judgments observed in para 17 and 19:-

17. In Elizabeth Dinshaw v. Arvand M. Dinshaw [(1987) 1 SCC 42 : 1987 SCC (Cri) 13 : AIR 1987 SC 3] this Court has observed that whenever a question arises before court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

19. In McGrath (infants), Re [(1893) 1 Ch 143 : 62 LJ Ch 208 (CA)] it was observed that: (Ch p. 148)

"... The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

78. In ***Mausami Moitra Ganguli Vs. Jayant Ganguli***23 Supreme Court observed in para-19 as under:-

19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

79. In ***Rosy Jacob (Supra),*** the Apex Court observed "*Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them".*

80. After going through the case laws propounded by Hon'ble Apex Court with regard

to the interest and welfare of the child, this Court has also required to evaluate the facts and circumstances involved in the present case with regard to the custody of minor child, Master Devansh Agarwal whether lies with the present custody i.e, with father or lies in removal of custody from the father to hand over the same to his mother.

81. In the foregoing discussion this court has already held the custody of father, opposite party no.3 is illegal, then also it is necessary to look into the best interest of the child, his physical and financial comfort, emotional attachment with natural guardian as well as the gravity of love, affection and care of either of the parent towards the minor child. The child since his birth on 3.7.2018 in Lucknow was ever been with the mother till 7.6.2020 when he was taken away from Lucknow to Dhanbad by the father at the age approximately below two years. The mother in her petition supported with the affidavit has stated that the child has never been parted from her throughout the aforesaid period and he heavily depends on her for his feeding, still depends on mother's milk. In other words, it is undoubtedly admitted fact that father has never been in custody of the child since his birth before 7.6.2020 when he landed suddenly at the house of petitioners in Lucknow on the pretext of offering some reconciliation. Naturally, the father would have not acquainted with the habit and requirement of the child for his nourishment, his care and requirements.

82. In his counter affidavit father emphatically stated his rights as natural guardian of the child to retain his custody and protested the removal of custody from him for the purpose repatriating the child to the custody of his mother again. He has also stated about the joint family who took responsibility of upbringing the child, caring him with love and affection but as the love and affection of a mother towards his child cannot be substituted from any others love and affection, the child is bound to loose her mother, even the father has stopped him seeing the mother, despite order of the court. The child is admittedly below the age of five years much tender in age approximately two years and he needs a lot of love from his mother. A Sanskrit Shlok for the requirement of a growing child since his birth is quoted hereunder:-

लालयेत् पंचवर्षाणि
दशवर्षाणि ताडयेत्
प्राप्ते तु षोडशे वर्षे पुत्रं
मित्रवदाचरेत्।

Meaning thereby, upto the age of five, love your child a lot, upto the age of ten be strict with him but when the child reaches the age of 16, treat him like a friend.

83. In the judgment above cited time and again it is held by Hon'ble Apex Court that the custody of a minor child primarily be decided not on consideration of legal right of the parties but on the sole and predominant criteria what would best served for the interest of the child. The word "welfare" must be taken in widest sense the moral and religious welfare of the child must be consider as well as its physical well-being. In considering the welfare the ties and bond with a child is natural cannot be substituted by any other thing like compassion, comfort or care. In the present case, the counter affidavit of father has repeated in so many words his competency with regard to physical comfort and financial support to the child as well as the love and care, the child attaining from the joint family. In ***Gaurav Nagpal (Supra),*** Hon'ble Supreme Court has observed that simply because the father loves his children does not necessarily lead to the conclusions that the welfare of the children would be better promoted by granting their custody to him.

(vii) Conclusion

84. Here, in the present case the detention of the minor child by the father is held illegal and

without authority of law. Further, it has been observed by this court during pendency of petition several orders of the court with regard to the production of child and even to facilitate the meeting of the mother with the child were flouted over by the father. This is enough to show that father not only has taken away the child illegally from the custody of mother but also he had not left any opportunity for the child to see his mother or the mother to see her child. This conduct of the father if taken with the facts of differences between the husband and wife i.e., the mother of the child by reason of which they are separately residing and the fact that the F.I.R. under Sections 498-A, 336, 506 of I.P.C. and Section 3/4 of Dowry Prohibition Act is lodged against father with regard to cruelty in connection with the demand of dowry and abduction of the child, there is reason to believe that father in furtherance of his malice towards mother will also make brain wash of the child towards his mother that would not be in the interest and welfare of the child. The mother is competent enough to take care, maintenance and upbringing of the child with the love and affection. She deserves to have custody of the child removing the same from the father.

85. In view of the above circumstances, the writ of habeas corpus is required to be issued to opposite party no.3 to produce the child before this Court on 20.12.2021 for handing over the same to the petitioner no.2 (mother), however, he will be at liberty to get finally decided his rights of exclusive custody as guardian by the family court or court of Guardians and Wards Act which are competent to declare the same in the welfare of the child on the basis of evidences produced before the said courts.

86. Opposite party no.3 is directed to produce the child in the court at 2:00 p.m. on 20.12.2021 for handing over the custody of the child to the petitioner no.2 (mother). The order regarding the visitation rights of opposite party no.3 will be passed after the child is produced in the court.

87. The opposite party no.2, S.H.O. Police Station Aliganj, Lucknow is directed to ensure the production of child alongwith opposite party no.3 in the court on the date fixed for implementation of the order. The expenses for the journey with companion if any deposited in the court pursuant to the order dated 20.1.2021 still remains unexhausted which shall be paid to the opposite party no.3 by the Senior Registrar of the court after handing over the child by the opposite party no.3 to petitioner no.2 (mother).

88. The instant writ petition of habeas corpus is ***disposed of*** in the above said terms.

89. Office is directed to list for implementation of the order on 20.12.2021.

90. The Senior Registrar of the court is directed to promptly serve the copy of the judgment to the opposite party no.3 in person in addition to the service in ordinary process through e-mail also and to the Superintendent of Police, Dhanbad for facilitating the implementation of order through his official Fax and e-mail.

91. The opposite party no.2, S.H.O., Police Station Aliganj, Lucknow shall get copy of the order promptly and constitute a police team to recover the child with opposite party no.3, so as to ensure the production of the child before the court on the date of implementation.

(2021)12ILR A1143
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.10.2021

BEFORE

THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 5432 of 2017

Kalloo @ Ravi **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Sri Mithilesh Kumar Shukla, Sri Avanish Kumar Shukla, Sri Shive Datta Yadav

Counsel for the Respondent:
A.G.A.

Indian Penal Code, 1860 – Section 377, Unnatural Offences - Protection of Children from Sexual Offences Act, 2012 – Sections 3(A) & 4 - Sentence - Modification - Trial court convicted appellant & sentenced under Section 377 I.P.C. for a period of 10 years rigorous imprisonment and under Section 4 POCSO Act for a period of 10 years rigorous imprisonment - Held - at the time of commission of offence the convict was nearly 17 years of age - medical report of the victim shows that he did not sustain any physical injury and there was no sign of physical violence on him - there is no previous criminal history of the appellant - minimum punishment for the offence under Section 4 POCSO Act is provided for 7 years – appellant served in jail for a period of more than 7 years - Considering the age of the appellant and the period he served in jail, court took a liberal view - conviction is upheld and the sentence under Section 377 I.P.C. and under Section 4 POCSO Act is modified to already undergone and in default of payment of fine appellant is to undergo additional imprisonment for a period of two months in each (Para 29, 30)

Partly Allowed. (E-5)

Cases Relied on:

1. Mohd. Giasuddin Vs St. of AP AIR 1977 SC 1926

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

3. St. of M.P. Vs Najab Khan (2013) 9 SCC 509

4. Jameel Vs St. of U.P. (2010) 12 SCC 532

5. Guru Basavraj Vs St. of Karn.(2012) 8 SCC 734

6. Deo Narain Mandal Vs St. of U.P. (2004) 7 SCC 257

7. Shyam Narain Vs State (NCT of delhi), (2013) 7 SCC 77

8. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323

9. St. of Pun. Vs Bawa Singh (2015) 3 SCC 441

10. Raj Bala Vs St. of Har., (2016) 1 SCC 463

11. Kokaiyabai Yadav Vs St. of Chhattisgarh(2017) 13 SCC 449

12. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

13. Jameel Vs St. of UP (2010) 12 SCC 532

14. Guru Basavraj Vs St. of Karn., (2012) 8 SCC 734

(Delivered by Hon'ble Subhash Chandra Sharma, J.)

1. This criminal appeal has been filed against the judgment and order dated 09.08.2017 passed by learned Additional Sessions Judge, Court- 16, Kanpur Nagar in Special Session Trial No.26 of 2014 (State of U.P. Vs. Kallu @ Ravi) arising out of Crime No.32 of 2014, under Sections 377 I.P.C. and Section 3(A)/4 POCSO Act, Police Station Kakadeo by which appellant was convicted and sentenced under Section 377 I.P.C. for a period of 10 years rigorous imprisonment with fine of Rs.20,000 and under Section 4 POCSO Act for a period of 10 years rigorous imprisonment with fine of Rs.20,000 and in default of payment of fine to undergo additional simple imprisonment for a period of 2 years respectively.

2. Fact in brief are that informant Subodh Kumar @ Guddu is resident of B-52, Rajapurwa opposite to Ambedkar Park, Police Station Kakadeo, District Kanpur Nagar. On 07.02.2014 at about 9:30 P.M. nephew of informant aged about 8 years was playing
outside the house. Appellant took him into the Ambedkar Park with bad intention and committed sodomy. Hearing shriek of the victim, informant and his brother Manoj went towards the park. Seeing them appellant fled away by jumping the grill. On the same day a

written tehrir was given at the police station Kakadeo on the basis 2 of which F.I.R. was lodged at about 10:30 P.M.

3. Majrubi chitthi was prepared in the police station and victim was sent to L.L.R. Hospital for medical examination.

4. Medical examination was done by Medical Officer, L.L.R. Hospital, Kanpur Nagar on 08.02.2014 at about 1:15 P.M. Detail of which is as under :-

‘

(I) Anal mucosal tears present on interior and posterior wall of anus at 12 O'clock and 6 O'clock position, fresh bleeding coming out during pushing of anal wall in opposite direction.

(II) Yellowish white material present on anal opening. Slide prepared for examination of semen/spermatozoa and handed over to the police.

(III) Opinion :- patient admitted u/o of Dr. Pawan Singh for expert opinion and management as a case of sexual assault by male partner. Injury no.1 caused by sodomy, fresh in duration and kept under observation, slide preparation done for examination of semen/spermatozoa of yellowish while material and handed over to police. On microscopic examination of swab/slide smears were negative for spermatozoa.

5. Investigation of the case was handed over to S.I. Ramakant Dubey who took in possession the clothes of victim, made spot inspection, prepared site plan and recorded statements of victim and of other witnesses. On the material collected during the investigation he prepared charge-sheet and submitted before the court concerned.

6. The court concerned took cognizance of the offences and in compliance of Section 207 Cr.P.C. necessary copies of police 3 papers were given to the appellant.

7. On the basis of material on record charge under Section 377
I.P.C. and Â¾ POCSO Act was framed which was read over and explained to the appellant who did not plead guilty but denied and claimed for trial.

8. In support of its case, prosecution adduced PW-1 Subodh Kumar informant, PW-2 victim as witness of fact, PW-3 Constable Satyendra Singh who prepared the F.I.R., PW-4 Dr. Vinay Kumar who examined the victim, PW-5 S.I. Ramakant Dubey who investigated the case and PW-6 Dr. Looba Khan the pathologist, PW-7 Manoj (uncle of the victim) a witness of fact.

9. After conclusion of prosecution evidence statement of appellant under Section 313 Cr.P.C. was recorded in which he stated about the incident to be false and the witnesses deposing falsely. In defence he produced DW-1 Pradeep Yadav, DW-2 Sunil and DW-3 Radha.

10. After hearing the arguments made by learned counsel for the appellant as well as learned counsel on behalf of the State and on perusal of record, learned trial court passed the judgment and order dated 09.08.2017 while convicting and sentencing the appellant as aforesaid. Being aggrieved with the judgment and order he has preferred this appeal.

11. Heard Sri Shive Datta Yadav, learned counsel for the appellant as well as learned A.G.A. for the State.

12 . Learned counsel for the appellant submits that no independent witness was examined by the prosecution whereas the alleged incident took place in a park that is an

open public place. The medical report has also not supported the prosecution 4 version, all the witnesses are interested witnesses and close relatives of the victim. No semen or spermatozoa was found on the anus and on the clothes of the victim during pathological examination. In this way, the prosecution could not prove it's case beyond reasonable doubt. The judgment under challenge is against the facts on record and also against the law. Without considering these facts, the learned trial court has awarded severe punishment to appellant.

13. At the outset, learned counsel for the appellant confined his argument to the quantum of sentence only without challenging the impugned judgment and order on merits. He has further submitted that as per statement of appellant recorded under Section 313 Cr.P.C. his age was 18 years at the time of recording the statement on 04.06.2015 whereas the incident took place on 07.02.2014, which shows that he was aged about 17 years at the time of occurrence. Considering the tender age of the appellant, a liberal view may be taken by the court. He has further submitted that appellant remained in jail throughout the trial from the date of incident and as such he has been in jail for the last more than 7 years. Minimum sentence provided under Section Â¾ POCSO Act is 7 years he, therefore, requested that considering the period already served in the jail, the sentence awarded to the appellant, may be modified to the minimum as provided under the Act.

14. He further submitted that learned trial court has awarded separate sentence under Section 377 I.P.C. and under Section 4 POCSO Act whereas on the analogy of Section 42 of POCSO Act accused be awarded sentence under the law which provides greater punishment. In view of this legal position learned trial court might have awarded sentence either under Section 377 I.P.C. or under Section 4 POCSO Act.
5

15. Learned A.G.A. on behalf of the State supported the impugned judgment and order of learned trial court and submitted that victim is a minor boy and act of the appellant is heinous in nature and trial court after appreciating all the evidence available on record, rightly convicted the appellant for the offences under Section 377 I.P.C. & Section 4 POCSO Act. The appellant deserves no leniency, hence appeal has no force and is liable to be dismissed.

16. Section ¾ of POCSO Act reads as under:

Section 3: Penetrative sexual assault.- *A person is said to commit 'penetrative sexual assault' if- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or (d) he applies his mouth to the penis, vagina, anus urethra of the child or makes the child to do so to such person or any other person.*

Section 4: Punishment for penetrative sexual assault.- *Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.*

17. Section 377 I.P.C. reads as under :-

377. Unnatural offences.— *Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.— Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*

18. Section 42 of POCSO Act reads as under :-

42. Alternate Punishment:- *Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 3540, 370, 370A, 375, 376, 376A, 376C, 3760, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.*

19. Regarding submission made by learned counsel for the appellant that on the analogy of Section 42 of POCSO Act, the learned trial court might have awarded sentence either under Section 377 I.P.C. or under Section 4 POCSO Act, which provides greater punishment, it is to note that the offence mentioned under Section 42 of POCSO Act does not include offence under Section 377 I.P.C., therefore, Section 42 of the Act cannot be taken recourse with, while awarding sentence.

20. While dealing with the quantum of sentence, it is expedient to go through the legal position in this regard.

21. In ***Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926***, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to antesocial behaviour has to be countered not by undue cruelty but by re-culturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

22. In ***Sham Sunder vs Puran, (1990) 4 SCC 731,*** where the 7 high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

23. In ***State of MP vs Najab Khan, (2013) 9 SCC 509,*** the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The

supreme court restored the sentence awarded by the trial court. Referring the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734,*** the court observed as follows:

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

24. Earlier, "Proper Sentence" was explained in ***Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into 8 account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

25. In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In ***Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77***, it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in ***Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463.***

26. In ***Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449,*** it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts, have grown and nurtured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

27. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,*** the Supreme Court referred the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC***
323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463 and has reiterated that, in operating the sentencing system, law should 9 adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it

was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used
and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced.

28. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society cannot endure long and develop under serious threats of crime and disharmony. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. It is therefore, necessary to avoid undue leniency in imposition of sentence. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

29. In the present case at the time of commission of offence the convict was nearly 17 years of age. It cannot be said that he was mature and there is no possibility of reform in him. The medical report of the victim shows that he did not sustain any physical 10 injury and there was no sign of physical violence on him. There is no previous criminal history of the appellant. The minimum punishment for the offence under Section 4 POCSO Act is provided for 7 years. The appellant has been in jail from the outset. As such he served in jail for a period of more than 7 years and there is no minimum limit provided under Section 377 I.P.C. Considering the age of the appellant and the period he served in jail, this Court is of the opinion that a liberal view should be taken on sentence by reducing the term of imprisonment already undergone by the appellant in this case and for default in payment of fine he will undergo additional imprisonment for a period of two months for each.

30. Consequently, the conviction is upheld and the sentence under Section 377 I.P.C. and under Section 4 POCSO Act is modified to already undergone and in default of payment of fine he is to undergo additional imprisonment for a period of two months in each.

31. With the above modifications, the appeal is ***partly allowed.***

32. Copy of this judgment alongwith original record of Court below be transmitted to the Court concerned for necessary compliance. A compliance report be sent to this Court within one month. Office is directed to keep the compliance report on record.

(2021)12ILR A1149
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE VIKAS BUDHWAR, J.

Spl. Appl. No. 1601 of 2012

Narendra Kumar Upadhyay ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Neeraj Tiwari, Sri Ashok Khare, Sri Anurag Ojha

Counsel for the Respondents:
C.S.C., Sri Mrigraj Singh, Sri Manvendra Dixit

A. Service Law – Compassionate Appointment - U.P. Dependents of Government Servants Dying in Harness Rules, 1974: Rule 5 and 6 - Provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved. (Para 22 to 25, 35)

B. Object of compassionate appointment is to enable the family of the deceased - employee to tide over the sudden financial crisis due to death of the bread earner which has left the family in penury and without means of livelihood, it is an exception to the normal rule of public employment, it is a concession. Compassionate Appointment cannot be treated as a Bonanza. It is not disbursement of gift. It is meant to provide minimum relief for meeting immediate hardship to save the bereaved family from sudden financial crisis due to death of sole breadwinner. (Para 23 to 26, 32, 35)

C. Mere death of an employee in harness does not entitle his family to such source of livelihood. The **Government or the public authority concerned has to examine the financial condition** of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. If employer finds that Financial arrangement made for family subsequent to death of the employee is adequate members of the family cannot insist for compassionate appointment. (Para 32, 35(c), 35(d))

D. There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. The norms prevailing on the date of the consideration of the application should be the basis for consideration of claim for compassionate appointment. (Para 22, 35(e), 35(j))

E. Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner. (Para 22, 35)

Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out. **Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee.** Hence, **there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority.** Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family. (Para 23, 35)

The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the St.Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the Government. (Para 22, 35)

F. A candidate for compassionate appointment has no right to any particular post of choice. He can only claim to be considered. It is not for conferring status on the family. An applicant has no right to claim compassionate appointment in a particular class or group or on the higher post than

what was held by the deceased employee as a matter of right, on the ground that he/she is eligible fulfilling the eligibility criteria of such higher post. (Para 30, 32, 35)

G. <u>Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post.</u> (Para 32, 35)

In the present case, father of the petitioner died on 7.7.1991 when petitioner was aged about eight years. He applied for compassionate appointment sometime in the year 2006-07 and the District Basic Education Officer granted appointment unauthorisedly, without grant of relaxation by the Competent Authority/St.Government. Thus, the petitioner unauthorisedly and in contravention of the GO, without relaxation of period for submission of application, obtained appointment on compassionate ground, which is nullity. Therefore, the appointing authority has lawfully cancelled the order of appointment of the petitioner. (Para 35)

Appeal dismissed. (E-4)

<u>Precedent followed</u>:

1. Sheo Kumar Dubey Vs St.of U.P. & ors., 2014 (2) ADJ 312 (Para 5(ii))

2. Hamza Haji Vs St.of Kerala, 2006 (7) SCC 416 (Para 21)

3. U.O.I. Vs Smt. Asha Mishra, Civil Misc. WP No. 13102 of 2010, decided on 07.05.2010 (Para 23)

4. Central Coalfields Ltd. Through its Chairman & Managing Director & ors. Vs Parden Oraon, Civil Appeal No. 897/2021, decided on 09.04.2021 (Para 24)

5. V. Sivamurthy Vs St.of A.P., (2008) 13 SCC 730 (Para 25)

6. Umesh Kumar Nagpal Vs St.of Har., (1994) 4 SCC 138 (Para 25)

7. Haryana SEB Vs Hakim Singh, (1997) 8 SCC 85 at 87 (Para 25)

8. Director of Education (Secondary) Vs Ankur Gupta, (2003) 7 SCC 704 (Para 25)

9. F.C.I.Vs Ramkesh Yadav, (2007) 9 SCC 531 (Para 25)

10. Indian Bank Vs Promila, (2020) 2 SCC 729 (Para 25)

11. St.of U.P. Vs Pankaj Kumar Vishnoi, 2013 (11) SCC 178 (Para 25)

12. N.C. Santosh Vs St.of Karn., (2020) 17 SCC 617 (Para 25)

13. St.of H.P. Vs Shashi Kumar, (2019) 3 SCC 653 (Para 25)

14. St.of Gujarat Vs Arvind Kumar Tiwari, (2012) 9 SCC 545 (Para 25)

15. MGB Gramin Bank Vs Chakrawarti Singh, (2014) 13 SCC 583 (Para 25)

16. U.O.I. Vs P. Venktesh, (2019) 15 SCC 613 (Para 25)

17. U.O.I. Vs V.R. Tripathi, (2019) 14 SCC 646 (Para 25)

18. PNB Vs Ashwini Kumar Taneja, (2004) 7 SCC 265 (Para 25)

19. St.of Chhatisgarh & ors. Vs Dhirjo Kumar Sengar, (2009) 13 SCC 600 (Para 25)

20. Santosh Kumar Dubey Vs St.of U.P., (2009) 6 SCC 481 (Para 25)

21. Chief Commissioner, Central Excise & Customs, Lucknow & ors. Vs Prabhat Singh, (2012) 13 SCC 412 (Para 26)

22. SAIL Vs Madhusudan, (2008) 15 SCC 560 (Para 26)

23. SBI Vs Anju Jain, (2008) 8 SCC 475 (Para 26)

24. SBI Vs Surya N. Tripathi, (2014) 15 SCC 739 (Para 27)

25. General Manager (D & PB) & ors. Vs Kunti Tiwary & ors., (2004) 7 SCC 271 (Para 27)

26. U.O.I. Vs Shashank Goswami, (2012) 11 SCC 307 (Para 29)

27. Pepsu Road Transport Corporation Vs Satinder Kumar, 1995 Supp. (4) SCC 597 (Para 29)

28. St.of Madhya Pradesh & ors. Vs Ramesh Kumar Sharma, (1994) Supp. (3) SCC 661 (Para 30)

29. The Director of Treasuries in Karnataka & Anr. Vs Somyashree, Civil Appeal No. 5122 of 2021, decided on 13.09.2021 (Para 31)

30. The St.of Uttar Pradesh & ors. Vs Premlata, Civil Appeal No. 6003 of 2021, decided on 05.10.2021 (Para 32)

Present Special Appeal challenges judgment and order dated 13.08.2012, passed by Hon'ble Mr. Justice V.K. Shukla.

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Vikas Budhwar, J.)

1. Heard Sri Ashok Khare, learned Senior Counsel, assisted by Sri Anurag Ojha, learned counsel for the petitioner/appellant, Sri Mrigraj Singh, learned counsel for the respondent nos. 2 and 3 and Sri Manvendra Dixit, learned counsel for the respondent no.1.

2. Briefly stated facts of the present case are that the appellant/petitioner is the son of the deceased, namely, Gyan Chand Upadhay, who was working as Assistant Teacher, and has died on 07.07.1991. According to the petitioner/appellant, he was about 8 years old at the time of death of his father. His mother, namely, Shashi Kala, made an application on 23.07.1992 before the District Basic Education Officer, Jaunpur, seeking appointment on compassionate ground, which was followed by a representation dated 14.10.1991 and reminders dated 23.09.1993, 17.07.1994 and 07.11.1995, but the appointment was not granted. The petitioner/appellant passed his Intermediate Examination in the year 2001 and thereafter did graduation from Purvanchal University, Jaunpur. Thereafter, he filed Civil Misc. Writ Petition No. 71340 of 2007, which was finally disposed of by order dated 09.02.2007 providing that the petitioner/appellant may file representation before the respondent no.1 ventilating all his grievances.

3. According to the petitioner/appellant, the respondent no.1 in the aforesaid Writ Petition No. 71340 of 2007, was the State of U.P. However, the petitioner/appellant instead of filing representation before the State Government, moved an application for compassionate appointment before the District Basic Education Officer, Jaunpur, who granted appointment vide order dated 31.03.2010. Admittedly, the petitioner/appellant filed an application for compassionate appointment after about 9 years of death of his father, but neither relaxation was sought from the State Government nor any representation was filed by him before the State Government pursuant to the order of the learned Single Judge dated 09.02.2007 nor delay in filing the application was condoned. Therefore, show cause notice dated 05.03.2012 was issued by the District Basic Education Officer, Jaunpur to the petitioner/appellant requiring him to show cause as to why his appointment may not be cancelled on the ground that petitioner/appellant obtained compassionate appointment by concealment of facts and misrepresentation. However, the petitioner/appellant had not submitted any reply to the aforesaid show cause notice. Consequently, the District Basic Education Officer, Jaunpur passed an order dated 14.04.2012 cancelling the appointment of the petitioner/appellant as untrained assistant teacher. Aggrieved with this order, the petitioner/appellant filed Civil Misc. Writ Petition No. 39344 of 2012 (Narendra Kumar Upadhaya Versus State of U.P. and others), which was dismissed by the learned Single Judge vide impugned judgment dated 13.08.2012, observing as under:-

(I) The said order is in uttar violation of the order passed by this Court, as in the absence of order passed by the State Government, according relaxation, the District Basic Education Officer, could not have entertained the said application, and accorded

compassionate appointment. District Basic Education Officer, had no authority whatsoever to accord compassionate appointment, the order offering compassionate appointment was void/illegal.

(ii) Thereafter District Basic Education Officer, has acquired knowledge of fact that date of death of father of the petitioner is 07.07.1991 and by misrepresenting the then District Basic Education Officer, Dhirendra Nath Singh offered appointment to the petitioner after 19 years and same was totally illegal and in contravention of Government Order.

(iii) Fact of the matter is that this Court Court has given categorical direction that matter be considered and decided by the State Government and accepted position is that there is no decision of the State Government.

(iv) In the facts of the case District Basic Education Officer, has rightly proceeded to revoke the earlier order, inasmuch as earlier order is based on misrepresentation and law on the subject is clear, that even if there is no power of review conferred under statute, every authority has inherent jurisdiction to recall/review its order, if the order has been passed on misrepresentation.

(v) Consequently, petitioner was not at all entitled to be offered compassionate appointment after 19 years of date of death, and there was no order passed by the State Government for accepting the time barred6claim after 19 years of death of father, and as order has been obtained by manipulation then this Court refuses to interfere in the matter as any interference with the order impugned would amount to perpetuation of illegality. The State Government is directed to take action against erring officials also in accordance with law.

4. The present special appeal has been filed challenging the aforesaid order dated 13.08.2012 passed in Civil Misc. Writ petition No. 38344 of 2012 (Narendra Kumar Upadhaya Versus State of U.P. and others).

5. Sri Ashok Khare, learned Senior Counsel submits as under:-

(i) The petitioner/appellant was only 8 years of age when his father died on 07.07.1991. Therefore, on attaining the age of majority, he filed an application for compassionate appointment, hence, there was no delay in filing the application for compassionate appointment.

(ii) The financial condition of the family of the deceased for the purposes of compassionate appointment has to be looked into, as on the date of death of his father. Reliance has been placed in the case of **Sheo Kumar Dubey Versus State of U.P. and others 2014 (2) ADJ 312.**

(iii) Once compassionate appointment has been granted to petitioner/appellant on 10.03.2012, then the said order cannot be reviewed on the ground that the order granting compassionate appointment is nullity, as the District Basic Education Officer, Jaunpur has no power to review its own order.

(iv) The compassionate appointment in the District Basic Education Department is governed by the Government Order dated 04.09.2000, which is pari materia with the provision of the ***U.P. Dependents of Government Servants Dying in Harness Rules, 1974***. Therefore, the petitioner/appellant was entitled for compassionate appointment and was rightfully granted the compassionate appointment.

6. Learned Standing Counsel as well as learned counsel for the respondent nos. 2 and 3 support the impugned order passed by the learned Single Judge.

7. We have carefully considered the submission of the learned counsel for the parties.

8. It is undisputed that the deceased employee died on 07.07.1991 when the petitioner was about 8 years old. He passed Intermediate Examination in the year 2001 and thereafter did his graduation some time in the

year 2004. Thereafter, he filed Civil Misc. Writ Petition No. 71340 of 2007 which was disposed of by the impugned order dated 09.02.2007 giving liberty to the petitioner/appellant to make a representation before the respondent no.1 ventilating all his grievances. However, petitioner had not filed any representation before the State Government which has power to condone/ relax the condition for filing an application beyond five years. Petitioner/appellant moved an application before the District Basic Education Officer, Jaunpur claiming appointment on compassionate ground pursuant to the order dated 09.02.2007 passed in Civil Misc. Writ Petition No. 31340 of 2007. The District Basic Education Officer, Jaunpur passed an order of compassionate appointment on 31.03.2010. Subsequently, show cause notice dated 05.03.2012 was issued by the District Basic Education Officer, Jaunpur to show cause as to why his appointment may not be cancelled, as it was illegally obtained. The petitioner/appellant, for the reason best known to him had not submitted any reply before District Basic Education Officer, Jaunpur. Therefore, the District Basic Education Officer, Jaunpur passed order dated 14.04.2012 cancelling his appointment.

9. Admittedly, the father of the petitioner/appellant Sri Gyan Chand Upadhyay was an Assistant Teacher in a Primary School Sauraiyyah, Block Khutahan, District Jaunpur, who died in-harness on 07/07/1991, leaving behind his widow Smt. Shashi Kala and two sons, namely, Narendra Kumar Upadhyay (petitioner/appellant) and Dharmendra. It is also not in dispute that after the death of Sri Gyan Chand Upadhyay (since deceased) on 7.7.1991, his widow Shashi Kala preferred application for the grant of compassionate appointment addressed to the third respondent on 23.7.1991, followed by reminders dated 14.10.1992, 23.9.1993, 17.7.1994 and 7.11.1995, respectively. There is nothing on record to substantiate the fact as to what action had been taken by the widow of the deceased Smt. Shashi Kala for enforcement of her legal right to be considered for compassionate appointment.

10. However, after a span of more than 16 years, it appears that the petitioner/appellant filed ***Writ Petition no. 71340 of 2007, Narendra Kumar Upadhyay vs. State of U.P. and others,*** seeking direction to the respondents therein to consider his claim for grant of compassionate appointment on account of the death of Sri Gyan Chand Upadhyay on 7.7.1991. The order dated 9.2.2007 passed in the said writ petition is reproduced below: -

"It is alleged that father of the petitioner expired during harness while working as assistant teacher in Prathmik Vidyalay Sauraiyya district Jaunpur. At the relevant time, petitioner was minor. On attaining majority he has made an application for compassionate appointment. Petitioner seeks consideration of his claim for compassionate appointment under the relevant provision of the rules applicable.

Sri P.D. Tripathi learned counsel for the respondents points out that the application has been made after expiry of five years from the date of death of the employee concerned. It is therefore requires relaxation of outer limit fixed by the State Government.

In view of the aforesaid facts let a representation be made by the petitioner before Respondent No.1 ventilating all this grievances within two weeks from today along with certified copy of this order. ON such representation being made, Respondent No.1 shall consider and decide the same, by means of a reasoned speaking order, preferably within four weeks thereafter.

With the aforesaid observations/directions, the present writ petition is disposed of finally."

11. By the aforequoted order dated 09.02.2007 passed in the Writ Petition No.

71340 of 2007, direction was issued to the respondent no.1 therein i.e, the State of Uttar Pradesh, to consider and decide the claim of the petitioner/appellant, on representation by him for ventilation of his grievances. The petitioner/appellant as per her own showing has appended as Annexures-9 and 10 to the Writ Petition No. 39344 of 2012, the representation preferred by him before the respondent no.2 and 3 for consideration of his claim for grant of compassionate appointment. There is nothing on record to show that by which manner and by which mode, the said letters/ representations were served upon the respondent nos. 2 and 3.

12. Clause-8 of the Government Order dated 4.9.2000 issued by Secretary, U.P. Government, addressed to Director Education (Basic) and Chairman Uttar Pradesh, Basic Shiksha Parishad, Allahabad providing the manner according to which compassionate appointment may be granted to a dependent of a deceased teacher / employee of the Institutions of the Uttar Pradesh Basic Shiksha Parishad, Allahabad, is reproduced below:-

"(8) मृतक आश्रित .ारा सम्बन्धित कर्मचारी के मृत्यु के दिनांक से पांच वर्ष के भीतर सेवायोजन के लिए आवेदन प्रस्तुत किया जा सकता है। परन्तु जहां राज्य सरकार को यह समाधान हो जाये कि सेवायोजन के लिए आवेदन करने के लिए नियत समय सीमा से किसी विशिष्ट मामले में, अनुचित कठिनाई होती है वहां वह अपेक्षाओं को, जिन्हें वह मामले में न्याय संगत और साम्यपूर्ण रीति से कार्यवाही करने के लिए आवश्यक समझे, अभियुक्त या शिथिल कर सकती है। नियमों में इस आशय की अभिमुक्ति/शिथिलीकरण के सम्बन्ध में, प्रस्ताव सम्बन्धित प्राधिकारी .ारा शिक्षा निदेशक (बे0) के माध्यम से शासन को प्रेषित किये जायेंगे।"

13. Clause-8 of the Government Order dated 4.9.2000 as referred to above is para materia with the provisions contained under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974. Rules 5 and 6 of the Uttar Pradesh Dying in Harness Rules 1974 (in short "The Rules 1974") are reproduced below:-

*"**[5. Recruitment of a member of the family of the deceased**. - (1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a **suitable employment** in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, **in relaxation of the normal recruitment rules**, if such person-*

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.]

***[5A. Recruitment of member of the family of Police/P.A.C. Personnel who dies in May, 1973.** - Notwithstanding anything contained to the contrary contained in Rule 5 or in any other rule, the provisions of these rules shall apply in the case of members of the family of twenty-two police or per Provincial Armed Constabulary personnel who died as a result of disturbances*

in May, 1973, as they apply in the case of a Government servant during dying in harness after the commencement of these rules.]

6. Contents of application for employment. *- An application for appointment under these rules shall be addressed to the appointing authority in respect of the post for which appointment is sought but it shall be sent to the Head of Office where the deceased Government servant was serving prior to his death. The application shall, inter alia, contain the following information :*

(a) the date of the death of the deceased Government servant; the department in which he was working and the post which he was holding prior to his death;

(b) names, age and other details pertaining to all the members of the family of the deceased, particularly about their marriage, employment and income;

(c) ***details of the financial condition of the family****; and*

(d) the educational and other qualifications, if any, of the applicant."

14. A conjoint reading of Rule 5 of the Rules, 1974 and the Government Order dated 4.9.2000, clearly reveals that for the **purposes of consideration for grant of compassionate appointment to the dependent of the deceased employee, the dependent has to fulfil the minimum requirement,** i.e, **(a)** possess educational qualification prescribed for the post; **(b)** otherwise qualified for service; **(c)** makes an application for employment within 5 years from the date of the death of the deceased. Proviso to Rule 5 of the Rules, 1974 carves out an exception to entertain an application beyond five years, when the State Government is satisfied that the time limit for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement, as it may consider necessary for dealing with the case in a just and equitable manner.

15. Thus from the aforesaid analysis with respect to the legal provisions as recapitulated hereinabove and the facts of the present case, it is crystal clear that the petitioner/ appellant has neither taken any steps before the State Government in terms of the Proviso to Rule 5 of the Rules, 1974, or the aforequoted Clause 8 of the Government Order for relaxation of outer limit of five years for consideration of application for compassionate appointment, nor any such relaxation was granted by the State Government.

16. On a pointed query, made from the learned Senior Counsel, as to whether any decision had been taken by the State Government for relaxation of the outer limit of 5 years for consideration for grant of compassionate appointment? The learned Senior Counsel could not point out from records any decision so taken by the State Government.

17. Even from perusal of the order dated 31.3.2010 passed by the third respondent granting compassionate appointment to the petitioner/appellant, there is no recital about the mandatory compliance of the Clause-8 of the Government Order dated 4.9.2000 read with Rules 5 and 6 of the Rules, 1974.

18. Learned Senior Counsel has further argued that the family condition of the petitioner appointment for the purposes of compassionate appointment has not been looked into as on the date of the death of the deceased (father).

19. The said argument of the learned counsel for the petitioner/appellant is not acceptable, as the stage of consideration of the claim of the petitioner/appellant for grant of compassionate appointment can only be seen, once the hurdle of granting relaxation or dispensing with the delay in filing the application for compassionate appointment beyond 5 years is over. Until and unless

relaxation is accorded by the State Government on the basis of an application of the dependent of the deceased giving required particulars/ details, there was no occasion for respondents to have considered the claim of the petitioner for grant of compassionate appointment with regard to the family condition of the family. Hence we do not find any error in the order dated 14.4.2012, which has been impugned by the petitioner/appellant before the learned Single Judge.

20. The argument of learned counsel for the petitioner/appellant that once compassionate appointment had been granted to the petitioner/appellant on 31.3.2010, then it could not be reviewed by the third respondent, as he has no power to review its own order, cannot be accepted as once the order dated 31.3.2010 granting compassionate appointment was a nullity being in contravention of the Government Order dated 4.9.2000, then it was open for the third respondent to cancel its earlier order, which was nullity in the eyes of law. The learned Single Judge has recorded a categorical finding of fact in its judgment dated 13.8.2012, which is impugned before us, observing as under: -

"Petitioner knew that, without his application for relaxation being allowed by State Government, he is not entitled to get appointment, even then he succeeded in procuring appointment. The order was for the benefit of petitioner, and complicity of petitioner in procuring order cannot be ruled out in the facts of the case. Fact of the matter is that manipulation is writ apparent and petitioner has already been apprised of the fact that in case any facts are found concealed, said appointment shall ipso facto cancelled."

Object and principles of Compassionate Appointment:-

21. The Apex Court in the case of ***Hamza Haji vs. State of Kerala*** reported in **2006 (7) SCC 416** in paragraphs 28 and 29 has observed as under: -

"In Hip Foong Hong vs. H. Neotia and Company (1918 Appeal Cases 888) the Privy Council held that if a judgment is affected by fraudulent conduct it must be set aside. In Rex vs. Recorder of Leicester (1947 (1) K B 726) it was held that a certiorari would lie to quash a judgment on the ground that it has been obtained by fraud. ***The basic principle obviously is that a party who had secured a judgment by fraud should not be enabled to enjoy the fruits thereof****. In this situation, the High Court in this case, could have clearly either quashed the decision of the Forest Tribunal in OA No.247 of 1979 or could have set aside its own judgment in MFA No.328 of 1981 dismissing the appeal from the decision of the Forest Tribunal at the stage of admission and vacated the order of the Forest Tribunal by allowing that appeal or could have exercised its jurisdiction as a court of record by invoking Article 215 of the Constitution to set at naught the decision obtained by the appellant by playing a fraud on the Forest Tribunal. The High Court has chosen to exercise its power as a court of record to nullify a decision procured by the appellant by playing a fraud on the court. We see no objection to the course adopted by the High Court even assuming that we are inclined to exercise our jurisdiction under Article 136 of the Constitution of India at the behest of the appellant."*

22. A Full Bench of this Court in the case of ***Shiv Kumar Dubey and others vs. State of U.P. and others,*** **2014(2) ADJ, 312 (Para 29)**, considered various aspects relating to compassionate appointment and held as under :-

"We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. ***The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;***

(ii) ***There is no general or vested right to compassionate appointment****. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the* case may be, the rules;

(iii) The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

(v) ***Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist*** *and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;*

(vi) ***Rule 5*** *mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee.* ***The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;***

(vii) ***The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence****. It is for the State Government after considering all the facts to take an appropriate decision.* ***The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;***

(viii) Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority*. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family."* ***(Emphasis supplied by us)***

23. In **Civil Misc. Writ Petition No. 13102 of 2010,** ***Union of India Vs. Smt. Asha Mishra,*** decided on 7.5.2010, a Division Bench of this Court has observed as under: -

"The principles of consideration for compassionate appointment have been firmly settled and have been reiterated from time to time. ***Compassionate appointment is not a vested right or an alternate mode of employment****. It has to be considered and granted under the relevant rules.* ***The object of compassionate appointment is to tide over an immediate financial crisis. It is not a heritable right to be considered after an unreasonable period,*** *for the vacancies cannot be held up for*

long and that appointment should not ordinarily await the attainment of majority. ***Where the family has survived for long, its circumstances must be seen before the competent authority may consider such appointment. It is not to be ordinarily granted, where a person died close to his retirement****. The Court, however, has emphasised time to time and more authoritatively in National Institute of Technology Vs. Neeraj Kumar Singh, (2007) 2 SCC 481 that such appointment can be granted only under a scheme.* ***It should not be considered after a long lapse of time."***

24. The judgment in the case of ***Smt. Asha Mishra (supra)*** has also been taken notice by the Full Bench of this Court in ***Shiv Kumar Dubey (supra***) reiterating the legal principles so mandated therein. Recently, the Apex Court in Civil Appeal No. 897 of 2021, in the matter of ***Central Coalfields Limited Through its Chairman an Managing Director and Ors. Vs. Parden Oraon*** decided on 09.04.2021, *in paragraph 9* has observed as under:-

"9. ... The application for compassionate appointment of the son was filed by the Respondent in the year 2013 which is more than 10 years after the Respondent's husband had gone missing. ***As the object of compassionate appointment is for providing immediate succour to the family of a deceased employee, the Respondent's son is not entitled for compassionate appointment after the passage of a long period of time since his father has gone missing."***

25. The object of compassionate appointment is to enable the family of the deceased - employee to tied over the sudden financial crisis due to death of the bread earner which has left the family in penury and without means of livelihood, it is an exception to the normal rule of public employment, it is a concession; vide; **V. Sivamurthy vs. State of A.P., (2008) 13 SCC 730 (Paras 13-18), Umesh Kumar Nagpal vs. State of Haryana, (1994) 4 SCC 138 (Para-2), Haryana SEB vs. Hakim Singh, (1997) 8 SCC 85 at 87, Director of Education (Secondary) vs. Ankur Gupta, (2003) 7 SCC 704 (Para-6), Food Corporation of India vs. Ramkesh Yadav, (2007) 9 SCC 531 (Para.9), Indian Bank vs. Promila, (2020) 2 SCC 729, State of U.P. vs. Pankaj Kumar Vishnoi, 2013 (11) SCC 178 (Paras 11-15), N.C. Santosh vs. State of Karnatka (2020) 17 SCC 617 (Para 18), State of H.P. vs. Shashi Kumar, (2019) 3 SCC 653 (Para 18), State of Gujarat vs. Arvind Kumar Tiwari, (2012) 9 SCC 545 (Para-8), MGB Gramin Bank V. Chakrawarti Singh (2014) 13 SCC 583 (Para 6-9), Union of India vs. P. Venktesh (2019) 15 SCC 613 (Para.7), Union of India vs. V. R. Tripathi, (2019) 14 SCC 646 (Para 13).** The basic intention to grant compassionate appointment is that on the death of the employee concern his family is not deprived of the means of livelihood vide **PNB Vs. Ashwini Kumar Taneja, (2004) 7 SCC 265 (para 4).** It can not be claimed by way of inheritance vide **State of Chhatisgarh & others Vs. Dhirjo Kumar Sengar (2009) 13 SCC 600 (para 10 and 12). In Santosh Kumar Dubey Vs. State of U.P., (2009) 6 SCC 481 (para 11 & 12),** the Apex Court held that **Compassionate Appointment can not be treated as a Bonanza.**

26. In **Chief Commissioner, Central Excise & Customs, Lucknow & others Vs. Prabhat Singh (2012) 13 SCC 412 (para 19),** Hon'ble Supreme Court has held that **it is not disbursement of gift**. It is not sympathy syndrome. In **State of U.P. Vs. Pankaj Kumar Vishnoi 2013(11) SCC 178 (paras 7,12,13 & 20)**. The Apex Court held that **it is meant to provide minimum relief for meeting immediate hardship to save the bereaved family** from sudden crisis due to death of sole bread winner. **Similar view has been expressed in SAIL Vs. Madhusudan (2008) 15 SCC 560**

(para 15) and SBI Vs. Anju Jain (2008) 8SCC 475 (Para 33).

27. In **SBI Vs. Surya N. Tripathi, (2014) 15 SCC 739 (paras 4,9)**, the Apex Court held that if employer finds that Financial Arrangement made for family subsequent to death of the employee is adequate members of the family can not insist for compassionate appointment.

28. In **General Manager (D & PB) and others Vs. Kunti Tiwary and other (2004)7 SCC 271 (Para 9)**, Hon'ble Supreme Court held that the Division Bench erred in diluting the criteria of penury to one of "not very well-to-do.

29. In **Union of India Vs. Shashank Goswami, (2012) 11 SCC 307 (Paras 9, 10)** the Apex Court held that an applicant has no right to claim compassionate **appointment in a particular class or group. It is not for conferring status on the family. In Pepsu Road Transport Corporation Vs. Satinder Kumar, 1995 Supp. (4) SCC 597 (Para 6)** the Apex Court held that **while minimum qualification** for eligibility may be matriculation, generally graduate and even post graduate decree holders respond and offer themselves for clerical appointments. **Courts can not ignore this fact and direct that possession of minimum qualification alone would be sufficient.**

30. In **State of Madhya Pradesh & others VS. Ramesh Kumar Sharma (1994) Supp.(3) SCC 661**, the Apex Court held that **a candidate for compassionate appointment has no right to any particular post of choice**. He can only claim to be considered.

31. In the judgment in the case of **The Director of Treasuries in Karnataka & Anr. vs. Somyashree, in Civil Appeal No.5122 of 2021, decided on 13.09.2021**, Hon'ble Supreme Court reiterated the object and principles of compassionate appointment, as under:

"7. While considering the submissions made on behalf of the rival parties a recent decision of this Court in the case of N.C. Santhosh (Supra) on the appointment on compassionate ground is required to be referred to. After considering catena of decisions of this Court on appointment on compassionate grounds it is observed and held that appointment to any public post in the service of the State has to be made on the basis of principles in accordance with Articles 14 and 16 of the Constitution of India and the compassionate appointment is an exception to the general rule. It is further observed that the dependent of the deceased Government employee are made eligible by virtue of the policy on compassionate appointment and they must fulfill the norms laid down by the State's policy. It is further observed and held that ***the norms prevailing on the date of the consideration of the application should be the basis for consideration of claim of compassionate appointment.*** *A dependent of a government employee, in the absence of any vested right accruing on the death of the government employee, can only demand consideration of his/her application. It is further observed he/she is, however, entitled to seek consideration in accordance with the norms as applicable on the day of death of the Government employee. The law laid down by this Court in the aforesaid decision on grant of appointment on compassionate ground can be summarized as under:*

(i) that the compassionate appointment is an exception to the general rule;

(ii) that no aspirant has a right to compassionate appointment;

(iii) the appointment to any public post in the service of the State has to be made on the basis of the principle in accordance with Articles 14 and 16 of the Constitution of India;

(iv) appointment on compassionate ground can be made only on fulfilling the norms laid down by the State's policy and/or satisfaction of the eligibility criteria as per the policy;

(v) ***the norms prevailing on the date of the consideration of the application should be the basis for consideration of claim for compassionate appointment.***

8.....

8.1.....

8.2 Apart from the above one additional aspect needs to be noticed, which the High Court has failed to consider. It is to be noted that the deceased employee died on 25.03.2012. The respondent herein - original writ petitioner at that time was a married daughter. Her marriage was subsisting on the date of the death of the deceased i.e. on 25.03.2012. Immediately on the death of the deceased employee, the respondent initiated the divorced proceedings under Section 13B of the Hindu Marriage Act, 1955 on 12.09.2012 for decree of divorce by mutual consent. By Judgment dated 20.03.2013, the Learned Principal Civil Judge, Mandya granted the decree of divorce by mutual consent. That immediately on the very next day i.e. on 21.03.2013, the respondent herein on the basis of the decree of divorce by mutual consent applied for appointment on compassionate ground. ***The aforesaid chronology of dates and events would suggest that only for the purpose of getting appointment on compassionate ground the decree of divorce by mutual consent has been obtained. Otherwise, as a married daughter she was not entitled to the appointment on compassionate ground****. Therefore, looking to the aforesaid facts and circumstances of the case, otherwise also the High Court ought not to have directed the appellants to consider the application of the respondent herein for appointment on compassionate ground as ''divorced daughter'. This is one additional ground to reject the application of the respondent for appointment on compassionate ground."*

(Emphasis supplied by us)

32. In a most recent judgment in the case of **The State of Uttar Pradesh and others vs. Premlata in Civil Appeal No.6003 of 2021, decided on 05.10.2021**, Hon'ble Supreme Court considered the provisions of U.P. Rules 1974 and summarized the principles of compassionate appointment in the context of U.P. Rules, 1974, as under:

"9. As per the law laid down by this court in catena of decisions on the appointment on compassionate ground, for all the government vacancies equal opportunity should be provided to all aspirants as mandated under Article 14 and 16 of the Constitution. However, appointment on compassionate ground offered to a dependent of a deceased employee is an exception to the said norms. The compassionate ground is a concession and not a right.

9.1 In the case of State of Himachal Pradesh and Anr. vs. Shashi Kumar reported in (2019) 3 SCC 653, this court had an occasion to consider the object and purpose of appointment on compassionate ground and considered decision of this court in case of Govind Prakash Verma vs. LIC reported in (2005) 10 SCC 289, in para 21 and 26, it is observed and held as under:-

"21. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289, has been considered subsequently in several decisions. But, before we advert to those decisions, it is necessary to note that the nature of compassionate appointment had been considered by this Court in Umesh Kumar Nagpal v. State of Haryana [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930]. The principles which have been laid down in Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] have

been subsequently followed in a consistent line of precedents in this Court. These principles are encapsulated in the following extract: (Umesh Kumar Nagpal case [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] , SCC pp. 139-40, para 2)

"2. ... As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. ***Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post****. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment.* ***The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis****. The object is not to give a member of such family a post much less a post for post held by the deceased.* ***What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family.*** *The posts in Classes III and IV are the lowest posts in nonmanual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."*

"26. The judgment of a Bench of two Judges in Mumtaz Yunus Mulani v. State of Maharashtra [Mumtaz Yunus Mulani v. State of Maharashtra, (2008) 11 SCC 384 : (2008) 2 SCC (L&S) 1077] has adopted the principle that appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden financial crisis. The financial position of the family would need to be evaluated on the basis of the provisions contained in the scheme. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] has been duly considered, but the Court observed that it did not appear that the earlier binding precedents of this Court have been taken note of in that case."

10. Thus as per the law laid down by this court in the aforesaid decisions, compassionate appointment is an exception to the general rule of appointment in the public services and is in favour of the dependents of a deceased dying in

harness and leaving his family in penury and without any means of livelihood, and in such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give such family a post much less a post held by the deceased.

10.1 Applying the law laid down by this court in the aforesaid decisions and considering the observations made hereinabove and the object and purpose for which the appointment on compassionate ground is provided, the submissions on behalf of the respondent and the interpretation by the Division Bench of the High Court on ***Rule 5 of Rules 1974, is required to be considered.***

10.2 The Division Bench of the High Court in the present case has interpreted Rule 5 of Rules 1974 and has held that ''suitable post' under Rule 5 of the Rules 1974 would mean any post suitable to the qualification of the candidate irrespective of the post held by the deceased employee*. The aforesaid interpretation by the Division Bench of the High Court is just opposite to the object and purpose of granting the appointment on compassionate ground. ''****Suitable post' has to be considered, considering status/post held by the deceased employee and the educational qualification/eligibility criteria is required to be considered, considering the post held by the deceased employee and the suitability of the post is required to be considered vis a vis the post held by the deceased employee, otherwise there shall be no difference/distinction between the appointment on compassionate ground and the regular appointment****. In a given case it may happen that the dependent of the deceased employee who has applied for appointment on compassionate ground is having the educational qualification of Class-II or Class-I post and the deceased employee was working on the post of Class/Grade IV and/or lower than the post applied, in that case the dependent/applicant cannot seek the appointment on compassionate ground on the higher post than what was held by the deceased employee as a matter of right, on the ground that he/she is eligible fulfilling the eligibility criteria of such higher post. The aforesaid shall be contrary to the object and purpose of grant of appointment on compassionate ground which as observed hereinabove is to enable the family to tide over the sudden crisis on the death of the bread earner. As observed above, appointment on compassionate ground is provided out of pure humanitarian consideration taking into consideration the fact that some source of livelihood is provided and family would be able to make both ends meet.*

10.3 .....

11. In view of the above and for the reasons stated above, the Division Bench of the High Court has misinterpreted and misconstrued Rule 5 of the Rules 1974 and in observing and holding that the "suitable post' under Rule 5 of the Dying-In-Harness Rules 1974 would mean any post suitable to the qualification of the candidate and the appointment on compassionate ground is to be offered considering the educational qualification of the dependent. As observed hereinabove such an interpretation would defeat the object and purpose of appointment on compassionate ground.

(Emphasis supplied by us)

33. The petitioner/appellant has neither pleaded nor argued as to what had been the financial condition of the family of the deceased right from 1991 till today. There is nothing on record to show that the financial condition of the family of the deceased was deplorable.

34. As more than 30 years have passed since the father of the petitioner/appellant had expired, neither there is any useful purpose to issue any positive direction, nor the facts of the case warrants it.

Conclusions: -

35. We have discussed **above** in detail the case of the petitioner / appellant and the principles of law on compassionate appointment laid down by this Court and by Hon'ble Supreme Court, which are briefly summarized as under: -

(a) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only **those situations which subserve the basic object and purpose which is sought to be achieved;**

(b) The object of compassionate appointment is to enable the family of the deceased - employee to tied over the sudden financial crisis due to death of the bread earner which has left the family in penury and without means of livelihood, it is an exception to the normal rule of public employment, it is a concession. The basic intention to grant compassionate appointment is that on the death of the employee, his family is not deprived of the means of livelihood. It can not be claimed by way of inheritance. **Compassionate Appointment can not be treated as a Bonanza. It is not disbursement of gift**. It is not sympathy syndrome. **It is meant to provide minimum relief for meeting immediate hardship to save the bereaved family from sudden financial crisis due to death of sole bread winner**. If employer finds that Financial arrangement made for family subsequent to death of the employee is adequate members of the family can not insist for compassionate appointment.

(c) **Mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family.**

(d) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

(e) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(f) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;

(g) An applicant has no right to claim compassionate **appointment in a particular class or group. It is not for conferring status on the family. A candidate for compassionate appointment has no right to any particular post of choice**. He can only claim to be considered.

(h) The dependent/applicant cannot seek the appointment on compassionate ground on the higher post than what was held by the deceased employee as a matter of right, on the ground that he/she is eligible fulfilling the eligibility criteria of such higher post.

(i) Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family.

(j) **The norms prevailing on the date of the consideration of the application should be the basis for consideration of claim for compassionate appointment.**

(k) **Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. The whole object of granting compassionate employment is to enable the family to tide over the sudden financial crisis.**

(l) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

(m) The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;

(n) The father of the petitioner died on 07.07.1991 when petitioner was aged about eight years. He applied for compassionate appointment sometime in the year 2006-07 and the District Basic Education Officer granted appointment unauthorisedly, without grant of relaxation by the Competent Authority/ State Government. Thus, the petitioner unauthorisedly and in contravention of the government order, without relaxation of period for submission of application, obtained appointment on compassionate ground, which is nullity. Therefore, the appointing authority has lawfully cancelled the order of appointment of the petitioner. Hence impugned order of the learned Single Judge does not suffer from any manifest error of law.

36. For all the reasons aforestated, we see no reason to deffer or take different view, vis-a-vis the view taken by the learned Single Judge in the judgment under challenge.

37. The present intra-court appeal is devoid of merit. Hence, it is dismissed. There shall be no order as to costs.

(2021)12ILR A1165
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.12.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Special Appeal No. 100 of 2019
Connected with
Spl. Appl. Nos. 98 of 2019, 99 of 2019, 103 of 2019 & 277 of 2019

Vinod Kumar Sirohi ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sameer Kalia

Counsel for the Respondents:
C.S.C., Srideep Chatterjee, V.S.Ojha

A. Service Law – Promotion – Seniority - Police Act 1861 - Sections 2, 12, 23 & 46(2)(c) - U.P. Sub-Inspector and Inspector (Civil Police) Service Rules, 2015 - Rules 3(i), 3(m), 3(n), 4(1), 18(2), 22(3), 22(4), 26, 27 & 28 - The Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2008 - Sections, 20, 21,22, 23, 24, 25 & 26 - Rule 18(2), 19 - Uttar Pradesh Government Seniority Rules, 1991 - The Uttar Pradesh High Schools and Intermediate Colleges (Reserve Pool Teachers) Ordinances, 1978 (U.P. Ordinance 10 of 1978) - The Uttar Pradesh High Schools and Intermediate Colleges (Reserve Pool Teachers) (Second) Ordinance 1978 (U.P. Ordinance 22 of 1978) - The Uttar Pradesh Police Constables and Head Constables Service Rules, 2008 - Rules 3, 3(i), 4, 4(1), 5, 6, 7, 8, 10, 11, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27 & 28.

Code of Civil Procedure: Order I Rule 8 – Non-joinder of necessary party - When the constitutional validity of a provision is challenged and there are beneficiaries of the said provision, some of them in a representative capacity have to be made parties failing which the writ court would not be justified in hearing a writ petition in the absence of the selected candidates when they are already appointed on the basis of the provision which was under assail before the Writ Court. (Para 28)

In the case at hand neither any rule nor regulation was challenged. Thirteen persons, who were impleaded, were not treated to be in the representative capacity. No adverse order can be passed against persons who were not made parties to the litigation. (Para 29, 30)

If a person who is likely to suffer from the order of the Court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. Proviso to Order I, Rule IX, CPC provide that non-joinder of necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of S. 141 CPC but the principles enshrined therein are applicable. (Para 34)

By the final outcome of the writ petitions viz. by the impugned order under appeal, almost 990 non-gazetted police personnel might be affected. When all the appointees were not impleaded, the writ petition was defective and hence, no relief could have been granted to the writ petitioners. In the instant case, prior to passing of the impugned judgment under appeal, no advertisement or publication was issued regarding the institution of the aforesaid writ petitions. Thus, the judgment under appeal has been passed without granting opportunity to the necessary parties to a *lis* to come and defend themselves. (Para 21, 37, 38)

The provisions of Order I Rule 8 of the Code of Civil Procedure have not been complied with by the writ petitioners. Impugned order under appeal is liable to be dismissed on the ground of non-joinder of the parties in the writ petitions. (Para 16, 21, 28 to 40)

B. The Police Act, 1861 is a special statute and a complete code. If the legislature has already made a law and the field is occupied, in such a situation, rules can be made under the law enacted by the legislature and not under Article 309. (Para 15(VI), 43, 44 to 59)

Once a self-contained Code in the form of the Police Act has been enacted by the legislature and its continuance after the adoption of the Constitution is ensured by Art. 313 and Art. 372 of the Constitution, the field relating to recruitment and conditions of service of members of the police force in the St.stands occupied by the legislation. Any rule or order relating to the determination of the conditions of service of the police force can be made only under the provisions of the Police Act or by the legislation enacted by the St.legislature governing the service conditions of the police force. S.2, S.7 and S. 46 of the Police Act clearly evince an intent of the legislature to occupy the whole of the field relating to conditions of service of the police force. (Para 43)

U/s 2 of the Police Act, 1861, the St.Government has been vested with power to determine the pay and all other conditions of service of members of the subordinate ranks of the police force. **The**

determination within the meaning of S.2 may be both by means of the exercise of the rule-making power as well as by an administrative direction. Thus, **the Police Act, 1861 being a complete code and it occupies the entire field of the determination of service condition.** The power to determine all the conditions of service of member of the subordinate ranks of the police force is vested with the St.Government and the St.Government has the rule making power u/s 46(2)(c) of the Police Act, 1861 to carry out the purposes of the Act by framing rules. (Para 63)

The GO dated 03.02.1994 shows that it relates to out of turn promotion of the Sub-Inspector to the post of Inspector and the ground for such out of promotion was the indomitable courage shown by the Sub-Inspectors in discharge of their duties. It does not contemplate merely courage rather indomitable courage. This GO is also referable to S.2 of the Police Act, 1861. Vide circular dated 10.02.1994 issued by the Director General of Police, Uttar Pradesh in pursuance of the statutory GO dated 03.02.1994, a complete mechanism/procedure was provided for out of turn promotion. For an act of bravery, a police officer can be rewarded according to Chapter XXXI of the Police Regulations, but the GO dated 03.02.1994 required something more than good work and bravery. (Para 61)

GOs 05.11.1965, 29.08.1983 and 24.07.2003 are referable to the same source i.e. S.2 of the Police Act, 1861 and further statutory order dated 03.02.1994 continuously remain in existence from 03.02.1994 till 07.06.2014 and all these GOs were co-existing as they were operating in different field providing for different contingencies. (Para 62)

From perusal of the impugned order dated 20.02.2019, it transpires that the **learned Single Judge has not considered the object of the Government Order dated 03.02.1994, its source, its nature etc**. It appears that the learned Single Judge, while passing the judgment and order dated 20.02.2019, has laid much emphasis upon Uttar Pradesh Sub-Inspectors and Inspector (Civil Police) Service Rules, 2008 and not considered the statutory GOs, as referred to hereinabove, which have been issued u/s 2 r.w. S.46(2) of the Police Act, 1861. (Para 64, 83)

C. Seniority is a civil right available to a Government servant to be determined by the policy of the employer and further it is always open for the employer/St.Government to amend/modify its policy and, thus, there is no vested right available to a Government servant if such policy is changed. (Para 16(g), 68)

Rule 3(i) of the Rules, 2015 - **'member of service' -** a person appointed to a post in service under these rules or any previous rules before the commencement of these rules. (Para 16(h))

Rule 3(m) of Rules, 2015 - **'Service' -** means the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service. (Para 16(h))

Rule 3(n) of Rules, 2015 - 'Substantive Appointment' - an appointment, not being an ad hoc appointment, on a post in the cadre of the service, made after selection in accordance with the rules **and, if there were no rules,** in accordance with the procedure prescribed for the time being by executive instructions issued by the Government. (Para 16(h))

Rule 3(m) of Rules, 2008 - 'substantive appointment' - an appointment, not being ad hoc appointment, on a post in the cadre of the service, made after selection in accordance with the rules **and if there were no rules**, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government. (Para 69)

Rule 4 of the Rules, 2008 - 'Cadre of service' - the strength of service and of each category of service therein shall be such as may be determined by the Government from time to time. (Para 69)

Rule 28 of the Rules, 2008 empowers the St.Government to grant relaxation from the conditions of service **Rule 30 of the Rules, 2008** grants overriding effect to the said rules and further **sub-rule 4 of Rule 30** also provides that notwithstanding such recission, the benefit of seniority and conformation etc. granted before 02.12.2008 under the prevalent rules, government orders or administrative instructions shall not be withdrawn. (Para 65, 75)

Rule 3(i) and Sub-Rule 2 of Rule 19 of Rules, 2008 clearly provide that any person substantively appointed under the orders enforced prior to the commencement of these Rules to a post of Cadre of the Service as well as any person appointed to a post

in the service prior to commencement of Rules, 2008 and who was working on the post shall be deemed to be substantively appointed under the said Rules. (Para 69, 75)

Rule 18(2) of the Rules, 2015 provides that if more than one order of appointment are issued in respect of any one selection u/Rule 17, then a combined order shall also be issued, mentioning the names of the persons in order of seniority as determined in the selection or, as the case may be, as it stood in the cadre from which they are promoted. **Proviso to Rule 18(2)** provides that any person appointed before the commencement of these rules to a post under the service and working on that post shall be deemed to have been substantively appointed under these rules and such substantive appointment shall be deemed to have been made under these rules. (Para 16(q), 76)

On 07.06.2014, the St.Government issued an order u/s 2 of the Police Act, 1861, by which the mechanism of out of turn promotion was rescinded and in its place, other arrangements, namely, cash reward and grant of medals was brought into force. Hence, prior to 07.06.2014, the GOs dated 03.02.1994 and 01.05.1999 were being applied for granting out of turn promotion on cadre posts of personnel who had shown exemplary courage, while carrying out their duties. It appears that once the St.Government on 07.06.2014 took a decision of rescinding its policy of granting out of turn promotion and replacing the same with the other arrangement, the St.Government in order to rectify the anomaly created vide order dated 01.05.1999, which provided that although promotions would be made on cadre post, the same would be treated ex cadre and the same would not confer any benefit for determination of seniority, issued the order dated 23.07.2015 rectifying the said anomaly by which earlier order dated 01.05.1999 was rescinded with immediate effect and it was provided that 990 Non-Gazetted Police Officers/employees who had been granted out of turn promotion w.e.f. 1994 till 2014, their probation shall be counted with effect from their date of out of turn promotion. This Government Order dated 23.07.2015 were challenged by the writ petitioners/private respondents before the learned Single Judge. (Para 16(h), 66, 67, 70, 71, 74)

At the time of issuance of the statutory orders i.e. 03.02.1994 and 01.05.1999, there were no service rules framed by the St.Government u/s 46(2)(c) of the Police Act, 1861. Thus, all the out of turn promotions were promoted on cadre posts and the said promotions were made by the St.Government in accordance with the GOs, which were issued in exercise of the statutory powers available to it under the provisions of Police Act, 1861. Therefore, **promotion of the appellants were made in accordance with the procedure then prevailing in law and were made on cadre posts.** (Para 72)

A bare reading of Rule 3(i), 3(l) and 3(m) of Rules, 2008 and on considering the fact that out of turn promotees were appointed on cadre posts as per the then existing procedure issued by the St.Government under the provisions of Police Act, 1861, it transpires that such **out of turn promotees were member of the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service having been substantively appointed on a cadre post prior to the issuance of the Rules, 2008 and after the advent of the Rules, 2008, they continued in the said capacity.** (Para 73)

The appellants were 'members of service' from the initial date of their out of turn promotion on the post of Inspector, for the reason firstly, that their promotion was against a vacancy in the cadre, secondly it was in accordance with the procedure prescribed by law i.e. under the GO issued under the provisions of S.2 of the Police Act, 1861 and thirdly it was a substantive appointment. Thus, **seniority could not have been denied to them by any stretch of imagination or by operation of any law.** (Para 16(i))

The appellants are 'members of the service' and 'substantively appointed' out of turn on the strength of the statutory Government Orders. Therefore, the policy of the St.Government issued vide order dated 23.07.2015 was legally justified and the learned Single Judge erred in quashing the GO dated 23.07.2015 and the seniority list. (Para 76, 82)

The learned Single Judge, while passing the impugned order, has failed to appreciate the nature of the appointment of the appellants. Furthermore, the learned Single Judge has not considered Rule 3(i) and part of Rule 3(m) of the Rules, 2008, which was conjuncted after the word 'and'. Even the GOs dated 05.11.1965, 29.08.1983 and 24.07.2003, which are the statutory orders have not been appreciated. (Para 83)

D. Merger of Cadres - Merger of cadre and the matter of creation of post is a prerogative of the St.policy. It is always open to the St.Government to create post or merge the cadres. No employee has the right to object to the merger/integration of the cadre of different departments on the ground that it will adversely affect the prospects of promotion or cover other service benefits. (Para 78)

In the instant case, there are two classes i.e. (1) out of turn promotee cadre; (2) direct recruitee cadre. These two classes were subsequently merged into one class of cadre. However, a dispute arose. Direct recruitee/private respondents have claimed that they are senior to the out of turn promotee cadre, whereas out of turn promotee cadre/appellants claims that as they are being working since the date of giving out of turn promotion on the strength of the statutory orders which have been issued in terms of S.2 of the Police Act, 1861, therefore, the policy decision taken by the St.Government vide order dated 23.07.2015 and the consequential orders are perfectly justifiable. (Para 77)

Further, before and after the merger of two cadres into one cadre, nature and duties of the post in question are more or less identical. Furthermore, the qualifications prescribed for appointment on the post in question on the date the private respondents and appellants were appointed, were the same. The appellant's date of substantive appointment on the post in question is admittedly prior in the point of time to that of the private respondents. (Para 79)

E. Doctrine of *per incuriam* and *sub-silentio* - It is settled law that when a judgment is rendered by ignoring the provisions of the governing statute and earlier larger Bench decision on the point such decisions are rendered *per incuriam*. (Para 16(k), 84)

Learned Single Judge has not taken into consideration the relevant statutory provisions, relevant GOs and the previous judgments of the Apex Court and this Court while passing the judgment and order under appeal. (Para 16(k), 16(r))

As per Rules 3(i), 3(m), 3(n), 4(1), 22(3), 22(4), 27 and 28 of Rules, 2015 and Rule 18(2) of Rules, 2008, and from a conjoint reading of Rules, 2008 and Rules, 2015, it is unambiguously clear that the appellants were members of service from the initial date of their out of turn promotion on the post of Inspector. That the policy decision taken by the St.Government vide order dated 23.07.2015 impugned in the writ petitions does not suffer from any illegality and the same is not violative of any of the provisions of the Rules, 2008 and Rules, 2015 rather the same is protected under both the Rules. (Para 17(i))

Writ petitioners have not challenged the aforesaid provisions contained in the said Rules and the same is neither arbitrary nor discriminatory in any manner so as to render it violative of Article 14 of the Constitution of India. (Para 17(i))

Thus, the learned Single Judge, while passing the impugned order, has not at all considered the aforesaid aspect of the matter and the judgment and order under appeal is hit by the **doctrine of *per incuriam*** as well as the **doctrine of *sub silentio***, hence the impugned order passed by the learned Single Judge is liable to be set-aside and also the writ petitions are also liable to be dismissed. (Para 17(i))

Special appeals allowed. (E-4)

Precedent followed:

1. Prabodh Verma & ors. Vs St.of U.P. & ors., (1984) 4 SCC 251 (Para 18(b))

2. Indu Shekhar Singh & ors. Vs St.of U.P. & ors., 2006 (8) SCC 129 (Para 31)

3. Tridip Kumar Dingal & ors. Vs St.of W.B. & ors., (2008) 1 SCC 768 (Para 33)

4. Public Service Commission Uttaranchal Vs Mamta Bisht & ors., AIR 2010 SCC 2613 (Para 34)

5. Vijay Kumar Kaul & ors. Vs U.O.I. & ors., 2008 (6) SCC 797 (Para 35)

6. St.of Raj. Vs Ucchab Lal Chhanwal, (2014) 1 SCC 144 (Para 36)

7. Rashmi Mishra Vs M.P. Public Service Commission & ors., (2006) 12 SCC 724 (Para 16(a))

8. St.of U.P. & ors. Vs Rajendra Singh & anr., 2015 4 ADJ 575 (Para 16(l), 43)

9. Praful Kumar Das Vs St.of Orissa, (2003) 11 SCC 614 (Para 16(g), 68)

10. Shivprasad Pipal Vs U.O.I. & ors., (1998) 4 SCC 598 (Para 78)

11. V. Sivaguru Vs St.of T.N., (2013) 7 SCC 335 (Para 81)

12. Chandra Prakash Tiwari Vs Shakuntala Shukla, AIR 2002 SC 2322; 2002 (6) SCC 127 (Para 83, 15(VI))

13. Government of A.P. & anr. Vs B. Satyanarayan, 2000 (4) SCC 262 (Para 16(r), 84)

14. Nirmaljeet Kaur Vs St.of M.P. & anr., 2004 (7) SCC 558 (Para 16(r))

15. Tuples Educational Society & anr. Vs St.of U.P. & anr., 2008 (3) AWC 2499 (FB) (Para 16(r), 84)

Precedent cited by appellants:

1. St. of U.P. Vs Babu Ram Upadhya, AIR 1961 SC 751 (Para 15(VI))

2. Suresh Vs Yeotmal District Central Co-operative Bank & anr., (2008) 12 SCC 558 (Para 16(a))

3. St.of Raj. Vs Ucchab Lal Chhanwal, (2014) 1 SCC 144 (Para 16(a))

4. Ranjan Kumar & ors. Vs St.of Bihar & ors., (2014) 16 SCC 187 (Para 16(a))

5. Vijay Singh & ors. Vs St.of U.P. & ors., (2005) 2 AWC 1191 (Para 16(l), 59)

6. Krishna Kumar Pandey Vs St.of U.P. & ors., 2001 (3) AWC 2163 (Para 16(o))

7. Narendra Chadha & ors. Vs U.O.I. & ors., 1986 (2) SCC 157 (Para 16(q))

8. U.O.I. & ors. Vs Pratap Narain & ors., 1992 (3) SCC 268 (Para 16(q))

9. St.of U.P. & ors. Vs Rajendra Singh & anr., 2015 (4) ADJ LB (FB) (Para 16(q))

10. Vijay Kumar Gaur Vs St.of U.P. & anr., 2016 (11) ADJ 502 (LB) (Para 16(q))

11. Vijay Singh & ors. Vs St.of U.P. & ors., 2005 AWC 1191 (FB) (Para 16(q))

12. Ajay Kumar Bhuyan Vs St.of Orissa, 2003 (1) SCC 707 (Para 16(q))

13. Prem Kumar Upadhyay Vs St.of U.P. & ors., 2014 (1)ADJ 536 (Para 16(q))

14. Kandwa Kumar Mishra Vs State, Special Appeal No. 117 of 2014, decided on 03.02.2014 (Para 16(q))

15. Krishna Kumar Pandey Vs St.of U.P. & anr., 2001 (3) AWC 2163 (Para 16(q))

16. Kishan Rao Vs Nikhil Super Specialty Hospital, 2010 (5) SCC 513 (Para 16(r))

17. Young Vs Bristol Aeroplane Company, 1948 78 LIL Rep 6 (Para 16(r))

18. Municipal Corp. of Delhi Vs Gurnam Kaur, 1989 (1) SCC 101 (Para 16(r), 84)

19. St.of U.P. & anr. Vs Synthetics and Chemicals Ltd. & anr., 1991 (4) SCC 139 (Para 16(r))

20. Public Welfare Hospital, Varanasi Vs St.of U.P. & ors., 2011 (5) AWC 4757 (Para 16(r))

21. U. Barkath Vs Director General of Police, 2019 SCC Online Mad. 4347 (Para 16(r))

22. S.P. Shivprasad Pipal Vs U.O.I., 1998 AIR (SC) 1982 (Para 16(u))

23. S.I. Roopal & anr. Vs Lt. Governor through Chief Secretary, Delhi & ors., AIR 2000 SC 594 (Para 16(u))

24. St.of Maharashtra Vs Chandrakant Anand Kulkarni, 1981 AIR (SC) 1990 (Para 16(u))

25. P.U. Joshi & ors. Vs Accountant General, Ahemedabad & ors., 2003 (2) SCC 632 (Para 16(u))

26. Tej Narain Tiwari Vs St.of Bihar & ors., 1993 Supp (2) SCC 623 (Para 16(u))

27. Prakash Ranjan Kumar & ors. & Ajit Kumar Saha Vs St.of Bihar & ors., 2007 (2) BLJR 2987 (Para 16(u))

28. Om Prakash Sharma & ors. Vs U.O.I. & ors., 1985 (Supp) SCC 218 (Para 16(u))

29. S.A. Siddiqui Vs M. Wajid Khan, 1999 AIR (SC) 604 (Para 16(u))

30. R.B.I. Vs N.C. Paliwal & ors., (1976) 4 SCC 838 (Para 16(u))

31. St.of Raj. & ors. Vs Shantilal Jain and Ors., 1989 Supp (2) SCC 777 (Para 16(u))

32. Tamil Nadu Education Department Ministerial and General Subordinate Services Association & ors. Vs St.of Tamil Nadu & ors., (1997) 8 SCC 522 (Para 16(u))

33. U.O.I. & ors. Vs S.L. Dutta & ors., AIR 1991 SC 363 (Para 16(u))

Precedent cited by respondent:

1. G.M. South Central Railways Sikandarabad Vs A.V.R. Siddhanti, (1974) 4 SCC 335 (Para 18(a))

2. Janardana Vs U.O.I., (1983) 3 SCC 601 (Para 18(a))

3. Syed Khalid Rizbi & ors. Vs U.O.I. & ors., 1993 Supp. (3) SCC 575 (Para 18(n))

4. The Food Commissioner, U.P. & ors. Vs Om Pal Singh & ors., Special Appeal No. 1960 of 2011, decided on 05.10.2018 (Para 18(n))

5. M. Venketeswarlu & ors. Vs Government of A.P. & ors., 1996 (5) SCC 167 (Para 18(n))

6. U.P. Jal Nigam & ors. Vs Narinder Kumar Agarwal, 1996 (8) SCC 43 (Para 18(n))

7. Suraj Prakash Gupta & ors. Vs St.of J & K & ors., 2000 (7) SCC 516 (Para 18(n))

8. Rajasthan St.Industrial Development Corporation Vs Subhash Sindhi Cooperative Society Jaipur & ors., 2013 (5) SCC 427 (Para 18(n))

9. Chairman, Public Service Commission, J & K & anr. Vs Sudarshan Singh Jamwal & ors., 1998 (9) SCC 327 (Para 18(n))

10. U.P. Unaided Medical Colleges Welfare Association Vs U.O.I. & ors., 2016 (3) UPLBEC 2363 (Para 18(n))

11. Bhupendra Nath Hazarika & ors. Vs St.of Assam & ors., 2013 (2) SCC 516 (Para 18(n))

12. J.K. Industries Ltd. & ors. Vs Chief Inspector of Factories and Boilers & ors., 1996 (6) SCC 665 (Para 18(o))

13. K. Kuppusamy & anr. Vs St.of T.N. & ors., 1998 (8) SCC 469 (Para 18(p))

14. Dr. Rajinder Singh Vs St.of Pun., 2001 (5) SCC 482 (Para 18(p))

15. Bindeshwari Ram Vs St.of Bihar & ors., 1989 (4) SCC 465 (Para 18(p))

16. Anurag Yadav & ors. Vs St.of U.P. & ors., 2010 (3) UPLBEC 2261 (Para 18(p))

17. K.P. Sudhakaran & anr. Vs St.of Kerala & ors., 2006 (5) SCC 386 (Para 18(p))

18. Mahadev Bhau Khilare (Mane) & ors. Vs St.of Mah. & ors., (2007) 5 SCC 524 (Para 18(p))

19. Madeva Upendra Sinai & ors. Vs U.O.I. & ors., 1975 (6) SCC 765 (Para 18(q))

20. Delhi Development Authority & anr. Vs Joint Action Committee Allottee of SF's Flats & ors., 2008 (2) SCC 672 (Para 18(q))

21. J.K. Cotton Spinning & Weaving Mills Company Ltd. Vs St.of U.P., AIR 1961 (SC) 1170 (Para 18(r))

22. Dharni Sugars & Chemicals Ltd. Vs U.O.I. & ors., 2019 (5) SCC 480 (Para 18(r))

23. M.S. Patil (Dr.) Vs Gulbarga University, 2010 (10) SCC 63 (Para 18(s))

24. St.of Orissa & anr. Vs Mamta Mohanty, 2011 (3) SCC 436 (Para 18(s))

25. Umarani Vs Registrar Cooperative Societies & ors., 2004 (7) SCC 112 (Para 18(s))

26. Baddula Lakshmaiah & ors. Vs Sri Anjaneya Swami Temple & ors., 1996 (3) SCC 52 (Para 18(t))

27. Managing Director, ECIL, Hyderabad & ors. Vs B. Karunakar & ors., 1993 (4) SCC 727 (Para 18(t))

Present appeals challenge judgment and order dated 20.02.2019, whereby Single Judge while allowing WPs with further directions, quashed the GO dated 23.07.2015, consequential order dated 29.07.2015 and seniority list dated 24.09.2016.

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

(1) The above-captioned Special Appeal Nos. 100 of 2019, 98 of 2019, 99 of 2019 and 103 of 2019 has been preferred by the appellants (out of turn promotees/private respondents in the writ petition) and Special Appeal No. 277 of 2021 has been preferred by the State, assailing the correctness of the judgment and order dated 20.02.2019 passed in Service Single No. 5677 of 2016 and connected Service Single No. 13625 of 2016 and 10759 of 2016, whereby the learned Single Judge, while allowing the aforesaid writ petitions, quashed the Government Order dated 23.07.2015, consequential order dated 29.07.2015 and seniority list dated 24.09.2016 and further directed the State to prepare a fresh seniority list in accordance with Rule 22 (3) of the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2015 and assign the seniority to the promotees of ex cadre posts from the date when their immediate juniors were promoted to the post of Inspector in accordance with the service rules against cadre posts within a period of two months from the date of the order and after preparing the seniority list as directed aforesaid, consequential orders in respect of promotions etc. be issued.

FACTS

(2) The factual matrix relevant for adjudication of this set of appeals is as under :-

(a) The State Government had issued a Government Order dated 05.11.1965, which provided for the method of selection of Sub-Inspector for promotion to the rank of Inspector. This Government Order dated 05.11.1965 is referable to Section 2 of the Police Act, 1861 (hereinafter referred to as "**Act, 1861**"). Thereafter, the State Government issued another Government Order dated 29.10.1983 under Section (2) of the Act, 1861, providing therein a Selection Committee be constituted for the purpose selecting Sub-Inspectors for promotion to the post of Inspectors.

(b) The aforesaid Government Orders dated 05.11.1965 and subsequent Government Orders were rescinded/modified by the Government Order dated 24.07.2003 issued under Section 2 of the Act, 1861 providing for the selection process for promotion of Sub-Inspector (Civil Police) to the Inspector (Civil Police). Subsequently, the State Government has issued Government Order dated 3.2.1994, by means of which it was provided that those Constables and Sub-Inspectors/Platoon Commanders, who have shown exemplary courage, be given appointment from the post of Constable to Head Constable and from the post of Sub-Inspector and Platoon Commander to Inspector/Company Commander on ex cadre posts. It was further provided that for each year, such ex cadre posts would be created by the State Government on the proposal of the Inspector General of Police, Lucknow. It was also provided that it has overriding effect over any other existing orders.

(c) The aforesaid Government Order dated 03.02.1994 contemplated that the promotions would be made on ex cadre posts, which were to be sanctioned by the State Government for the said purpose every year, however, no such post were ever created and the out of turn promotions were made on cadre posts of Head Constables and Inspector, respectively.

(d) The Government Order dated 3.2.1994 is also referable to Section 2 of the Act, 1861. Thereafter, the Director General of Police, Uttar Pradesh had issued a Circular dated 10.02.1994 in pursuance of the statutory Government Order

dated 3.2.1994, in which complete mechanism/procedure was prescribed for out of turn promotion.

(e) Subsequently, on 01.05.1999, the State Government issued another statutory order referable to Section 2 of the Act, 1861, by means of which it laid down that out of turn promotions would be against the vacancies existing in the cadre, however, promotion would be treated ex cadre and its benefit will not be available for the purposes of determination of seniority.

(f) It is relevant to add here that at the time of issuance of the statutory orders i.e. 03.02.1994 and 01.05.1999, there were no service rules framed by the State Government under sub-section 2(c) of Section 46 of the Act, 1861. All the out of turn promotees were, thus, promoted on cadre posts and the said promotions were granted by the State Government in accordance with the Government Orders which were issued in exercise of the statutory powers available to it under the provisions of the Act, 1861.

(g) Subsequently, for the first time, the State Government, in exercise of power available to it under sub-sections (2) of Section 46 read with Section 2 of the Act, 1861 (Act No. 5 of 1861), framed the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2008 (hereinafter referred to as "**Rules, 2008**") in supersession of all existing rules issued in this behalf with a view to regulating the selection, promotion, training, appointment, determination of seniority and confirmation etc., which came into effect from 02.12.2008.

(h) Thereafter, another Government Order dated 07.06.2014 was issued by the State Government under Section 2 of the Act, 1861, by means of which, the Government Order dated 03.02.1994, which was related to ex cadre out of turn promotees of non-gazetted staff of the Police department, was cancelled and consequently a decision was taken by the State Government to award the non-gazetted staff of the police department who had shown exemplary courage with the Police Medal of the Chief Minister's appreciation letter and was Rs.25,000/- cash reward instead of out of turn promotion in terms of the Government Order dated 07.06.2014. The Director General of Police, U.P. had also issued a circular dated 14.08.2014 in pursuance to the aforesaid Government Order dated 07.06.2014.

(i) The Director General of Police, Lucknow, on 06.02.2015 and 20.05.2015, wrote to the Principal Secretary, Home, Government of Uttar Pradesh, Lucknow, refusing for grant of seniority to the ex cadre out of turn promotees from the date of their out of turn promotion, who were engaged in the security of the Chief Minister, *inter alia* on the ground that in the Government Order dated 01.05.1999, it was provided that out of turn promotions would be made against the vacant posts in the cadre which will be treated as ex cadre promotions and no benefit of the same will be admissible in the fixation of seniority. In these backgrounds, a direction was sought through the aforesaid letters dated 06.02.2015 and 20.05.2015 from the State Government with regard to fixation of seniority of such out of turn promotees.

(j) Thereafter, Government Order dated 23.07.2015 was issued, whereby earlier order dated 01.05.1999 was rescinded with immediate effect and it was provided that the probation of 990 Non-Gazetted Police Officers/ employees, who had been granted out of turn promotion w.e.f. 1994 till 2014, shall be counted with effect from their date of out of turn promotion. This Government Order dated 23.07.2015 was issued by the State Government in exercise of powers available to it under Section 2 of the Act, 1861.

(k) Thereafter, the State Government, in exercise of power conferred under sub-section 2

of Section 46 read with Section 2 of the Act, 1861, has framed U.P. Sub-Inspector and Inspector (Civil Police) Service Rules, 2015 (hereinafter referred to as **"Rules, 2015")** in superssession of all existing rules or orders issued in this behalf with a view to regulating the selection, promotion, training, appointment, determination of seniority and confirmation etc. of Sub-Inspectors and Inspectors of (Civil Police) in Uttar Pradesh Police Force, which came into force w.e.f. 19.08.2015.

(l) Thereafter, the writ petitioners/private respondents herein, who are regularly promoted Inspectors from the cadre of Sub-Inspector against cadre posts of the Inspector of Civil Police, has challenged the Government Order dated 23.07.2015, consequential order dated 29.07.2015 issued by the Director General of Police, U.P. and the seniority list dated 24.02.2016 by filing Service Single No. 5677 of 2016, 13625 of 2016 and 10759 of 2016, by impleading the name of thirteen out of turn promotees as private respondents in the aforesaid writ petitions.

(m) When the aforesaid writ petitions were listed before the learned Single Judge as peremptorily i.e. on 20.02.2019, none was responded before the learned Single Judge on behalf of the private respondents in writ petitions/ appellants herein, therefore, in the absence of any assistance on behalf of the private respondents/appellants herein, the learned Single Judge, looking to the fact that the matter was expedited by the Apex Court and so many counsel, namely, Mr. Brijendra Singh, Sri Ravi Singh, Sri Sameer Kalia have put in appearance on earlier occasions when the case was listed, proceeded to hear the matter finally on the basis of the submissions put forth by learned Counsel for the writ petitioners and learned Counsel for the State.

(n) Learned Single Judge, on considering the Government Order dated 23.07.2015 in the light of the Rules, 2008, observed that the Government Order dated 23.07.2015 had been issued in violation of Rules, 2008 and ex cadre posts are not the posts within the cadre and their appointments were not substantive appointments and as such, out of turn promotees cannot claim seniority on the basis of their appointment on ex cadre post over the writ petitioners and the seniority of all the Inspectors are to be governed in accordance with Rules 22 (3) of Rules, 2015, which provides that the seniority of the Inspectors is to be determined from the date of substantive appointment after selection and inter se seniority of the promotees of same selection is to be that of the seniority in the ex cadre posts.

(o) In these backdrops, the learned Single Judge allowed the writ petitions with the direction as already recorded above, vide judgment and order dated 20.02.2019, which is impugned in the above-captioned special appeals.

GOVERNMENT ORDERS :

(3) The method of selection of Sub-Inspectors for promotion to the rank of Inspectors has earlier been made in the Government Order dated 05.11.1965, which is reproduced as under :-

"From :
Shri R.K. Dar,
UP Sachiv,
Uttar Pradesh Shasan

To,
The Inspector General of Police,
Uttar Pradesh Allahabad/Lucknow

Dated Lucknow: November 5, 1965
Home (Police-A)

Sub : Method of Selection of Sub-Inspectors for promotion to the rank of Inspectors.

Sir,

With reference to Deputy Inspector General of Police, Headquarters letter No. V-500-51, dated August 18, 1964, on the subject noted above, I am directed to say that after careful consideration of the recommendations contained in para 246 of the U.P. Police Commissions Report, 1960, the Governor in supersession of the povisions in the Police Regulations and in modification of the present orders on the subject, has been pleased to order that the procedure for selection of Sub Inspectors for their promotion to the cadre of Inspector shall henceforth be as follows :

(A) The existing quota system by which a certain number of Sub Inspectors are at present selected from each Range should be abolished. Sub Inspectors Civil Police who have put in not less than 10 years service as such (and are below 50 years of age) on the 1st day of January of the year in which the selection is made will now be eligible for promotion to the post of Inspector. The range Deputy Inspector General of Police will send to the Police Headquarters every year the following list.

(i) Lists of Sub Inspectors, Civil Police considered suitable for officiating promotion as Inspector in order of seniority in a prescribed form, which may be laid down by the Police Headquarters.

(ii) Lists of Sub Inspectors, Civil Police, who are not considered fit for officiating promotion with brief reasons.

The Departmental Selection Committee will thereafter have a final consolidated list prepared of Sub Inspectors Civil Police, considered suitable for officiating promotion arranged in the order of their seniority. From the final consolidated list, four times the number of Inspectors required to be approved for officiating promotion will be called for interview by the Departmental Selection Committee as constituted by Government vide G.O. No. 4381-A/VIII-A-268/1961, dated August 2, 1962. The assessment made by the Committee will be done by selection on merit, and a list of approved candidates will be prepared on which the names of selected candidates will arrange in order of their seniority. Those who are borne on the approved list of an earlier year will rank above those selected and brought on an approved list of a later year.

(B) On the occurrence of substantive vacancies appointment to them shall be made from amongst the candidates on the approved list prepared under para 'A' on the basis of suitability. The claims of the candidates passed over will be considered in the subsequent selection. The selection will be made by the Departmental Selection Committee and there will be no further interview of the candidates for filling in the substantive vacancies.

(C) Candidates selected for substantive appointment will be placed on two years probation in accordance with the provisions of para 403(3) of the Police Regulations. The period of service rendered by them as Inspector of Police in a temporary or officiating capacity will be counted towards the period of probation.

2. The above orders shall come into force with immediate effect.

Yours faithfully,
Sd/- R.K. Dar,
Up Sachiv."

(4) It is needless, however, to record that selection of Inspectors in Uttar Pradesh stands effected on the basis of merit arranged in order of seniority and the Government Order dated 5.11.1965 being the background thereto.

(5) Thereafter, for the purpose of promotion from the post of Sub-Inspector (Civil Police) to Inspector, a Committee was constituted vide order dated 29.10.1983, which is reproduced as under :-

"प्रेषक,

श्री शिव स्वरूप श्शुक्ल,
उप सचिव,
उ0प्र0 श्शासन।

सेवा में,

पुलिस महानिदेशक एवं महानिरीक्षक,
उ0प्र0, लखनऊ।

गृह (पुलिस) अनुभाग– 1

लखनऊः दिनांक 29अक्टूबर, 1983

विषय : सब इन्सपेक्टर नागरिक पुलिस इन्सपेक्टर पद पर प्रोन्नति हेतु चयन समिति का गठन।

महोदय,

उपर्युक्त विषय पर सहायक पुलिस महानिरीक्षक, उत्तर प्रदेश, लखनऊ पत्रांक काम–106 (385)–83 दिनांकित 6.09.83 व 12. 10.83 के सन्दर्भ में श्शासनादेश संख्या 4840/आठ–85/82 दिनांक 2.09.1983 का आंशिक संशोधन करते हुए मुझे यह कहने का निर्देश हुआ है कि उपरोक्त विषय पर चयन समिति का गठन निम्न प्रकार होगा :–

1– पुलिस महानिदेशक/पुलिस महानिदेक्षक अध्यक्ष
2– पुलिस महानिदेशक द्वारा नाम एक पुलिस महानिरीक्षक सदस्य
3– पुलिस महानिदेशक द्वारा नामित एक पुलिस महानिरीक्षक सदस्य
4– पुलिस उप महानिरीक्षक, मुख्यालय सदस्य एवं सचिव

2– मुझे यह भी कहना है कि पुलिस महानिदेशक को यह अधिकार होगा कि ये चयन के समय उपरोक्त अधिकारियों के अतिरिक्त किसी उच्च अधिकारी को आमंत्रित कर लें, किन्तु प्रतिबन्ध यह है कि इस प्रकार आमंत्रित किया जाने वाला अधिकारी पुलिस उपमहानिरीक्षक के स्तर से निम्न का न होगा।

भवदीय,
शिव स्वरूप शुक्ल
उप सचिव"

(6) Office Memorandum dated 3.2.1994 was issued by Principal Secretary (Home). This Office Memorandum was in reference to the appointment of a Police Inspector/ Company Commander on a non cadre post of Deputy Superintendent of Police where such Police Inspector/Company Commander P.A.C. has shown an act of exemplary courage and gallantry. Conditions on which such appointment against a non-cadre-post of Deputy Superintendent of Police, was permissible, provided in the Office Memorandum, reads as under:

'कार्यालय ज्ञाप

अद्योहस्ताक्षरी को उत्तर प्रदेश पुलिस बल के ऐसे आरक्षी एवं उप निरीक्षक/प्लाटून कमान्डर का, जिन्होनें अदम्य साहस और श्शौर्य का प्रदर्शन किया हो, मनोबल और साहस बढ़ाने के लिए क्रमशः मुख्य आरक्षी पद पर और निरीक्षिक/कम्पनी कमांडर पद पर नियुक्त करने के संबंध में निम्नलिखित आदेश देने का निर्देश हुआ है:-

1. अदम्य साहस एवम् शौर्य प्रर्दशन करने वाले पुलिस बल के उक्त कर्मियों को यथास्थिति आरक्षी से मुख्य आरक्षी तथा उपनिरीक्षक से निरीक्षक/ कम्पनी कमाण्डर को के निः संवर्गीय पद पर नियुक्ति किया जायेगा।

2. प्रत्यक वित्तीय वर्ष के लिए यथास्थिति मुख्य आरक्षी या निरीक्षक/कंपनी कमाण्डर के निःसंवर्गीय पदों का सृजन राज्य सरकार द्वारा पुलिस महानिदेशक, उत्तर प्रदेश के प्रस्ताव पर किया जायेगा।

3. पुलिस बल के ऐसे आरक्षीगण उपनिरीक्षक/ प्लाटून कमाण्डर अदम्य साहस और शौर्य प्रर्दशन करने वाले पुलिस कर्मी की कोटि में आयेंगे, जिन्होने कुख्यात आतंकवादी या जघन्य अपराधी के साथ में मुठभेड़ या उनकी गिरफ्तारी में साहस और शौर्य प्रदर्शित किया हो या अपने कर्तव्य पालन के दौरान जोखिम भरा कार्य किया हो।

4. उक्त निःसंवर्गीय पदों पर नियुक्ति पुलिस महानिदेशक के पूर्वानुमोदन के उपरान्त नियुक्ति प्राधिकारी द्वारा की जायेगी।

5. यह आदेश इस विषय पर समय- समय पर जारी आदेशों में किसी अन्य बात के होते हुए भी प्रभावी होगा।

6. यह आदेश तात्कालिक प्रभाव से लागू होगा।''

(7) On the same date, i.e., 3.2.1994 another Government Order No. 605 (11) छ–पु–1–24/93 was issued by Principal Secretary (Home) providing for a similar ex cadre "Out of Turn" promotion to Constables and Sub-

Inspectors/Platoon Commander on the post of Head Constable and Inspector/ Company Commander respectively. The conditions of such appointment are similar to the earlier Government Order except of the difference of designations of post and rank but for ready reference, these conditions are also reproduced as under :-

''1. अदम्य साहस एवम् शौर्य प्रर्दशन करने वाले पुलिस बल के उक्त कर्मियों को यथास्थिति आरक्षी से मुख्य आरक्षी तथा उपनिरीक्षक से निरीक्षक/ कम्पनी कमाण्डर को के निः संवर्गीय पद पर नियुक्ति किया जायेगा।

2. प्रत्यक वित्तीय वर्ष के लिए यथास्थिति मुख्य आरक्षी या निरीक्षक/कंपनी कमाण्डर के निःसंवर्गीय पदों का सृजन राज्य सरकार द्वारा पुलिस महानिदेशक, उत्तर प्रदेश के प्रस्ताव पर किया जायेगा।

3. पुलिस बल के ऐसे आरक्षीगण उपनिरीक्षक/ प्लाटून कमाण्डर अदम्य साहस और शौर्य प्रर्दशन करने वाले पुलिस कर्मी की कोटि में आयेंगे, जिन्होने कुख्यात आतंकवादी या जघन्य अपराधी के साथ में मुठभेड़ या उनकी गिरफ्तारी में साहस और शौर्य प्रदर्शित किया हो या अपने कर्तव्य पालन के दौरान जोखिम भरा कार्य किया हो।

4. उक्त निःसंवर्गीय पदों पर नियुक्ति पुलिस महानिदेशक के पूर्वानुमोदन के उपरान्त नियुक्ति प्राधिकारी द्वारा की जायेगी।

5. यह आदेश इस विषय पर समय समय पर जारी आदेशों में किसी अन्य बात के होते हुए भी प्रभावी होगा।

6. यह आदेश तात्कालिक प्रभाव से लागू होगा।''

(8) The aforesaid Government Orders being orders relating to recruitment and conditions of service of Police Officers of subordinate rank, hence statutory by virtue of Section 2 of the Act, 1861.

(9) Thereafter, the Inspector General of Police has issued a Circular on 10.02.1994 laying down the procedure with regard to cash reward and out of turn promotion. Subsequently, the aforesaid Government Order dated 3.2.1994 was modified by Government Order dated 02.01.1998, which reads as under :-

"अधोहस्तारी को श्शासनादेश संख्या–665(1)/ 6–पु–1–24/93, दिनांक 3–2–94 के अनुक्रम में यह कहने का निदेश हुआ है कि उक्त आदेश के प्रस्तर–(3) में निम्नलिखित अंश और बढ़ा दिया गया है :-

"आऊट आफ टर्न पदोन्नति की पात्रता में एसे आरक्षी भी आयेंगे जिनकी उत्कृष्ट सेवा के आधार पर पुलिस महानिदेश/गृह सचिव उन्हें आऊट आफ टर्न पदोन्नति का पात्र समझें।''

उक्त 'शासनादेश दिनांक 3–2–94 इस सीमा तक संशोधित समझा जायेगा।

ह0 अपठनीय / 2–1–98
(राजीव रत्न 'शाह)
प्रमुख सचिव, गृह

(10) On 01.05.1999, another Government Order was issued, in which it was provided that out of turn promotion would be made against the vacant posts in the cadre, which will be treated as ex cadre promotion and no benefit of the same will be admissible in the fixation of seniority. It was also provided in paragraph-2 of the aforesaid Government Order dated 01.05.1999 that such promotions should not be more than 2% in the year. The Government Order dated 01.05.1999 reads as under :-

"प्रेषक,
जगदीश लाल,
अनु सचिव
उत्तर प्रदेश 'शासन।

सेवा में,

पुलिस उप महानिरीक्षक (स्थापना),
उत्तर प्रदेश, पुलिस मुख्यालय,
इलाहाबाद।

गृह (पुलिस) अनुभाग–1 लखनऊः दिनांक 1 मई, 1999

विषयः– आउट आफ टर्न प्रन्नति हेतु निःसंवर्गीय पदों के सृजन के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक आपके पत्रांक–पॉच–468 (निर्देश) 98, दिनॉकः 27.08.93 तथा पत्रॉक–पॉच–460 (04) 95 दिनॉकः 26. 10.98 द्वारा प्रेषित प्रस्ताव के संदर्भ में शासन द्वारा किये गये विचारोपरान्त निम्नलिखित निर्णय लिया गया हैः–

1– आउट आफ टर्न प्रोन्नति उपलब्ध संवर्गीय पद में रिक्त पदों के सापेक्ष की जाय, जो निःसंवर्गीय मानी जायेगी और इसका लाभ ज्येष्ठता निर्धारण में अनुमन्य नहीं होगा।

2– इस प्रकार की प्रोन्नतियॉ वर्ष में 2 : से अधिक नहीं होनी चाहिए।

अतः मुझे यह कहने का निदेश हुआ है कि उपर्युक्त बिन्दुओं के आधार पर संदर्भित पत्रों द्वारा प्रेषित प्रस्ताव पर कार्यवाही तत्काल सुनिश्चित करने का कष्ट करें तथा कृत कार्यवाही से 'शासन को अवगत कराया जाय।

भवदीय
(जगदीश लाल)
अनु सचिव"

(11) Another Government Order dated 07.06.2014 was issued by the State Government, whereby the Government Order dated 03.02.1994, which was related to ex cadre out of turn promotees of non-gazetted staff of the police department was cancelled and consequently, a decision was taken by the State Government to award the non-gazetted staff of the police department who had shown exemplary courage, with the police medal, the Chief Minister's appreciation letter and Rs.25,000/- cash reward instead of out of turn promotion in terms of the Government Order dated 07.06.2014. The Government Order dated 07.06.2014 is reproduced as under :-

"प्रेषक,
अमृत अभिजात,
सचिव,
उत्तर प्रदेश शासन।

सेवा में,

पुलिस महानिदेशक,
उत्तर प्रदेश लखनऊ।

गृह (पुलिस) अनुभाग–1 लखनऊ : दिनांकः 07 जून, 2014

विषयः– पुलिस विभाग में आउट आफ टर्न प्रोन्नति के संबंध में।

महोदय,

उपरोक्त विषयक अपने पत्र संख्या डीजी–चार–100 (58)/2013, दिनांक 28–04–2014 का कृप्या सन्दर्भ ग्रहण करने का कष्ट करें।

2–इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि कार्यालय ज्ञाप संख्या–665/छः–पु–1–24/93, दिनांक 03–02–1994 एवं कार्यालय ज्ञाप संख्या–665 (1)/छः–पु–1–24/93, दिनांक 03–02–1994 द्वारा स्वीकृत पुलिस विभाग में आउट आफ टर्न प्रोन्नति की व्यवस्था को एतद्द्वारा तत्काल प्रभाव से समाप्त किया जाता है। इसके स्थान पर पुलिस कर्मियों को उनके साहसिक कार्य के लिये निम्नलिखित नगर पुरस्कार एवं मेडल प्रदान किये जाने का निर्णय लिया गया है :–

(1) पुलिस कर्मियो के साहसिक कार्य के लिये पुलिस महानिदेशक की संस्तुति पर मा. मुख्यमंत्री का प्रशस्ति पत्र एवं उसके साथ रूपये 25000/– का नगद पुरस्कार दिया जायेगा। एसे कर्मियो की संख्या वर्ष में अधिकतम 25 निर्धारित की जाती है किन्तु मा. मुख्यमुत्री द्वारा समय-समय पर स्व–विवेक से पुरस्कार की धनराशि एवं कर्मियों की संख्या बढ़ायी जा सकती है।

2. उच्च श्रेणी का साहसिक कार्य करने वाले पुलिस कर्मियो को पुलिस महानिदेशक की संस्तुति पर मा. मुख्यमंत्री का वीरता पदक दिये जाने के साथ प्रति माह रू. 1000/– का मासिक भत्ता दिया जायेगा। इन पदो की संख्या वर्ष में अधिकतम 10 निर्धारित की जाती है किन्तु मा. मुख्यमंत्री द्वारा समय- समय पर स्व–विवेक से दिये जाने वाले उक्त भत्ते की धनराशि एवं कर्मियों की संख्या बढ़ायी जा सकती है।

3. कृपया उपरोक्तानुसार कार्यवाही कराने का कष्ट करें।

भवदीय,
(अमृत अभिजात)
सचिव"

(12) On 14.08.2014, the Director General of Police, U.P. has issued a circular with regard to the Government Order dated 07.06.2014.

(13) Thereafter, another Government Order dated 23.07.2015 was issued, whereby decision was taken by the State Government to give seniority to the ex cadre out of turn promotee non-gazetted police officers/employees. The Government Order dated 23.07.2015 is reproduced as under :-

संख्या% 1693/6प–1–15–90(4)/2014

प्रेषक

मणि प्रसाद मिश्र]
सचिव
उत्तर प्रदेश शासन
सेवा में]

पुलिस महानिदेशक]
उत्तर प्रदेश]
लखनऊ।

गृह (पुलिस)अनुभाग–1 लखनऊ दिनॉक 23 जुलाई] 2015

विषय%– उ०प्र०पुलिस बल के वर्ष 1994 से वर्ष 2014 तक आउट आफ टर्न पदोन्नती प्राप्त कुल 990 अराजपत्रित अधिकारी/ कर्मचारियों (मुख्य आरक्षी/उप निरीक्षक एवं निरीक्षक) की वन टाइम वरिष्ठता निर्धारित किये जाने केसम्बन्ध में।

महोदय]

उपर्युक्त विषयक कृपया अपने पत्र संख्या % डीजी–चार–119 (11)/2014 दिनॉक 20.05.2015 एवं पत्र संख्या% डीजी–चार–119 (11)/2014 दिनॉक 09.06.2015 का कृपया संदर्भ गहण करने का कष्ट करें।

2. आउट आफ टर्न पदोन्नति प्राप्त अराजपत्रित अधिकारियों/ कर्मचारियों की वन टाइम वरिष्ठता निर्धारित किये जाने के सम्बन्ध में सम्यक विचारोपरान्त निम्नलिखित निर्णय शासन द्वारा लिया गया है।

शासनादेश संख्या 7249 / छ–.पु०–1–98–24/93 दिनोंक 01.05.1999 तत्काल प्रभाव से निरस्त करते हुए आउट आफ टर्न पदोन्नति संवर्गीय मानी जाय तथा इसी के साथ समय-समय पर शासन द्वारा 09 निरीक्षकों को दी गई वनटाइम वरिष्ठता को भी सम्मिलित करते हुए वर्ष 1994 से वर्ष 2014 तक आ आफ टर्न पदोन्नति प्राप्त कुल 990 अराजपत्रित पुलिस अधिकारी/कर्मचारियों (विवरण संलग्न सूची में उल्लिखित है) के परिवीक्षाकाल का निर्धारण आउट आफ टर्न पदोन्नति की तिथि से किया जाय, ताकि सभी प्रश्नगत अराजपत्रित पुलिस कर्मियों के सम्बन्ध में वन टाइम वरिष्ठता निर्धारित हो सके।

3– इस संबंध में मुझे यह कहने का निदेश हुआ है कि कृप्या उपरोक्त निर्णय के आलोक में तत्काल कार्यवाही सुनिश्चित कराते हुए कृत कार्यवाही से श्शासन को अवगत कराने का कष्ट करें।

संलग्नकःउपरोक्तानुसार। भवदीय
(मणि प्रसाद मिश्र)
सचिव

(14) Thereafter, the Director General of Police (Establishment), Uttar Pradesh, Lucknow has issued the consequential order on 29.07.2015 in regard to Government Order dated 23.07.2015.

STATUTORY PROVISIONS: RULES

(15) The Police Act, 1861

I. The Police Act, 1861 was enacted in the aftermath of the Mutiny of 1857. The Act, 1861 received the assent of the Governor General on 22.03.1861. The long title describes it as "*an act for the regulation of police*". The Preamble states that *"it was expedient to re-organise the police and to make it a more efficient instrument for the prevention and detection of crime*'. The Act and the Regulations were saved under Section 243 of the Government of India Act, 1935 and by Article 313 and 372 of the Constitution.

II. After the enactment of the Constitution, the police is a State subject under Entry 2 of the State List to the Seventh Schedule. Entry 2, which deals with the police, including railway and village police, is subject to the provisions of Entry 2A of the Union List providing for the deployment of any armed force of the Union or any other force subject to the control of the

union. Section 2 of the Act, 1861 provides for the constitution of force, in the following terms :-

"2. Constitution of the forces.-- The entire police establishment under a State Government shall for the purposes of this Act, be deemed to be one police force, and shall be formally enrolled and shall consist of such number of officers and men, and shall be constituted in such manner, as shall from time to time be ordered by the State Government.

Subject to the provisions of this Act the pay and all other conditions of service of members of the subordinate ranks of any police force shall be such as may-be determined by the State Government."

III. Section 7 provides that subject to the provisions of Article 311 of the Constitution and to such rules as the State Government may, from time to time, make under the Act, the Director-cum-Inspector General may, at any time, dismiss, suspend or reduce any police officer of subordinate ranks who is though to be remiss or negligent in the discharge of the duties or unfit "for the same' or may award one of the punishments mentioned in the provision. Section 8 provides that every police officer appointed to the police force shall receive on appointment, a certificate in the form annexed to the Act by virtue of which such a person is vested with the powers, functions and privileges of the police officer. When the person named in the certificate ceases to be a police officer, the certificate shall cease to have effect and it would have to be surrendered forthwith.

IV. Section 12 of Act, 1861 confers upon the Director General-cum-Inspector General, the power to make rules and is in the following terms :-

"12. Power of Inspector-General to make rules.- The Director General of Police may, from time to time, subject to the approval of the State Government, frame such orders and rules as he shall deem expedient relating to the organization, classification and distribution of the police force, the places at which the members of the force shall reside, and the particular services to be performed by them; their inspection, the description of arms, accoutrements and other necessaries to be furnished to them, the collecting and communicating by them of intelligence and information; and all such other orders and rules relating to the police-force as the Inspector-General shall, from time to time, deem expedient for preventing abuse or neglect of duty, and for rendering such force efficient in the discharge of its duties."

V. Section 23 of the Act, 1861 provides for the duties of police officers. A rule making power is conferred upon the State Government under Section 46 (2). Under clause (c) of sub-section (2) of Section 46, the following has been made :-

"46. Scope of Act. (1) This Act shall not by its own operation take effect in any presidency, State or place. But the State Government by an order to be published in the Official Gazette may extend the whole or any part of this Act to any presidency, State or place; and the whole or such portion of this Act as shall be specified in such order shall thereupon take effect in such presidency, State or place.

(2) When the whole or any part of this Act shall have been extended, the State Government may, from time to time, by notification in the Official Gazette, make rules consistent with this Act:

(a) to regulate the procedure to be followed by Magistrates and police-officers in the discharge of any duty imposed upon them by or under this Act;

(b) to prescribe the time, manner and conditions within and under which claims for compensation under section 15A are to be made,

the particulars to be stated in such claims, the manner in which the same are to be verified, and the proceedings (including local enquiries, if necessary) which are to be taken consequent thereon; and

(c) generally, for giving effect to the provisions of this Act.

(3) All rules made under this Act may from time to time be amended, added to or cancelled by the State Government."

VI. The Act, 1861 and the rules made thereunder constitute a self-contained code providing for the appointment of police officers and prescribing the procedure for their removal, as held by the Apex Court in **State of U.P. Vs. Babu Ram Upadhya** : AIR 1961 SC 751**, Chandra Prakash Tiwari Vs. Shakuntala Shukla** : 2002 (6) SCC 127. Thus, the Act, 1861 is a special statute and a complete code.

POLICE REGULATIONS

VII. The Police Regulations deal with matters including (i) powers and duties of officers in Part-I; (ii) particular duties including lodging of reports, investigations, inquests, arrest, bail and custody, custody and disposal of property, special crimes, patrols and pickets, execution of processes and other miscellaneous provisions in Part II; (iii) internal administration in Part III; and (iv) training in Part-IV. Regulation 61 to 64 of the Police Regulations provides for the organization and duties of Constables. Regulations 65 to 72 provide for the organization and duty of the Armed Police.

VIII. Chapter XXIX comprises of Regulations 396 to 427 and deals with appointment. Regulation 396 provides that the police force consists of (1) Provincial Police, Civil, Armed and Mounted; (2) Government Railway Police; and (iii) Village Chaukidars. Regulation 397 provides for gazetted officers of the force. Under Regulation 398, non-gazetted officers of the force are Inspectors, Sub Inspectors, Head Constables and Constables. Regulation 409 speaks of the enlistment of constables for the Armed and Civil Police, the minimum and upper age limit being 18 and 23, subject to a relaxation of five years for candidates belonging to Scheduled Castes. Regulation 413 requires that a register of candidates for recruitment shall be kept in every district. Under Regulation 418, as soon as a person's name is entered in the register of candidates and he is passed by the Civil Surgeon or immediately after enlistment in the case of a man recruited without being first registered as a candidate, a verification of his character and antecedents has to be carried out. Regulation 423 requires that a certificate of appointment, showing the date of enrolment, is to be furnished mounted on cloth to every person enrolled in the police force under the Police Act. The certificate is liable to be surrendered on quitting the service.

IX. Regulation 423 provides that these orders also apply to men temporarily appointed. Regulation 427 provides as follows:

"The men whose names are on the register of candidates for recruitment (see Paragraph 413) and who have not yet been enlisted, have a prior claim to appointment in temporary vacancies. If none of these men are available, others may be appointed. The Superintendent should insist, as far as possible, on men temporarily appointed as constables possessing the qualifications required for recruits. No man may be appointed to act temporarily as a constable in a permanent vacancy."

The Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2008

X. Rule, 2008 has come into operation on 02.12.2008. The relevant provisions for adjudication of this set of appeals are as under :-

XI. Rule 3 of Rules, 2008 lays down the definitions, which is reproduced as under :-

"3. **Definitions.-** In these rules, unless there is anything repugnant in the subject or context;

(a) '*Act*' means the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward classes) Act, 1994;

(b) *'appointing authority'* means the Deputy Inspector General of Police, Uttar Pradesh;

(c) '*Board*' means the Uttar Pradesh Police Services Service Recruitment and Promotion Board established in accordance with Government orders issued from time to time in this regard;

(d) *'Citizen of India'* means a person who is or is deemed to be a citizen of India under Part II of the Constitution;

(e) *'Constitution*' means the Constitution of India;

(f) '*Government*' means the State Government of Uttar Pradesh;

(g) '*Governor'* means the Governor of Uttar Pradesh;

(h) *'Head of the Department'* means the Director General of Police, Uttar Pradesh;

(i) **'member of the service' means a person substantively appointed under these rules or the rules or orders in force prior to the commencement of these rules to a post in the cadre of the service;**

(j) *'other backward classes of citizens'* means the backward classes of citizens specified in Schedule I of the Act, as amended from time to time;

(k) *'Police Headquarters'* means the Headquarters of the Director General of Police, Uttar Pradesh at Lucknow and Uttar Pradesh Police Headquarters at Allahabad.

(l) *'Service'* means the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service;

(m) *'Substantive appointment'* means an appointment, not being an adhoc appointment, on a post in the cadre of the service, made after selection in accordance with the rules and, if there were no rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government;

(n) 'year of recruitment' means a period of twelve months commencing on the first day of July of a calendar year."

XII. Rule 4 of the Rules, 2008 deals with "Cadre of Service', which reads as under :-

"4.(1) The strength of the service and of each category of posts therein shall be such as may be determined by the Government from time to time.

(2) The strength of the service and of each category of posts therein shall, until orders varying the same are passed under sub-rule(1), be as given below:

Name of post	**Number of Posts**		
	Permanent	Temporary	Total
1. Inspector	890	339	1229
2. Sub-Inspector	7153	3754	10907

Provided that:

(i) the Head of the Department may re-determine the number of posts of various units within the overall sanctioned allocation.

(ii) the appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post, without thereby entitling any person to compensating; or

(iii) the Governor may create such additional permanent or temporary posts as he may consider proper."

XIII. Rule 5 of Rules, 2008 deals with "Recruitment', which reads as under :-

"5. **Source of recruitment**- Recruitment to the various categories of posts in the service shall be made from the following sources:

(1) Sub-Inspector

(1) fifty percent by direct recruitment through the Board. The recruitment of dependents of those employees who died during their service is also made in accordance with the Dying in Harness Rules 1974.

(2) Fifty percent by promotion through the Board on the basis of departmental examination from amongst substantively appointed Head Constables and Constables of the Uttar Pradesh Civil Police who fulfils the following eligibility conditions:-

(a) must have completed three years service as such on the first day of the year of recruitment

(b) must not have attained the age of more than 40 years on the first day of the year of recruitment.

(2) Inspector

By promotion through the Board on the basis of departmental examination from amongst substantively appointed Sub-Inspectors who have completed five years service as such on the first day of the years of recruitment.

NOTE - The post of Sub-Inspector (Teacher) shall be filled by transfer from amongst substantively appointed Sub-Inspectors who have undergone a course in Pedagogy, as prescribed by the Government from time to time.

XIV. Subsequently, Rule 5 of the Rules, 2008 has been substituted w.e.f. 11.12.2013 and the new substitution rules is as under :-

"**5. Source of recruitment**.- Recruitment to the various categories of posts in the service shall be made form the following sources :-

(1) Sub-Inspector.- (i) Fifty percent by direct recruitment through the Board

(ii) Fifty percent by promotion through the Board on the basis of seniority subject to rejection of the unfit from amongst substantively appointed Head Constables of Uttar Pradesh Civil Police who have completed three years of service as such on the first day of the year of recruitment.

(2) Inspector.- (a) Hundred percent of the total number of sanctioned posts Inspector Civil Police sub-rule (2) of Rule 4 shall be filled by recruitment through promotion by the Board on the basis of seniority subject to rejection of unfit, from amongst substantively appointed Sub-Inspectors Civil Police, who have completed seven years of service as such on the first day of the year of recruitment, including the probation period.

(b) Inspector Civil Police promoted on ex cadre posts meeting the requirement will also be eligible for promotion to the posts of Inspector Civil Police under sub-clause (a)."

XV. Rule 6 of the Rules, 2008 relates to reservation; Rule 7 relates to the nationality; Rules 8 relates to academic qualification; Rules 9 relates to preferential qualification; Rule 10 relates to age, Rule 11 relates to character, Rules 12 relates to marital status; Rules 13 relates to physical fitness; Rules 14 relates to determination of vacancies; Rules 15 relates to procedure for direct recruitment to the post of Sub-Inspector. Rule 16 relates to promotion on the basis of seniority, which provides that fifty percent of the total number of sanctioned posts of Sub-Inspector Civil Police shall be filled by recruitment through promotion on the basis of seniority subject to rejection of unfit, along with

physical efficiency test which is of qualifying nature, through the Board on the basis of the recommendation of the Selection Committee. Section 17 of Rules, 2008 deals with the procedure for recruitment to the post of Inspector by promotion. Section 18 relates to training.

XVI. Rule 19 of the Rules, 2008 relates to appointment and proviso to Rule 19 (2) prescribed down that any person appointed to a post in the service prior to the commencement of these Rules and is working on the post shall be deemed to have been substantively appointed under these Rules and such substantive appointment shall be deemed to have been made under these Rules. Rule 19 of the Rules, 2008 is reproduced as under :-

"19.(1) Subject to the provisions of clause (a) of rule 15 the appointing authority shall make appointment by taking the names of candidates in the order in which they stand in the list prepared under rules 15, 15 (c), 15 (d), 15 (e) and sub-rule 15(f) (I), as the case may be.

(2) If more than one order of appointment are issued in respect of any one selection, a combined order shall also be issued, mentioning the names of the persons in order of seniority as determined in the selection or, as the case may be, as it stood in the cadre from which they are promoted. If the appointments are made both by direct recruitment and by promotion, names shall be arranged in accordance with the order, referred to in Rule 15 (e) :

Provided that **any person appointed before the commencement of these rules to a post under the service and working on that post shall be deemed to have been substantively appointed under these rules and such substantive appointment** shall be deemed to have been made under these rules."

XVII. Section 20 relates to Probation; Section 21 relates to confirmation; Section 22 relates to seniority, which provides that the seniority of the persons substantively appointed to a post in the service shall be determined in accordance with the Uttar Pradesh Government Servants Seniority Rules, 1991 as amended from time to time; Section 23 deals with Scales of Pay; Section 24 deals with Pay during probation; Section 25 deals with Canvassing; Section 26 deals with Regulation of other matters, which provides that in regard to the matters not specifically covered by these rules or special orders, persons appointed to the service shall be governed by the rules, regulations and orders applicable generally to government servants serving in connection with the affairs of the State. Section 27 deals with combined select list, in which it has been provided that if in any year of recruitment, appointments are made both by direct recruitment and by promotion, a combined select list shall be prepared by taking the names of the candidates from the relevant lists, in such manner that the prescribed percentage is maintained, the first name in this list being of the person appointed by promotion.

XVIII. Rule 28 deals with the relaxation from the conditions of service, which is reproduced as under :-

"**28. Relaxation from the conditions of service**.- Where the State Government is satisfied that the operation of any rule, regulating the conditions of service of persons appointed to the service causes undue hardship in any particular case, it may, notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the cases in just and equitable manner."

XIX. Section 30 of Rules, 2008 deals with overriding effect, which is reproduced as under :-

"**30. Overriding effect**.- (1) The provisions of these rules shall have effect notwithstanding anything to the contrary contained in any other rules, Government Order or Administrative instructions, made or issued by the State Government.

(2) The orders of the Government issued from time to time with regard to matters connected with or incidental to the selection, promotion, training, appointment, determination of seniority and confirmation etc. of Sub-Inspectors and Inspectors of Civil Police in Uttar Pradesh Police Force shall stand rescinded and revoked ab-initio.

(3) The members of the service shall have no claim with regard to matters connected with or incidental to the selection, promotion, training, appointment, determination of seniority and confirmation etc., under any rules, Government Orders or Administrative instructions issued in regard thereto, and any rights accrued thereunder shall be deemed terminated.

(4) Notwithstanding such rescission, the benefit of selection, promotion, training, appointment, determination of seniority and confirmation etc. granted before December 2, 2008 under the prevalent rules, Government Orders or Administrative Instructions shall not be withdrawn."

XX. The State Government, in exercise of powers under clause (c) of sub-section (2) of Section 46 read with sub-section (3) of the said section and section 2 of the Act, 1861 and all other powres enabling him in this behalf and in superssession of all existing rules or orders issued in this behalf, has framed the Uttar Pradesh Police Constables and Head Constables Service Rules, 2008 (hereinafter referred to as "U.P.P.C. & H.C. Rules, 2008". Rule 3 of the U.P.P.C. & H.C. Rules, 2008 relates to definition. Rule 3 (i) of U.P.P.C. & H.C. Rules, 2008 provides that "member of service' means a person substantively appointed under these rules or orders in force prior to commencement of these rules to a post in the cadre of the service; and Rule 3 (l) of U.P.P.C. & H.C. Rules, 2008 provides that service means the Uttar Pradesh Police Constable and Head Constable Service. "Cadre of Service' has been defined in Rule 4 of the U.P.P.C. & H.C. Rules, 2008. Rule 4 (1) of the U.P.P.C. & H.C. Rules, 2008 provides that the strength of the service and of each category of posts therein shall be such as may be determined by the Government from time to time. Rule 5 of the U.P.P.C. & H.C. Rules, 2008 relates to source of recruitment; Rule 6 relates to reservation; Rule 7 relates to nationality; Rule 8 relates to academic qualification; Rule 10 relates to age; Rule 11 relates to character; Rule 12 relates to marital status; Rule 13 relates to physical fitness; Rule 14 relates to determination of vacancies; Rule 15 relates to procedure for direct recruitment of Constable; Rule 16 relates to Character Verification; Rule 17 relates to Procedure for promotion to the post of Head Constable; Rule 18 relates to appointment, Rule 19 relates to training, Rule 20 relates to probation; Rule 21 relates to confirmation; Rule 22 relates to seniority; Rule 23 relates to scales of pay, Rule 24 relates to pay during probation; Rule 25 relates to canvassing, Rule 26 relates to Regulation of other matters, Rule 27 relates to relaxation from the conditions of service, Rule 28 relates to saving.

XXI. Vide notification No. 1835/6-pu-15-53-2015, dated 19.08.2015, published in the U.P. Gazette, Part 4, Section Ka, dated 19.08.2015, the State Government, in exercise of the powers under clause (c) of sub-section (2) of Section 46 read with sub-section (3) of the said section and Section 2 of the Police Act, 1861 (Act No. 5 of 1861) and all other powers enabling him in this behalf and in superssession

of all existing rules or orders issued, in this behalf, has framed a new rule, namely, Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 20115 (hereinafter referred to as "Rules, 2015") with a view to regulating the selection, promotion, training, appointment, determination of seniority and confirmation etc. of sub-inspectors and inspectors of the Civil Police in Uttar Pradesh Police Force. Rule 3 of the Rules, 2015 lays down the definition, which is reproduced as under :-

"**3. Definitions**.-In these rules unless there is anything repugnant in the subject or context,--

(a) 'Act' means the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (U.P. Act No. 4 of 1994) as amended from time to time.

(b) 'appointing authority' means the Deputy Inspector General of Police;

(c) 'Board' means the Uttar Pradesh Police Service Recruitment and Promotion Board, established in accordance with Government orders issued from time to time in this regard;

(d) 'Constitution' means the Constitution of India;

(e) 'Citizen of India' means a person who is or is deemed to be a citizen of India under Part II of the Constitution of India;

(f) 'Government' means the State Government of Uttar Pradesh;

(g) 'Governor' means the Governor of Uttar Pradesh;

(h) 'Head of the Department' means the Director General of Police, Uttar Pradesh;

(i) 'Member of Services' means a person appointed to a post in service under these rules or any previous rules before the commencement of these rules.

(j) 'Other Backward Classes of citizen' means the backward classes of citizens specified in Scheduled I of the Act;

(k) 'Police Headquarters' means the Headquarters of the Director General of Police, Uttar Pradesh at Lucknow and Uttar Pradesh Police Headquarters at Allahabad;

(l) 'Selection Committee' means the Committee duly constituted in accordance with the provisions of these rules to select candidates for appointment to the posts in the Services;

(m) 'Service' means the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service;

(n) 'Substantive appointment' means an appointment, not being an ad hoc appointment, on a post in the cadre of the service, made after selection in accordance with the rules and, if there were no rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government;

(o) 'Year of recruitment' means a period of twelve months commencing on the first day of July of a calendar year."

XXII. "Cadre of Service' has been defined in Rule 4 of the Rules, 2015, which is reproduced as under :-

"4. Cadre of service.-- (1) The strength of the service and of each category of posts therein shall be such as may be determined by the Government from time to time.

(2) The strength of the service and of each category of posts therein shall, until orders varying the same are passed under sub-rule (1), be as given below:

Name of Post	Number of Posts		
	Permanent	Temporary	Total
1. Inspector	890	1748	2638
2. Sub-Inspector	7153	11846	18999

Provided that;

(i) the Head of the Department may re-determine the number of posts of various units within the overall sanctioned allocation.

(ii) the appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post, without thereby entitling any person to claim compensation, or

(iii) the Governor may create such additional permanent or temporary posts as he may consider proper."

XXIII. Rule 5 deals with source of recruitment, which is reproduced as under :-

"**5. Source of recruitment**.-Recruitment to the various categories of posts in the service shall be made from the following sources :

(1) Sub-Inspector

(i) Fifty per cent by direct recruitment through the Board.

Note .- Dependents of personnel of police department deceased during service who apply for the post of Sub-Inspector of Pollice in the dependant of deceased category shall be recruited by the Board as per the policy decided by the Government. Restriction being that every year such posts shall not be more than 5 per cent of the posts to be filled by direct recruitment as against the vacancies arising in the previously sanctioned posts of sub-Inspector of Police.

(ii) Fifty per cent by promotion through the Board, on the basis of seniority subject to rejection of the unfit from amontgst the substantively appointed Head Constables of Civil Police Who have been found successful in physical efficiency test of qualifying nature and have completed three years of service as such on the first day of the year of recruitment.

(iii) Head Constable Civil Police promoted on the ex cadre posts of Inspectors Civil Police who fulfil the requirement mentioned in clause (ii) shall also be eligible for promotion to the post of sub-Inspector.

(2) Inspector

(a) Hundred per cent of the total number of sanctioned posts of Inspector civil police shall be filled by promotion by the Board on the basis of seniority subject to rejection of unfit, from amongst substantively appointed sub-Inspectors Civil Police who have completed seven years of service as such on the first day of the year of recruitment, including the probation period.

(b) Sub-Inspectors Civil Police promoted on ex cadre posts of Inspector Civil Police who fulfil the requirement mentioned in sub-clause (a) shall also be eligible for promotion to the post of Inspector Civil Police."

XXIV. Rule 6 of Rules, 2015 deals with reservation; Rule 7 relates to Nationality; Rule 8 relates of academic qualification; Rule 9 relates to preferential qualification; Rule 10 relates to age; Rule 11 relates to Character; Rule 12 relates to Marital Status; Rule 13 relates to Physical fitness; Rule 14 relates to determination of vacancies; Rule 15 relates to procedure for direct recruitment to the post of Sub-Inspector; Rule 16 relates to Character verification; Rule 17 relates to procedure for recruitment by promotion, which is reproduced as under :-

"17. Procedure for recruitment by promotion.--

(1) Promotion on the post of Sub-Inspector--

The appointment to the post of the Sub-Inspector shall be made from amongst the eligible personnel substantively appointed as Head Constable Civil Police according to the following policy--

(a) Fifty per cent of the total sanctioned posts of the Sub-Inspector Civil Police shall be filled by recruitment through promotion by the Board on the basis of seniority subject to rejection of unfit from amongst such

substantively appointed Head Constables who have completed three years of service including probation period on the first day of the year of recruitment and are found successful in qualifying physical efficiency test according to Appendix 5.

(b) Such Head Constables Civil Police promoted to ex-cadre post of Sub-Inspector Civil Police shall also be eligible for promotion to the posts of Sub-Inspector Civil Police under clause (a) who fulfil the qualifications.

(2) Promotion on the post of Inspector Civil Police.--

The appointment to the post of the Inspector Civil Police shall be made from amongst the eligible personnel substantively appointed as Sub-Inspector Civil Police according to the following policy--

(a) Hundred per cent of the total number of sanctioned posts of Inspector Civil Police shall be filled by recruitment through promotion by the Board on the basis of seniority subject to rejection of unfit from amongst those substantively appointed Sub-Inspector Civil Police who have completed seven years of service including probation period on the first day of the year of recruitment.

(b) Such Sub-Inspector Civil Police, promoted to ex-cadre post of Inspector Civil Police, shall also be eligible for promotion to the posts of Inspector Civil Police under clause (a), who fulfil the qualifications.

(3) Selection Committee for Promotion--

(a) The Selection Committee for promotion shall be constituted by the Board.

(b) The Chairman of the Committee shall be nominated by the Board and shall not be junior in rank than the Appointing Authority for the promotional post for which the selection committee is constituted. One member of appropriate rank shall be nominated by the Head of the Department in the Committee and remaining members of the Committee shall be nominated by the Board according to Government Orders for the time being in force.

(c) Undisputed seniority list for promotion shall be made available by the Police Head Quarters to the Board.

(d) Selection Committee shall submit the result of successful candidates along with its recommendations to the Board. The Board shall submit the list of selected candidates along with its recommendations to the Head of the Department. The list shall not contain candidates more than the notified vacancies.

(e) The Head of the Department shall after his approval send the List to Appointing Authority who will issue final orders for promotion.

(f) After approval by the Head of Department, final list of candidates selected for promotion shall be displayed by the Board on its website and U.P. Police website.

XXV. Rule 18 of the Rules, 2018 relates to appointment, which is reproduced as under :-

"18. Appointment.--

(1) Subject to the provisions of Rules 15 and 16 the appointing authority shall make appointment by taking the names of candidates in the same order in which they stand in the list prepared under clause (f) of Rule 15. The appointing authority shall issue the appointment letter to the candidates with the direction that they should report for service/training within one month of the date of issue of the letter or any date specified for this purpose in the appointment letter. If a candidate does not do so his selection/appointment shall be cancelled:

Provided that any person appointed to a post in the service prior to the commencement of

these rules and is working on the post, shall be deemed to have been substantively appointed under these rules.

(2) **If more than one order of appointments are issued in respect of any one selection under Rule 17, then a combined order shall also be issued, mentioning the names of the persons in order of seniority as determined in the selection or, as the case may be, as it stood in the cadre from which they are promoted.**

Provided that **any person appointed before the commencement of these rules to a post under the service and working on that post shall be deemed to have been substantively appointed** under these rules and such substantive appointment shall be deemed to have been made under these rules.

XXVI. Rule 19 relates to training; Rule 20 relates to probation; Rule 21 relates to confirmation; Rule 22 of the Rules, 2015 lays down that the seniority of the persons appointed to the post in service shall be determined in the matter laid down therein, which is reproduced as under :-

"22. Seniority.-- Seniority of persons substantively appointed to any posts in the service shall be determined as follows--

(1) Determination of seniority of sub-inspectors recruited before 2-12-2008

(a) Seniority of sub-inspectors recruited by any means who have undergone training at one time shall be determined on the basis of the percentage of marks obtained by them in training after selection in training institutions.

(b) Sub-inspectors trained in one training session shall be junior to all sub-inspectors trained in previous training session and shall be senior to all sub-inspectors trained in subsequent training sessions. Restriction being that if sub-inspectors appointed by direct recruitment and by promotion undergo training in one training session then in that case the seniority of promotes vis a vis direct recruits shall be determined in a cyclic order (the first being a promotee) so far as may be, in accordance with the quota prescribed for two sources.

(2) Determination of seniority of sub-inspectors recruited after 2-12-2008

(a) seniority of sub-inspectors appointed by any type of selection shall be determined from their date of selection. Here date of selection means the date on which the Head of the Department approves the select list sent by the Board or the selection committee after the completion of recruitment process;

(b) selection of sub-inspectors by the Board by means of direct recruitment shall be considered a separate selection. Inter se seniority of sub-inspectors recruited in a single selection under direct recruitment shall be according to the order of the final select list issued by the Board.

(c) sub-inspectors recruited under the dependants of deceased category and sub-inspectors recruited under the Skilled Sportsmen Rules, 2011 shall be considered a separate selection of direct recruitment. The inter se seniority of sub-inspectors so recruited shall be determined according to the percentage of marks obtained by them in training after selection in training institutions. In one training session if percentage of marks obtained in training institutions are same for more than one candidate then date of birth shall be made the basis of determination of inter se seniority. In case of percentage of marks and date of birth being same the seniority shall be determined according to the alphabetical order of the names in High School Certificates in English.

(d) Sub-inspectors appointed through promotion shall be considered a separate selection. If promotion to the post of sub-inspector is through an examination then inter se seniority of sub-inspectors appointed after

promotion shall be according to the final select list issued by the Board. If promotion to the post of sub-inspector is done on the basis of seniority then the inter se seniority of sub-inspectors appointed having same date of selection shall be according to their seniority in the feeder cadre and sub-inspector selected in previous year shall be senior to sub-inspector selected in subsequent year.

(3) Determination of seniority of Inspectors.--

Seniority of inspectors appointed on the basis of promotion shall be determined from their date of selection. Inter se seniority of inspectors appointed on same date of selection shall be according to their seniority in their feeder cadre and inspectors selected in previous year shall be senior to inspectors selected in subsequent year. Here date of selection means the date on which the Head of the Department approves the select list sent by the Board or the selection committee after the completion of recruitment process.

(4) The seniority in some special case determined according to a previously determined policy shall remain unchanged.

(5) Despite the aforesaid if new facts come to light about seniority determination or in case some dispute arises then it shall be resolved by the Head of the Department according to policy of the Government."

XXVII. Rule 23 relates to scales of pay; Rule 24 relates to payt during probation; Rule 25 relates to canvassing; Rule 26 relates to Regulation of other matters, which provided that in regard to the matter not specifically covered by these rules or special orders persons appointed to the service shall be governed by the rules, regulations and orders made under the Police Act.

XXVIII. Rule 27 of the Rules, 2015 deals with relaxation for the conditions of service, which reproduced as under :-

"27. Relaxation for the conditions of service.--

Where the State Government is satisfied that the operation of any rule, regulating the conditions of service of persons appointed to the service causes undue hardship in any particular case, it may, notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the cases in just and equitable manner."

XXIX. Rule 28 is a savings clause, which is reproduced as under :-

"28. Savings.--Nothing in these rules shall affect reservations and other concessions required to be provided for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other special categories of persons in accordance with the orders of the Government issued from time to time in this regard.

XXX. The State Government, in exercise of powers under clause (c) of sub-section (2) of section 46 read with sub-section (3) of the said section and section 2 of the Act, 1861 and all other powers enabling him in this behalf and in superssession of all existing rules or orders issued in this behalf, has framed the Uttar Pradesh Police Constable and Head Constable Service Rules, 2015, which is in operation w.e.f. 02.12.2015.

APPELLANTS' CASE

(16) On behalf of the appellants, broadly the submissions made are as under :-

(a) The persons, who were covered by the Government Order dated 23.07.2015 and who might be prejudicially and adversely affected by

the outcome of the writ petitions, were not impleaded as party respondents and only 13 persons out of 990 non-gazetted police personnel have been impleaded in the writ petitions, hence the writ petitions ought to be dismissed by the learned Single Judge for non-joinder of necessary parties. Furthermore, the writ petitions were not maintainable in view of non-compliance of the provisions of Order I Rule 8 of the Code of Civil Procedure, 1908. The submission of the appellants is that in case there are large number of persons likely to be adversely affected, the provision of impleading some of them in representative capacity in accordance with the principles laid down in Order I Rule 8 of the Code of Civil Procedure, 1908 are required to be followed, which mandates permission of the Court in this regard and publication in the notice. In the instant case, no permission was ever sought nor any advertisement was issued prior to passing of the judgment and order dated 20.02.2019 under appeal. He further argued that the principles of Order I Rule 8 of the Code of Civil Procedure, 1908 are applied in writ proceedings under Article 226 of the Constitution of India and which provide that one person may sue or defend on behalf of all in same interest with the permission of the Court, however, before the aforesaid permission is granted, it is necessary to give notice of the institution of the suit at the plaintiff's expense to all persons so interested, either by personal service or where, by reason of the number of persons or any other cause such service is not practicable, by public advertisement, as the Court in each case may direct. Furthermore, prior to passing the judgment and order dated 20.02.2019 under appeals, no advertisement was issued regarding the institution of the aforesaid writ petitions, therefore, it is clear that the judgment and order dated 20.02.2019 under appeal has been passed without granting opportunity to the necessary parties to a lis to come and defend themselves. In support of this submissions, appellants have relied upon the judgment of the Apex Court in the case of **Suresh Vs. Yeotmal District Central Co-operative Bank and another** : (2008) 12 SCC 558, **State of Rajasthan Vs. Ucchab Lal Chhanwal** : (2014) 1 SCC 144, **Ranjan Kumar and others Vs. State of Bihar and others** : (2014) 16 SCC 187, **Rashmi Mishra Vs. M.P. Public Service Commission and others** : (2006) 12 SCC 724.

(b) The appellants/private respondents in writ petitions were not afforded opportunity of hearing by the learned Single Judge and the impugned judgment is ex parte. Even the learned single Judge has not taken into consideration the case of the appellants, who filed their counter affidavit before the learned Single Judge as counter affidavit filed by them has not at all been adverted to by the learned Single Judge. Appellants' submission is that on the date when the writ petitions were being finally heard by the learned Single Judge, a request was made on behalf of the Counsel for the appellants before the learned Single Judge that they are out of station on account of marriage of a close relative and as such, the matter may be adjourned only for a day and further matter may be fixed for the succeeding day itself. However, the learned Single Judge, without considering the fact that even on earlier occasion, the matter was finally heard and judgment was reserved on 13.04.2018 and later on it was released by the Co-ordinate Bench of the Court and was again being listed for final hearing, has passed the judgment and order dated 20.02.2019 under appeals without affording opportunity of hearing to the Counsel for the appellants as well as other Counsel for the private respondents. This fact of request having been made to the learned Single Judge for adjournment for a day has not been disputed in the counter affidavit filed on behalf of the respondent no.8 in Special Appeal No. 100 of 2019 and, therefore, the aforesaid defect of non-joinder of necessary parties could not be pointed out to the learned Single Judge, which itself renders the petition not maintainable and liable to be dismissed at the very outset.

(c) While adjudicating the issue raised in the writ petitions, the learned Single Judge has

not at all considered the relevant provisions of Police Act, 1861 and Police Regulations and has also ignored the relevant and material provisions of Rule, 2008 and Rule, 2015. Further the learned Single Judge has not at all taken into consideration the previous judgments of the Apex Court as well as this Court which have clarified and laid down the nature of Government Orders issued under Section 2 of the Act, 1861 and also the nature of appointment on the basis of those Government Orders. Elaborating his submission, appellants have asserted that the appellants and other similarly situated out of turn promotees were appointed in accordance with the procedure prescribed for the said purpose under law against substantive vacant posts in the cadre. Thus, since the date of their initial appointment/promotion, they were "members of service' having been born in the cadre since their date of initial appointment on the post of Inspector and as such, their appointment on the post of Inspector on out of turn basis cannot at all be treated to be ex cadre, and treating their appointment on the post of Inspector as an ex cadre appointment/promotion would not only be illegal but would also be absolutely factually incorrect. To substantiate the aforesaid submissions, appellants has drawn our attention to the Police Act, 1861 and has argued that a perusal of Section 2 of the Police Act, 1861, it reveals that the State Government has been empowered to lay down the conditions of service and pay of the members of subordinate police force. Further Section 46-2 (c) of the Police Act, 1861 empowers the State Government to make rules consistent with the provisions of the Act by notification in official gazette generally for giving effect to the provisions of the said Act. A perusal of the aforesaid makes it abundantly clear that the State Government while laying down the conditions of service of police personnel exercises statutory powers available to it under Section 2 as well as Section 42-2(c) of the Police Act, 1861. He argued that under Section 2 of the Police Act, 1861, statutory orders are issued and under Section 42-2(c) of the Police Act, 1861, rules are framed by the State Government. However, both, orders under Section 2 of the Police Act, 1861 and Rules under Section 42-2(c) of the Police Act, 1861, have statutory origin and none is subordinate to the other.

(d) It has been stated by learned Senior Counsel Sri Kalia that the State Government, while exercising power enshrined to it under Section 2 of the Police Act, 1861, issued an order dated 03.02.1994, by which it was provided that those Constables and Sub-Inspectors/Platoon Commanders, who have shown exemplary courage, be given appointment from the post of Constable to Head Constable and from the post of Sub-Inspector and Platoon Commander to Inspector/Company Commander on ex cadre posts. It was further provided that for each year, such ex cadre posts would be created by the State Government on the proposal of the Inspector General of Police, Lucknow and further it has overriding effect over any other existing orders. He argued that the aforesaid order dated 03.02.1994 contemplated that the promotions would be made ex cadre posts, which were to be sanctioned by the State Government for the said purpose every year, however, no such post were ever created and the out of turn promotions were made on cadre posts of Head Constables and Inspectors, respectively. Subsequently, on 01.05.1999, the State Government issued another statutory order referable to Section 2 of the Police Act, 1861, by which it laid down that out of turn promotions would be against the vacancies existing in the cadre, however, promotion would be treated ex cadre and its benefit will not be available for the purposes of determination of seniority. He pointed out that at the time of issuance of the aforesaid statutory orders dated 03.02.1994 and 01.05.1999, there were no service rules framed by the State Government under Section 46-2 (c) of the Police Act, 1861. Therefore, all the out of turn

promotees were, thus, promoted on the cadre posts and the said promotions were granted by the State Government in accordance with Government Orders which were issued in exercise of the statutory powers available to it under the provisions of the Police Act, 1861. Thus, it is clear that promotion of the appellants were made in accordance with the procedure, then, prevailing in law and were made on cadre posts.

(e) Sri Kalia has further stated that in exercise of powers made to it under Section 2 of the Section 46 read with Section 2 of the Police Act, 1861, the State Government framed the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2008 (hereinafter referred to as the "***Rules, 2008***"). The Rules, 2008 were deemed to come into force w.e.f. 02.12.2008. Rule 3 of the Rules, 2008 lays down the definitions. Rule 3(i) of Rules, 2008 provides "member of service', which means a person substantively appointed under these rules or the rules or orders in force prior to the commencement of these rules to a post in the cadre of the service. Rule 3 (l) provides "service', which means that the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service. The definition of substantive appointment has been laid down in Rule 3 (m), which provides that substantive appointment means an appointment, not being an ad hoc appointment, on a post in the cadre of the service, made after selection in accordance with rules and, if there were no rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government. He argued that a bare reading of the aforesaid Rules and after taking into consideration the same, that out of turn promotees were appointed on cadre posts as per the then existing procedure issued by the State Government under the provisions of the Act, 1861, such out of turn promotees were member of the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service having been substantively appointed on a cadre post prior to the issuance of the Rules, 2008 and after the advent of the said rules, they continued in the said capacity. It has been pointed out by Sri Kalia that cadre of service has been defined in Rule 4 of the Rules, 2008, which lays down that the strength of service and of each category of service therein shall be such as may be determined by the Government from time to time. Rule 19 of the Rules, 2008 relates to the appointment and proviso to Rules 19 (2) of the Rules, 2008 prescribed that any person appointed to a post in the service prior to the commencement of these rules and is working on the post shall be deemed to have been substantively appointed under these rules and such substantive appointment shall be deemed to have been made under these rules. Rule 22 of the Rules, 2008 lays down that the seniority of the persons appointed to the post in service shall be determined in accordance with Uttar Pradesh Government Servant Seniority Rules, 1991 (hereinafter referred to as "***Seniority Rules, 1991***") as amended from time to time. Further Rule 28 of the Rules, 2008 empowers the State Government to grant relaxation from the conditions of service if it is satisfied that operation of any rule, regulating the condition of service of persons appointed to the service causes undue hardship in any particular case, it may notwithstanding any thing contained in the Rules applicable to the case, by order dispense with or relax the requirement of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the cases in just and equitable manner. Rule 30 of the Rules, 2008 grants overriding effect to the said rules notwithstanding anything contrary contained in any other rules, government order or administrative instructions made or issued by the State Government and further Sub-Rule 4 of Rule 30 also provides that notwithstanding such rescission, the benefit of selection, promotion, training, appointment, determination of seniority and confirmation etc. granted before 02.12.2008 under the prevalent rules, government orders or

administrative instructions shall not be withdrawn.

(f) Sri Kalia has stated that on 07.06.2014, the State Government issued an order under Section 2 of the Police Act, 1861, by means of which the mechanism of out of turn promotion was done away with and in its place other arrangements, namely, cash reward and grant of medals was brought into force, as such prior to 07.06.2014, the Government Orders dated 03.02.1994 and 01.05.1999 was being applied for granting out of turn promotion on cadre posts on personnel who had shown exemplary courage, while carrying out their duties. He argued that once, on 07.06.2014, the State Government took a decision of rescinding its policy of granting out of turn promotion and replacing the same with other arrangement, the State Government in order to rectify the anomaly created vide earlier order dated 01.05.1999 which provided that although promotions would be made on cadre post, the same would be treated ex cadre and the same would not confer any benefit for determination of seniority, issued the order dated 23.07.2015 rectifying the said anomaly by means of which the earlier order dated 01.05.1999 was rescinded with immediate effect and it was provided that 990 Non-Gazetted Police Officers/ Employees, who had been granted out of turn promotion w.e.f. 1994 till 2014, their probation shall be counted with effect from their date of out of turn promotion.

(g) Elaborating his submission, Shri Kalia has submitted that the order dated 23.07.2015 was also issued by the State Government exercising powers available to it under Section 2 of the Police Act, 1861. The said order was challenged by the writ petitioners on the ground that the same has been issued in violation of the express provisions of the Rules, 2008 and operation of which would cause them undue hardship, since the out of turn promotees would be placed higher in rank in the seniority list. He argued that seniority is a civil right available to a Government servant to be determined by the policy of the employer and further it is always open for the employer/State Government to amend/modify its policy and, thus, there is no vested right available to a Government servant if such policy is changed. To strengthen his submission, he has placed reliance upon the judgment of the Apex Court rendered in **Prafful Kumar Das Vs. State of Orissa** : (2003) 11 SCC 614.

(h) Sri Kalia has pointed out that the writ petitioners have worked under the out of turn promotees for considerable period of time i.e. from 1994 till 2014 and have choosen not to challenge the arrangement of grant of out of turn promotion and as such, only on the ground that they would be facing hardship by loss of seniority is no ground to strike down the policy of the State Government as laid down vide order dated 23.07.2015. He argued that the provisions of Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2015 (hereinafter referred to as "**Rules, 2015**") have been framed by the State Government in exercise of power available to it under Section 46-2 (c) of the Police Act, 1861 read with Section 2 of the Police Act, 1861, wherein the arrangement provided vide order dated 23.07.2015 has been specifically saved and incorporated in the Rules, 2015 and further out of turn promotions have been statutorily saved for all purposes. Rule 3 of the Rules, 2015 lays down the definitions and further Rule 3(i) provides for *"member of service'*, which means a person appointed to a post in service under these rules or any previous rules before the commencement of these rules. Rule 3 (m) of Rules, 2015 provides the definition of "Service' which means the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service. The definition of "Substantive Appointment' has been laid down in Rule 3 (n) of Rules, 2015, which means an appointment, not being an *ad hoc* appointment, on a post in the cadre of the service, made after selection in accordance with the rules and, if there were no

rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government.

(i) Sri Kalia has further pointed out that Cadre of Service has been defined in Rule 4 (1) of the Rules, 2008, which lays down that the strength of service and of each category of service therein shall be such as may be determined by the Government from time to time. Rule 18 of the Rules, 2008 relates to appointment and proviso to Rules 18 (2) of the Rules, 2008 provides that any person appointed before the commencement of these rules to a post under the service and is working on the that post shall be deemed to have been substantively appointed under these rules and such substantive appointment shall be deemed to have been made under these rules. Rule 22 of the Rules, 2015 lays down that the seniority of the persons appointed to the post in service shall be determined in the manner laid down therein and further Rule 22 (3) of the Rules, 2015 deals with determination of seniority of Inspectors. He argued that under the provisions of Rule 22 (4) of the Rules, 2015, the seniority in some special case determined according to previously determined policy shall remain unchanged. He argued that a perusal of the Rule 22 (4) of the Rules, 2015 makes it abundantly clear that the policy as determined by the State Government vide order dated 23.07.2015 has been specifically saved by operation of the aforesaid rule. He further argued that Rule 27 of the Rules, 2015 empowers the State Government to grant relaxation from the conditions of service, if it is satisfied that operation of any rule, regulating the condition of service of persons appointed to the service cause undue hardship in any particular case, it may not withstanding anything contained in the Rules applicable to the case by order dispense with or relax the requirement of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the cases in just and equitable manner. Thus, from a conjoint reading of the Rules, 2008 and Rules 2015, it is unambiguously clear that the appellants were members of service from the initial date of their out of turn promotion on the post of Inspector, for the reason firstly, that their promotion was against a vacancy in the cadre, secondly it was in accordance with the procedure prescribed by law i.e. under the Government Order issued under the provisions of Section 2 of the Police Act, 1861 and thirdly it was a substantive appointment. Thus, seniority could not have been denied to them by any stretch of imagination or by operation of any law.

(j) It has further been stated by the learned Senior Counsel Sri Kalia that the policy decision taken by the State Government vide order dated 23.07.2015 does not suffer from any illegality and is not violative of any of the provisions of Rules, 2008 and Rules, 2015 rather the same is protected under both the rules and further the writ petitioners have not challenged the aforesaid provisions contained in the said Rules and the same is neither arbitrary nor discriminatory in any manner so as to render it violative of Article 14 of the Constitution of India.

(k) Sri Kalia has pointed out that it was nobody's case that the Government Order dated 23.07.2015 impugned in the writ petitions has not been issued by the State Government, hence the learned Single Judge erred in law in holding that there is no order of his Excellency the Governor. Thus, it is axiomatic that the writ petitions were not maintainable on the first count itself and further the same were bereft of any merit in them. The policy of the State Government issued vide order dated 23.07.2015 impugned in the writ petitions was legally justified and the same could not have been impeached alleging violation of the Rules, 2008 as well as Rules, 2015, wherein the said policy decision has been specifically saved and granted statutory recognition. He argued that the aforesaid propositions of fact and law was not

considered by the learned Single Judge while passing the judgment and order under appeal for the reason that the counsel for the appellants could not be heard and, thus, it is clear that judgment and order under appeal is hit by the doctrine of *per incurium* as well as the doctrine of *sub silentio*. Hence, the judgment and order under appeal by which bunch of writ petitions were allowed, is liable to be set-aside and the said writ petitions are liable to be dismissed.

(l) Sri Anoop Trivedi, learned Senior Advocate, appearing on behalf of the appellants in Special Appeal No. 103 of 2019 has reiterated the aforesaid submissions advanced by Shri S.K. Kalia and has argued that the issue in the writ petitions is in respect of the promotions of Sub-Inspectors to the rank of Inspectors. The aforesaid promotions had been governed by the Government Order dated 05.11.1965, which provided for the method of selection of Sub-Inspector for promotion to the rank of Inspector. The Government Order dated 05.11.1965 issued by the Government is referable to Section 2 of the Police Act, 1861. The Government Order dated 29.10.1983 issued under Section 2 of the Police Act, 1861 provided for a selection committee for the purpose of selecting Sub-Inspectors for promotion to the post of Inspectors. The Government Order dated 05.11.1965 and subsequent Government Orders were rescinded/modified by the Government Order dated 24.07.2003 issued under Section 2 of the Police Act, 1861 providing for the Selection Process for promotion of Sub-Inspector (Civil Police) to the Inspector (Civil Police). The aforesaid Government Orders dated 05.11.1965, 29.8.1983 and 24.07.2003 were providing selection process for normal promotion of the Sub-Inspectors to the rank of Inspectors. These Government Orders have been issued under Section 2 of the Police Act, 1861 and were having statutory force, hence they are having mandatory and binding effect as held by the Full Bench of this Court in **Vijay Singh and others Vs. State of U.P. and others :** (2005) 2 AWC 1191 and **State of U.P. and others Vs. Rajendra Singh and another** : 2015 (4) ADJ 575.

(m) Sri Trivedi has submitted that the Police Act is a State subject under Entry 82 of the State list to the 7th Schedule of the Constitution of India. The Police Act was enacted in the year 1857 and received the assent of the then Governor General on 22.03.1861. Section 2 of the Police Act, 1861 provides for the constitution of force. Sub-section 2 of Section 46 of Police Act, 1861 confers a rule making power upon the State Government. He argued that from the aforesaid, it is quite evident that Section 2 of the Police Act, 1861 is the exclusive provision empowering the State to issue Government Order from time to time for enrollment of police personnel and constitution of Police Force. Section 46 (2) of the Police Act, 1861 provides that the State Government may from time to time by notification in the Gazette, make rules consistent with the act, Enrollment/recruitment of police personnel or anything related to that is not provided under Section 46 (2) of the Police Act, 1861. He pointed out that the Rules, 2008 have come into operation on 02.12.2008.

(n) Sri Trivedi, while drawing our attention to Rule 3 (i), 3 (m), 19 (1) and (2) of the Rules 2008, has contended that Sub-Rule 2 of Rule 19 of Rules, 2008 clarifies that any person appointed prior to the commencement of rules to a post under the service and working on that post shall be deemed to have substantive appointment under the Rules. He, thereafter, drawing our attention to Rule 28, 30 (1), 30 (2), 30 (3), 30 (4) of Rules, 2008, and has argued that sub-rule (4) of Rule 30 of the Rules, 2008 provides that the benefit of selection, promotion, training, appointment, seniority and confirmation etc. granted before the commencement of the Rules under the Government Orders or the administrative instructions shall not be withdrawn. He also drawing our attention of Rule 3 (i), 3 (n), 18 (2), 22 (3), 22 (4), 26 and 27

of the Rules, 2015 and has contended that these statutory provisions have not been considered by the learned Single Judge while passing the judgment and order under appeal. He argued that Rule 3 (m) of Rules, 2008 though has been noted by the learned Single Judge but part of it has not at all been considered which provides that where there were no rules, the substantive appointment means in accordance with the procedure prescribed for the time being as per the executive instructions provided by the Government. Similarly, Rule 3 (n) of the Rules, 2015 though noted by the learned Single Judge, however, were not completely considered by the learned Single Judge and the part of the said Rules, 2015, where there were no rules, the substantive appointment means in accordance with the procedure prescribed for time being by executive instructions issued by the Government has all together been ignored.

(o) Sri Trivedi has further submitted that the learned Single Judge has also not considered the object of the Government Order dated 03.02.1994. In a previous judgment of this Court rendered by the learned Single Judge in the case of **Krishna Kumar Pandey Vs. State of U.P. and others** : 2001 (3) AWC 2163, the object of the Government Order dated 03.02.1994 was considered and in paras 6 to 8 of the aforesaid report, it has been categorically held that the aforesaid Government Order does not contemplate merely courage rather indomitable courage for grant of out of turn promotion and for an act of bravery, a police officer can be rewarded according to Chapter XXXI of Police Regulations, but the Government Order dated 03.02.1994 required something more than good work and bravery and for out of turn promotion, the police officers must have shown indomitable courage and gallantry. However, the learned learned Single Judge, while passing the impugned judgment, was much influenced with the promulgation of Rules, 2008 and discarded the orders issued under Section 2 of the Police Act, 1861 because the learned Single Judge escaped attention of the fact that the Government Order issued under Section 2 of the Police Act, 1861 and Rules framed under Section 46 (2) of the Police Act, 1861 are both pieces of subordinate/delegate legislation. He argued that as the object of Government Order dated 03.02.1994, its source, its nature etc. could not be considered by the learned Single Judge and, as such, the nature of appointment by way of out of turn promotion could not be tested by the learned Single Judge. In fact the out of turn promotion was having a statutory backing.

(p) It has been contended by Sri Trivedi that the learned Single Judge, while considering Rules, 2008, has not taken into consideration the meaning of term "members of service'. Rule 3 (i) of Rules, 2008 categorically provides that any person substantively appointed under the orders enforced prior to the commencement of these Rules to a post of Cadre of the Service shall be deemed to be substantively appointed in service. Further, learned Single Judge has completely ignored the part of definition of substantive appointment as occurring in Rule 3 (m) of the Rules, 2008. The part which was conjuncted after the word "and' has not been taken into account. The part which was highlighted in bold in the impugned judgment has only been considered and the part which provides that the substantive appointment would also mean to the appointment in accordance with the procedure prescribed for the time being by executive instructions issued by the Government, if there were no rules, has not been considered. Similarly proviso to sub-rule 2 of Rule 19 of the Rules, 2008 has also not been taken into consideration, which provides that any person appointed to a post in the service prior to commencement of the Rules, 2008 and was working on the post shall be deemed to be substantively appointed under the said Rules. The learned Single Judge has also not taken into consideration the sub-rule 4 of Rule 30 which categorically provided that nothing contained in the Rules can withdraw the benefit of the

selection, promotion, training appointment, determination of seniority and confirmation etc. granted before 02.12.2008 under the prevalent Government Orders. Similarly, learned Single Judge could not give any findings to the policy decision contemplated under Government Order dated 07.06.2014 and, therefore, could not have the occasion to test the need of issuing Government Order dated 23.07.2015. He argued that the learned Single Judge could not advert to the necessity of bringing a new set of Rules after the policy decision dated 23.07.2015 and their impact/effect on the policy decision dated 23.07.2015. He argued that the effect of Government Order dated 23.07.2015 is quite apparent in the Rules, 2015. A bare glance on the relevant statutory provisions of Rules, 2015 established that the policy decision dated 23.07.2015 taken with reference to Section (2) of Police Act, 1861 is clearly saved by Rules, 2015.

(q) Elaborating his submission, Sri Trivedi has submitted that the learned Single Judge could not advert himself to the Rule 3 (I) and 3 (n) of Rules, 2015, which provides for the term "members of service' and "substantive appointment', respectively. The learned Single Judge has also not considered the proviso to the Rule 18 (2) of the Rules, 2015. The aforesaid proviso categorically provides that any person appointed before the commencement of Rule, 2015 to a post under the service and working on that post shall be deemed to have been substantively appointed under the said Rules. However, this aspect of the matter has been completely ignored by the learned Single Judge. Similarly, sub-rule (3), (4) and (5) of Rule 22 of the Rules, 2015 have not been considered which proceed to save the policy decision contemplated under Government Order dated 23.07.2015 wherein the sub-rule 4 provides that the seniority in some special case determined according to previous determined policy shall remain unchanged. Furthermore, the learned Single Judge has also remained oblivious to Rule 28 of the Rule, 2008 and Rule 27 of Rules, 2015, which provide for relaxation. To strengthen his submission, he has placed reliance upon **Narendra Chadha and others Vs. Union of India and others** : 1986 (2) SCC 157, **Union of India and others Vs. Pratap Narain and others** : 1992 (3) SCC 268, **State of U.P. and others Vs. Rajendra Singh and another** : 2015 (4) ADJ LB (FB), **Vijay Kumar Gaur Vs. State of U.P. and anothe**r : 2016 (11) ADJ 502 (LB), **Vijay Singh and others Vs State of U.P. and others** : 2005 AWC 1191 (FB), **Ajay Kumar Bhuyan Vs. State of Orissa** : 2003 (1) SCC 707, **Prem Kumar Upadhyay Vs. State and others** : 2014 (1) ADJ 536, **Kandwa Kumar Mishra Vs. State (Special Appeal No. 117 of 2014, decided on 03.02.2014), Krishna Kumar Pandey Vs. State of U.P. and another** : 2001 (3) AWC 2163.

(r) It has been submitted by Sri Trivedi that the learned Single Judge has not taken into consideration the relevant statutory provisions, relevant Government Orders and the previous judgments of the Apex Court and this Court and thus the judgment of the learned Single Judge can be termed to be *per incuriam* and the same suffers from the vice of doctrine of *sub silentio*. In support of this submission, he has placed reliance upon the judgments of the Apex Court in **V. Kishan Rao Vs. Nikhil Super Specialty Hospital** : 2010 (5) SCC 513, **Government of A.P. and another Vs. B. Satyanarayan** : 2000 (4) SCC 262**, Young Vs. Bristol Aeroplane Company** : 1948 78 L.I.L Rep 6**, Municipal Corporation of Delhi Vs. Gurnam Kaur** : 1989 (1) SCC 101, **Nirmaljeet Kaur Vs. State of M.P. and another :** 2004 (7) SCC 558, **Tuples Educational Society and another Vs. State of U.P. and another** : 2008 (3) AWC 2499 (FB), **State of U.P. and another Vs. Synthetics and Chemicals Ltd. and another** : 1991 (4) SCC 139, **Public Welfare Hospital, Varanasi Vs. State of U.P. and others :** 2011 (5) AWC 4757, and **U. Barkath Vs. Director**

General of Police : 2019 SCC Online Mad. 4347.

(s) The other submission of the learned Senior Counsel Sri Trivedi is that once the policy decision has been taken vide Government Order dated 07.06.2014, the Government Order dated 23.07.2015 became need of the hour to be issued under Section 2 of the Police Act, 1861. This was done in order to save those appointments and further to protect the right accrued to all those police officers who were promoted out of turn. The policy decisions has further necessitated to promulgate the new set of rules in consonance with the said policy decision. The rule pertaining to appointment i.e. Rule 18 in 2015 Rules which goes to demonstrate that proviso to sub-rule (2) that any person appointed before the commencement of these rules and working over the post deemed to have been substantively appointed under the said rules. He argued that Rule 22 pertaining to seniority was also suitably amended in furtherance of the policy decision contained in Government Order dated 07.06.2014 and 23.07.2015 but the learned Single Judge has not taken into consideration sub-rule 3, 4 and 5 of the Rule 22 of the Rules, 2015 even though the Rule 4 categorically provides that the seniority in some special case shall be determined on the basis of previously determined policy shall remain unchanged.

(t) Sri Trivedi has further stated that at the best, Government Order dated 23.07.2015 can be treated to be integration in the cadre or amalgamation/merger of the cadre and ex cadre. He argued that it is settled law that questions relating to creation/abolition of cadre/categories of posts pertain to the field of policy decision and the same is within the exclusive discretion and jurisdiction of the State. Similarly, amalgamation/merger/bifurcation of the cadre creation or abolition of different category post or cadre classification re-constitution and re-structure the pattern and cadres/categories of service fall within the exclusive domain of the policy decision of the State Government. There is no right of any employee of the State to challenge such action on the ground of co-incidental prejudice or the reduced chances of promotion. A Government servant has no right to challenge the authority of the State to amend, alter and bring into new rules. But in the instant case, the State Government has taken policy decision of integration/merger of ex cadre into cadre. The amalgamation of employees by the Government Order dated 23.07.2015 was the need of the hour in the wake of the policy decision dated 07.06.2014. The legislature was also conscious of the aforesaid policy decisions and thus, Rules, 2008 were repealed and in its place, new Rules 2015 have been promulgated. These rules which have saved these policy decisions have not been challenged by the writ petitioners/ private respondents with regard to competence of the State Government for taking action of amalgamation/merger of the Government Servants or the creation/management of the cadre.

(u) To strengthen the aforesaid submission, Sri Trivedi has relied upon **S.P. Shivprasad Pipal Vs. Union of India** : 1998 AIR (SC) 1982, **S.I. Roopal and another Vs. Lt. Governor through Chief Secretary, Delhi and others** : AIR 2000 SC 594, **State of Maharastra Vs. Chandrakant Anand Kulkarni** : 1981 AIR (SC) 1990, **P.U. Joshi and others Vs. Accountant General, Ahemedabad and others** : 2003 (2) SCC 632, **Tej Narain Tiwari Vs. State of Bihar and others** : 1993 Supp (2) SCC 623, **Prakash Ranjan Kumar and others and Ajit Kumar Saha vs. State of Bihar and others** : 2007 (2) BLJR 2987, **On Prakash Sharma and others Vs. Union of India and others** : 1985 (Supp) SCC 218, **S.A. Siddiqui Vs. M. Wajid Khan** : 1999 AIR (SC) 604, **Reserve Bank of India Vs. N.C. Paliwal and others** : (1976) 4 SCC 838, **Prafulla Kumar Das and others Vs. State of Orissa and others** : (2003) 11 SCC 614, **State of Rajasthan and another Vs. Shatilal Jain**

and others : 1989 Supp (2) SCC 777, **Tamil Nadu Education Department Ministerial and General Subordinate Services Association and others Vs. State of Tamil Nadu and others :** (1997) 8 SCC 522, **Union of India and others Vs. S.L. Dutta and others** : AIR 1991 SC 363.

APPELLANTS/STATE CASE

(17) On behalf of the State, submission of Sri Manjive Shukla, learned Additional Chief Standing Counsel is as under :-

(a) The necessary parties were not impleaded as respondents in the writ petitions and, therefore, the writ petitions ought to have been dismissed by the learned Single Judge for non-joinder of necessary parties. He argued that the Government Order dated 23.07.2015 was related to 990 employees including Head Constables, but without impleading affected parties, learned Single Judge has quashed the Government Order dated 23.07.2015 and therefore, the impugned judgment and order dated 20.02.2019 is unsustainable in the eyes of law. He also argued that writ petitions were not maintainable in view of non-compliance of the provisions of Order I Rule 8 of the Code of Civil Procedure, 1908.

(b) The next submission of the learned Additional Chief Standing Counsel is that out of turn promotees were appointed in accordance with the procedure prescribed for the said purpose under law against substantive vacant posts in the cadre and thus, since the date of their initial appointment/promotion, they were "member of service' having been born in the cadre since their date of initial appointment on the post of Inspector and as such, their appointment on the post of Inspector on out of turn basis cannot be at all treated to be ex cadre, and treating their appointment on the post of Inspector as an ex cadre, appointment/promotion would not only be illegal, but would also be absolutely factually incorrect. He argued that as per Section 2 of the Police Act, 1861, the State Government has been conferred power to lay down the conditions of service and pay of the members of sub-ordinate police force. Section 46 (2) (c) of the Police Act, 1861 further empowers the State Government to make Rules consistent with the provisions of the Act by Notification under official gazette for giving effect to the provisions of the Police Act, 1861. Thus it is quite clear that the State Government, while laying down the conditions of service of police personnel exercises statutory powers available to it under Section 2 as well as Section 46 (2) (c) of the Police Act, 1861.

(c) Elaborating his submission, learned Additional Chief Standing Counsel has submitted that under Section 2 of the Police Act, 1861, statutory orders are issued and under Section 46 (2) (c) of the Police Act, 1861, rules are framed by the State Government. However, orders, under Section 2 and Rules under Section 46 (2) (c) of the Police Act, 1861, both have statutory origin and none is subordinate to the other. He argued that in exercise of powers available to it under Section 2 of the Police Act, 1861, the State Government issued an order dated 03.02.1994 by means of which it was provided that those Constables and Sub-Inspectors/Platoon Commanders, who have shown exemplary courage, be given appointment from the post of Constable to Head Constable and from the post of Sub-Inspector and Platoon Commander to Inspector/Company Commander on ex cadre posts, would be created by the State Government on the proposal of the Inspector General of Police, Lucknow. The aforesaid office memorandum dated 03.02.1994 further provided that it has overriding effect over any other existing orders. He argued that although the aforesaid order contemplated that the promotions would be made ex cadre posts, which were to be sanctioned by the State Government for the said purpose every year. However, no such post were ever created and the

out of turn promotions were made on cadre posts of Head Constables and Inspectors, respectively. Subsequently, on 01.05.1999, the State Government issued another statutory order referable to Section 2 of the Police Act, 1861 by means of which it laid down that out of turn promotions would be against the vacancies existing the cadre. However, it would be on ex cadre basis and its benefit will not be available for the purposes of determination of seniority. He pointed out that at the time of issuance of statutory orders i.e. 03.02.1994 and 01.05.1999, there were no service rules framed by the State Government under Section 46 (2) (c) of the Police Act, 1861.

(d) It has been stated by the learned Additional Chief Standing Counsel that in exercise of power available to it under sub-Section (2) of Section 46 read with Section 2 of the Police Act, 1861, the State Government has framed the Rules, 2008. This rules were deemed to come into force w.e.f. 02.12.2009. Rule 3 of the Rules, 2008 lays down the definitions and further Rule 3 (i) provides for "member of service', whereas definition of "service' has been laid down in Rule 3 (l) and the definition of "Substantive Appointment' has been laid down in Rule 3 (m) of Rules, 2008. He argued that a bare reading of the aforesaid Rules and after taking into consideration the same that out of turn promotees were appointed on cadre posts as per the existing procedure issued by the State Government under the provisions of the Police Act, 1861 and such out of turn promotees were of the U.P. Sub-Inspector and Inspector (Civil Police) Service having been substantively appointed on a cadre post prior to the issuance of Rules, 2008 and after the advent of the said Rules, they continued in the said capacity.

(e) Learned Additional Chief Standing Counsel has further stated that "Cadre of Service' has been defined in Rule 4 of the Rules, 2008, which lays down that the strength of service and of each category of service therein shall be such as may be determined by the Government from time to time. Rule 19 of the Rules, 2018 relates to appointment and proviso to Rule 19 (2) prescribes down that any person appointed to a post in the service prior to the commencement of these Rules and is working on the post shall be deemed to have been substantively appointed under these rules and such substantive appointment shall be deemed to have been made under these Rules. Rule 22 of the Rules, 2018 lays down that the seniority of the persons appointed to the post in service shall be determined in accordance with U.P. Government Servant Seniority Rules, 1991, as amended from time to time. Rule 28 of the Rules, 2008 empower the State Government to grant relaxation from the conditions of service, if it is satisfied that operation of any rule, regulating the condition of service of persons appointed to the service cause undue hardship in any particular case, it may notwithstanding anything contained in the Rules applicable to the case, by order dispense with or relax the requirement of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the cases in just and equitable manner.

(f) It has been argued by the learned Additional Chief Standing Counsel that Rule 30 of the Rules, 2008 grants overriding effect to the said rules notwithstanding anything contrary contained in any other rules, Government Order or administrative instructions made or issued by the State Government and further sub-rule (4) of Rule 30 also provides that notwithstanding such rescission, the benefit of selection, promotion, training, appointment, determination of seniority and confirmation etc. granted before 02.12.2008 under the prevalent rules, government orders or administrative instructions shall not be withdrawn. He further argued that on 07.06.2014, the State Government issued an order under Section 2 of the Police Act, 1861, by which the mechanism of out of turn promotion was done away with and in its place, other arrangement, namely, cash reward and grant of

medals, was brought into force and as such, prior to 07.06.2014, the Government Orders dated 03.02.1994 and 01.05.1999 was being applied for granting out of turn promotion on cadre posts of personnel who had shown exemplary courage, while carrying out their duties. His submission is that once the State Government on 07.06.2014 took a decision for rescinding its policy for granting out of turn promotion and replacing the same with other arrangement, the State Government, in order to rectify the anomaly created vide earlier order dated 01.05.1999, which provided that although promotions would be made on cadre post but the same would be treated ex cadre and the same would not confer any benefit for determination of seniority, issued the order order dated 23.07.2015 rectifying the said seniority anomaly by means of which the earlier order dated 01.05.1999 was rescinded with immediate effect and it was provided that 990 non-gazetted Police Officers/Employees, who had been granted out of turn promotion w.e.f. 1994 till 2014, their probation shall be counted w.e.f. their date of out of turn promotion. This Government Order dated 23.07.2015 was issued by the State Government in exercise of powers available to it under Section 2 of the Police Act, 1861.

(g) Learned Additional Chief Standing Counsel has stated that the aforesaid Government Order dated 23.07.2015 was challenged by the writ petitioners on the ground that the same has been issued in violation of the express provisions of the Rules, 2008 and operation of which would cause them undue hardship, since the out of turn promotees would be placed higher in rank in the seniority list. He, while placing reliance upon **Prafull Kumar Das Vs. State of Orissa** : 2003 (11) SCC 614, has argued that the seniority is a civil right available to a Government Servant to be determined by the policy of the employer and further it is always open for the employer/State Government to amend /modify its policy and thus there is no vested right available to a Government Servant if such policy is changed. He argued that the writ petitioners have worked under the out of turn promotes for considerable point of time i.e. from 1994 till 2014 and have chosen not to challenge the arrangement of grant of out of turn promotion and as such, only on the ground that they would be facing hardship by loss of seniority is no ground to strike down the policy of the State Government laid down vide order dated 23.07.2015.

(h) Elaborating his submission, learned Additional Chief Standing Counsel has drawn our attention to Rules, 2015 and argued that Rules 2015 have been framed by the State Government in exercise of powers available to it under Section 46 (2) (c) read with Section 2 of the Police Act, 1861, wherein the arrangement provided vide order dated 23.07.2015 has been specifically saved and incorporated in the Rules, 2015 and further out of turn promotions have been statutorily saved for all purposes.

(i) Learned Additional Chief Standing Counsel has also drawn our attention to Rules 3 (i), 3 (m), 3 (n), 4 (1), 22 (3), 22 (4), 27 and 28 of Rules, 2015 and Rule 18 (2) of Rules, 2008, and argued that from a conjoint reading of Rules, 2008 and Rules, 2015, it is unambiguously clear that the appellants were members of service from the initial date of their out of turn promotion on the post of Inspector, for the reason firstly, that their promotion was against a vacancy in the cadre, secondly it was in accordance with the procedure prescribed by law i.e. under the Government Order issued under the provisions of Section 2 of the Police At, 1861 and thirdly it was a substantive appointment and, thus, seniority could not have been denied to them by any stretch of imagination or by operation of any law. He further argued that the policy decision taken by the State Government vide order dated 23.07.2015 impugned in the writ petitions does not suffer from any illegality and the same is not violative of any of the provisions of the Rules, 2008 and Rules, 2015 rather the same is

protected under both the Rules. He pointed out that the writ petitioners have not challenged the aforesaid provisions contained in the said Rules and the same is neither arbitrary nor discriminatory in any manner so as to render it violative of Article 14 of the Constitution of India. Thus, the learned Single Judge, while passing the impugned order, has not at all considered the aforesaid aspect of the matter and the judgment and order under appeal is hit by the doctrine of per incurium as well as the doctrine of sub silentio, hence the impugned order passed by the learned Single Judge is liable to be set-aside and also the writ petitions are also liable to be dismissed.

PRIVATE RESPONDENTS' CASE

(18) On behalf of the respondents, the submission of learned Counsels are as under :-

(a) Sri Asit Kumar Chaturvedi, learned Senior Advocate, assisted by Sri V.S. Ojha, appearing on behalf of the writ petitioners/private respondents has submitted that if the policy decisions of the Government is under challenge on the ground of being violative of Article 14 and 16 of the Constitution of India, the proceedings are analogous to those in which the constitutionality of a statutory rules regulating seniority of the Government Servant is assailed, in such proceedings the necessary parties to be impleaded or those against whom the relief is sought and in whose absence no effective decision can be rendered by the Court. In the present case, relief was claimed against the State Government, which has been impleaded through its representative. The individuals who are likely to be affected as a result of readjustment of the writ petitioners/private respondents in the seniority list in accordance with law were at the most, proper parties and not necessary parties, and their non-joinder could not be fatal to the writ petition. In support of his submission, he has relied upon **G.M. South Central Railways Sikandarabad Vs. A.V.R. Siddhanti** : (1974) 4 SCC 335 and **A. Janardana Vs. Union of India** : (1983) 3 SCC 601.

(b) Elaborating his submission, Sri Chaturvedi has stated that since the number of ex cadre out of turn promotees Inspectors, who have been included in the seniority list dated 24.02.2016, were very large, therefore, thirteen ex cadre out of turn promotees Inspectors were made parties in the array of respondents in the writ petitions in the representative capacity to represent ex cadre out of turn promotees Inspectors, at the time of filing of the writ petition. Thereafter, few ex cadre out of turn promotees were impleaded in compliance of the orders passed by the learned Single Judge and few applications were allowed as Intervener during the writ proceedings. However, only five ex cadre out of turn promotees, who were respondents in the writ petitions, have filed four special appeals and none else. In support of his submission, he has placed reliance upon **Prabodh Verma and others Vs. State of U.P. and others** : (1984) 4 SCC 251.

(c) The submission of Sri Chaturvedi, learned Senior Counsel is that it has been wrongly alleged on behalf of the appellants that none of Sub-Inspectors given out of turn promotion as Inspector, have been impleaded even in the representative capacity, whereas, as a matter of fact more than thirteen Sub-Inspectors granted out of the turn promotions as Inspectors were respondents in the writ petitions and even few were interveners out of which only five Inspectors earlier granted out of turn promotion from the post of Sub-Inspectors and further promoted as Depurty Superintendent of Police, during the pendency of writ petitions, have filed four special appeals and none who were not impleaded in representative capacity, have filed special appeal resulting which is not open for five appellants to plead non-impleadment in special appeals as well as compliance of principles of Order I Rule VIII of the Civil

Procedure Code. The said ground only open to those who were not impleaded even in representative capacity. He further argued that five appellants, who were respondents in the writ petitions in the representative capacity, cannot plead that the judgment and order dated 20.02.2019 is ex parte as vide order dated 06.02.2019 passed in the bunch of the writ petitions, learned Single Judge has fixed the hearing of the bunch of the writ petitions for peremptorily hearing on 20.02.2019 and in this regard, a written notice dated 14.02.2019 (Annexure No. CA-23 of Special Appeal No. 103 of 2019) served upon the counsel for respondents as well as through e-mail on 15.02.2019 to Sri Anoop Trivedi but even then none appeared to argue on 20.02.2019. His submission is that the sanctity of peremptorily hearing on 20.02.2019 has to be honored without any exception and despite non-appearance on the date fixed for peremptorily hearing, it is not open for the appellants to plead that the judgment dated 20.02.2019 is ex parte. He argued that the Counsel for the State of U.P. was present and argument on his behalf has been considered and decided through the judgment and order dated 20.02.2019. It has not been pleaded on behalf of the State of U.P./appellants that the issue raised during the course of hearing on 20.02.2019 has not been considered and incorporated in the judgment dated 20.02.2019. He further argued that the averment made in the counter affidavit of the private respondents will not change or affect in any manner the findings recorded in paragraph 32, 35, 36 and 37 of the impugned judgment dated 20.02.2019. However, during the course of hearing on 20.02.2019, the averments made in the counter affidavit of private respondents was read by the learned Single Judge and only thereafter the relevant pleadings, the judgment dated 20.02.2019 was delivered.

(d) The next submission of the learned Senior Counsel for the private respondents Sri Chaturvedi is that the private respondents herein are regularly promoted Inspectors (Civil Police) from the cadre post of Sub-Inspector (Civil Police) in accordance with law applicable. The Police Act, 1861 was enacted with object to re-organise the police and to make it a more efficient instrument for the prevention and detection of crime. Section 2 of the Police Act, 1861 relates to the constitution of force. Section 12 of the Police Act, 1861 is related to the power of Inspector General to make rules. Section 46 of the Police Act, 1861 empowers the State Government to frame rules. He argued that prior to 02.12.2018, there were no rules, framed under Section 46 (2) read with Section 2 of the Police Act, 1861 so as to govern the matter of appointment of subordinate ranks i.e. Sub-Inspectors and Inspectors, and earlier entire matter to be governed by various orders issued by the State Government from time to time under Section 2 of the Police Act, 1861. On 03.02.1994, an Office Memorandum was issued by the State Government by which a provision was made for the appointment of Constables/Sub-Inpsectors/Platoon Commanders on the ex cadre post of Head Constables/ Inspectors/Company Commanders in the reorganization of their act of indomitable courage and bravery. On 10.02.1994, order was issued by the Inspector General of Police (Personnel) laying down the procedure with regard to cash reward and out of turn promotion, whereas order dated 10.02.1994 was not issued under Section 12 of the Police Act, 1861 as the same was not approved by the State Government. On 01.05.1999, another Government Order was issued in which it was provided that out of turn promotion would be made against the vacant posts in the cadre, which will be treated as ex cadre promotion and no benefit of same will be admissible in the fixation of seniority. It was also pleaded that in paragraph-2 of the aforesaid Government Order dated 01.05.1999 that such promotions should not be more than 2% in the year. He argued that in the promotion order of ex cadre out of turn

promotees, it was specifically mentioned that in future, they would have to appear in the selection/examination for regular promotion on the post of Inspector (Civil Police) and after being declared successful, their seniority would be determined accordingly.

(e) Learned Senior Counsel for the private respondents has submitted that in exercise of powers conferred under sub-Section 2 read with Section 46 read with Section 2 of the Police Act, 1861, the Government of Uttar Pradesh framed Rules, 2008 in supersession of all existing rules issued in this behalf with a view to selection, promotion, training, appointment, determination of seniority and confirmation etc., which came into effect from 02.12.2008. At this stage, he has drawn our attention to sub-rule (i), (l) and (m) of Rules 3, 4, 5 (1) (iii), 5 (2) (b), 17, 22, 28, 29 and 30 and has argued that proviso appended to the Sub-Rule 2 of Rule 19 of Rules, 2008 is referable to Rule 15, which relates to recruitment of Sub-Inspectors and not to the Inspectors. Thus, the Government Orders dated 03.02.1994, 02.01.1998 and 01.05.1999 continued to operate subject to Rule 5 (1) (iii) and Rule 5 (2) (b) of the Rules, 2008.

(f) At this stage, learned Senior Counsel for the private respondents has drawn our attention to the service details of the appellants, which are reproduced as under :-

Name	**Sub Inspector**	**One Time Promotion**	**Inspector (Date of Regular Promotions)**	**Dy. S.P.**	**Special Appeal No.**
Umesh Chandra Mishra	1989-90	29.10.1994	12.07.2013 (Sl. No. 1671)	11.07.2016	99(SPLA) 2019
Harimohan Singh	1989-90	31.01.1998	12.07.2013 (Sl. No.	11.07.2016	98(SPLA) 2019
Vinod Singh Sirohi	1989-90	13.12.2004		11.07.2016	100(SPLA) 2019
Upendra Kumar	1989-90	03.07.2004		11.07.2016	103(SPLA) 2019
Rajesh Kumar Dwivedi	1989-90	27.12.1998	(Sl. No. 1407)	11.07.2016	103(SPLA) 2019

(g) It has been submitted by the learned Senior Counsel for the private respondents that pursuant to the aforesaid Office Order dated 03.02.1994, 02.01.1998 and 01.05.1999, out of turn promotion on the *ex cadre* post of Inspector (Civil Police) were given on 29.03.2013 to Sri Udai Pratap Singh (SI 2007-08 Batch) (respondent no.6 in writ petition No. 13625 (SS) of 2016) and Sri Rajendra Kumar Nagar (SI 2007-08 Batch) (respondent no.7 in writ petition no. 13625 (S/S) of 2016) and their names find place at Serial No. 616 and 617, respectively, in the seniority list dated 24.02.2016. He argued that on the basis of the recommendation of U.P. Police Recruitment and Promotion Board and approval by the Director General of Police, U.P., the respondent no.5 (Devi Prasad Shukla in writ petition no. 13625 (SS) of 2016) was promoted from the post of Sub-Inspector (Civil Police) to Inspector (Civil Police) on regular basis on 12.07.2013 in accordance to the provisions of the U.P. Sub-Inspector and Inspector (Civil Police) Service Rules, 2008 as amended in 2013. The name of respondent no.5 in writ petition no. 13625 of 2016 (S/S) i.e. Devi Prasad Shukla herein appears at serial no. 1719 in the promotion order dated 12.07.2013.

(h) It has been argued by the learned Senior Counsel for the private respondents that another Government Order was issued by the State Government on 07.06.2014, whereby the

Government Order dated 03.02.1994, which was related to ex cadre out of turn promotees of non-gazetted staff of the police department was cancelled and consequently a decision was taken by the State Government to award the non-gazetted staff of the police department who had shown exemplary courage with the police medal, Chief Minister's appreciation letter and Rs.25,000/- cash reward instead of out of turn promotion in terms of the Government Order dated 07.06.2014. A circular to the said effect was issued by the Director General of Police, U.P. on 14.08.2014. He argued that after issuance of the aforesaid Government Order dated 07.06.2014, cancelling the Government Order dated 03.02.1994, no benefits can be extended to the ex cadre out of turn promotees Inspector (Civil Police) beyond the provisions of the Circular dated 14.08.2014. He further argued that the Director General of Police, Lucknow, on 06.02.2015 and 20.05.2015, wrote to the Principal Secretary, Department of Home, Government of U.P., refusing for grant of seniority to the *ex cadre* out of turn promotees from the date of their out of turn promotion, who were engaged in the security of the Hon'ble Chief Minister, on the ground that in the Government Order dated 01.05.1999, it was provided that out of turn promotees would be made against the vacant posts in the cadre which will be treated as ex cadre promotions and no benefit of the same will be admissible in the fixation of seniority. Thereafter, Government Order dated 23.07.2015 was issued, whereby decision was taken by the State Government to give seniority to the *ex cadre* out of turn promotee non-gazetted police officers/employees and, thereafter, pursuant to Government Order dated 23.07.2015, consequential order was issued by the Director General of Police, U.P. on 29.07.2015 in violation of Rules, 2008.

(i) Sri Chaturvedi, learned Senior Counsel has submitted that the Government Order dated 23.07.2015, which was related, to ex cadre out of turn promotion of non-gazetted staff of Police Department had already been cancelled by the State Government vide Government Order dated 07.06.2014 and as such, no benefit contradictory to the Government Order dated 07.06.2014 could be made to the out of turn promotees. The findings recorded by the learned Single Judge in paragraph-32 of the impugned judgment dated 20.02.2019 is perfectly justifiable. He argued that the statutory provisions relied upon on behalf of the appellants in the counter affidavit filed in writ petitions will not change or affect the findings recorded in paragraph 32, 35, 36 and 37 of the impugned judgment dated 20.02.2019 as the Government Order dated 23.07.2015 has to be tested only on the touch stone of Rules, 2008 as the same was applicable from 02.12.2008 to 18.08.2015, which was framed in exercise of powers confirmed under Section 46 (2) read with Section 2 of the Police Act, 1861 and all other powers enabling the State Government in this behalf and in superssession of all existing Rules issued in this behalf, read with Rule 30 (overriding effect of the Rules, 2008 added through notification dated 05.04.2010) to regulate the selection, promotion, training, appointment, determination of seniority and confirmation etc. of Sub-Inspectors and Inspectors. Whereas the Government Order dated 23.07.2015 was only in exercise of power under Section 2 of the Police Act, 1861, resulting which the Government Order dated 23.07.2015 being in conflict with the Preamble, Sub-rule (i), (l) and (m) of Rules 3, 4, 5 (1) (iii), Rule 5 (2) (b), Rule 17, Rule 19, Rule 22, Rule 28, Rule 29 and Rule 30 of Rules, 2008. He argued that the appellants have deliberately skipped preamble, sub-rule (l) of Rule 3, Rule 5 (2) (b), Rule 17, Rule 29 as well as the fact, criteria and procedure for out of turn promotion as Inspector was to be governed only by the procedure laid down in paragraph 6 of the letter dated 10.02.1994 issued by Inspector General of Police (Personnel) of the office of Director General of Police, U.P., Lucknow which was not

even in exercise of powers under Section 12 of the Police Act, 1861. Whereas criteria and procedure for regular promotion as Inspector is to be governed in pursuance of Government Orders dated 05.11.1965, 29.08.1983 and 24.07.20003 or Rule 17 of Rules, 2018 during the relevant period between 10.02.1994 to 07.06.2014.

(j) It has been contended by Sri Chaturvedi that the criteria and procedure dated 05.11.1965, 29.08.1983 and 24.07.2003 and Rule 17 of the 2008 had statutory backing, whereas letter dated 10.02.1994 have no statutory backing. The criteria and procedure for regular promotion as Inspector is uniformly to be applied for all Sub-Inspectors including Sub-Inspectors promoted as Inspector as ex cadre out of turn promotee in terms of Rules 5 (2) (b) read with Rule 17 substituted vide notification dated 06.06.2013 and same procedure was adopted while regular promotion of three appellants through order dated 12.07.2013, whereas the remaining two appellants were not regularly promoted till 23.07.2015. Neither the three appellants have challenged their promotion order dated 12.07.2013 nor all the five appellants have challenged their terms and conditions of out of turn promotions. However, the Government Order dated 23.07.2015 is not saved under Rule 29 of the Rules, 2008 as only the orders existing till 02.12.2008 were saved even the Government Order dated 12.07.2013 i.e. promotion order has not been superseded or revised till date. He further argued that the Government Order dated 23.07.2015 is not management/ amalgamation/merger of cadre as there is no cadre, of out of turn promotee Sub-Inspectors. There is only one cadre of Sub-Inspectors which has two posts i.e. Sub-Inspectors and Inspectors. As the seniority of regularly promoted Inspectors is determined only on the basis of substantive appointment on the post of Sub-Inspectors except those who are later on regularly promoted as Inspector on account of any reason.

(k) Sri Chaturvedi has submitted that the law of *sub silentio* and *per incuriam* is not applicable with respect to the paragraph 32, 35, 36 and 37 of the impugned judgment dated 20.02.2019. He argued that the judgments relied by the appellant are not relevant and applicable. He further argued that in exercise of powers conferred under Clause-(c) to sub-Section (2) of Section 46 read with sub-section (3) of the said section and Section 2 of the Police Act, 1861, the State Government framed Rules, 2015 in supersession of all existing Rules or orders issued in this behalf with a view to regulating the selection, promtion, training, appointment, determination of senrioity and confirmation etc. of Sub-Inspectors and Inspectors of (Civil Police in Uttar Pradesh Police Force), which came into force with effect from 19.08.2015. The relevant rules for the purposes of instant case are preamble, sub-rule (i), (m) and (n) of Rule 3, Rule 4, Rule 5 (1) (iii), Rule 5 (2) (b), Rule 17 (1) (b), Rule 17 (2) (b), Rule 18, Rule 22, Rule 26 and Rule 27 and Rule 28. The proviso appended to the sub-rule 1 of Rule 18 is referable to Rule 15 and Rule 16, which relates to the recruitment of Sub-Inspectors and not to the Inspectors. The proviso appended to the Sub-Rule 2 of Rule 18 is referable to Rule 17 (1), which relates to the recruitment of Sub-Inspectors by promotions and not to the Inspectors. He argued that on 04.02.2016, tentantive, combined seniority list of Commanders was circulated by the U.P. Police Headquarter, Allahabad under the signature of the Deputy Inspector General of Police (Establishment), U.P. and objections were invited against said list by 12.02.2016, keeping in view of Government Order dated 23.07.2015 in paragraph 3 (10) of Tentative Seniority List dated 04.02.2016. Against the aforesaid tentative seniority list dated 04.02.2016, the writ petitioners/respondents filed their objection to the Inspector General of Police (Establishment), U.P. The respondents herein/writ petitioners in their objection specifically indicated that the

tentative seniority list was prepared in violation to Rules, 2008 and names of ex cadre out of turn promotee Inspectors (Civil Police) has wrongly been included in the tentative seniority list because out of turn promotions/ appointments are not the substantive promotion/appointment. He argued that in paragraphs 39, 40 and 41 of his objection dated 12.02.2016, respondent no.6 specifically stated that the Government Order dated 23.07.2015 cannot override or supersede the statutory Rules, 2008. It has also been indicated in the objection that out of turn ex cadre promotee Inspector (Civil Police) cannot be placed over and above the substantively appointed/promoted Inspector (Civil Police) and tentative seniority list dated 04.02.2016 has been issued in utter violation to the provisions of Rules, 2008 and further seniority should be determined in accordance with the provisions of Rules, 2008. He argued that on 24.02.2016, combined final seniority list of Inspectors (Civil Police), Reserve Inspectors and Company Commanders has been issued in de horse the Rules and no heed has been paid to the objections filed by the writ petitioners/respondents herein and objections were rejected through non-speaking and unreasoned order and in utter disregard and violation to the provisions of Rules, 2015, the seniority list has been finalized and number of ex cadre out of turn promotee Inspector (Civil Police), who are ranked junior to the writ petitioners/respondents herein treating their out of turn ex cadre promotion date as their date of regular promotion on the basis of the Government Order dated 23.07.2015, which was in violation of Rules, 2008 and was not to be saved by 2015 Rules which came into force w.e.f. 19.08.2015, therefore, action of the State cannot be justified on the touchstone of reasonableness and fairness, hence same cannot be sustained in the eyes of law.

(l) Sri Chaturvedi has submitted that the direction issued by the Apex Court vide order dated 30.06.2016 was not complied within the stipulated period of three months and the writ petitions were decided after two years and seven months due to delaying tactics adopted by the appellants/respondents which will be evident from the order-sheet of the writ petitions. He further argued that prior to 03.02.1994 and after 07.06.2014, there was provision for cash rewards in terms of Government Orders/Police Regulations which is compilation of Government Orders with regard to categories covered under Government Orders dated 03.02.1994, 02.01.1998 and 01.05.1999 whereas between 03.02.1994 to 07.06.2014, it was out of turn promotion which is in effect is a reward as they have to be considered again for regularization of their promotion on their turn in accordance with the procedure laid down in the Government Orders dated 05.11.1965, 24.07.2003 and Rules of 2008 and 2015. He further argued that the word "Special Categories' used in Rule 28 of the Rules, 2015 can include "Other Backward Class Categories' applying the doctrine "Ejusdem Generis'.

(m) It has been argued by the learned Senior Counsel for the private respondents that the police force is a uniform disciplined service governed by rank and the benefits conferring higher status and rank to juniors will disturb the entire edifice which is foundation to strict discipline based on seniority, rank and status and of utmost importance in a disciplined uniform police force. He further argued that ex cadre out of turn promotions were granted in pursuance of Government Order dated 03.02.1994 and 01.05.1999. According to Service Rules, an *ex cadre* out of turn promotee cannot be substantive appointee/promotee until they are granted regular promotion. After coming into force of service rules, *ex cadre* out of turn promotee Inspector (Civil Police) cannot be extended seniority benefits in contravention to the provisions of service rules. He further argued that on 22.11.2019, combined seniority list of Inspector (Civil Police), Reserve Inspector and Company Commander has been issued giving

the benefit of Government Order dated 23.07.2015 by the Deputy Inspector General of Police Personnel/ Establishment i.e. respondent no.11, rejecting the objection dated 28.07.2019 submitted by the respondent no.6 vide order dated 20.11.2019, during the pendency of the special appeal in utter violation to the judgment and order dated 20.02.2019 as well as order dated 28.03.2019 passed in Special Appeal.

(n) Submission of the learned Senior Counsel Sri Chaturvedi is that the condition of recruitment cannot be relaxed. The condition of recruitment are mandatory for appointment by promotion and any appointment in contravention thereof would negate the scheme of the Rules. The power to relax the Rules does not include the power to relax recruitment rules. In support of his submission, he relied upon **Syed Khalid Rizbi and others vs. Union of India and others** : 1993 Supp. (3) SCC 575, **The Food Commissioner, U.P. and others Vs. Om Pal Singh and others** (Special Appeal No. 1960 of 2011, decided on 05.10.2018**, M. Venketeswarlu and others Vs. Government of A.P. and others** : 1996 (5) SCC 167, U.P. **Jal Nigam and others vs. Narinder Kumar Agarwal** : 1996 (8) SCC 43, **Suraj Prakash Gupta and others Vs. State of J & K and others** : 2000 (7) SCC 516, **Rajasthan State Industrial Development and Investment Cooperation Vs. Subhash Sindhi Cooperative Society Jaipur and others** : 2013 (5) SCC 427, **Chairman, Public Service Commission, J & K and Anr. Vs. Sudarshan Singh Jamwal and others** : 1998 (9) SCC 327, **U.P. Unaided Medical Colleges Welfare Association Vs. Union of India and others** : 2016 (3) UPLBEC 2363, **Bhupendra Nath Hazarika and others Vs. State of Assam and others** : 2013 (2) SCC 516.

(o) Sri Chaturvedi has further stated that "proviso' cannot be read independently, the proviso will have to be read with the main provision and further proviso cannot travel beyond the scope of main provision and same cannot be inconsistent to the main provision. In support of his submission, he relied upon **J.K. Industries Ltd. and others Vs. Chief Inspector of Factories and Boilers and others** : 1996 (6) SCC 665.

(p) The next submission of Sri Chaturvedi is that the executive instruction or orders cannot override the statutory rules. In support of his submission, he relied upon **Vijay Singh and others vs. State of U.P. and others** : 2005 (2) AWC 1191 (FB), **K. Kuppusamy and another Vs. State of Tamil Nadu and others** : 1998 (8) SCC 469, **Dr. Rajinder Singh Vs. State of Punjab** : 2001 (5) SCC 482, **Bindeshwari Ram Vs. State of Bihar and others** : 1989 (4) SCC 465, **Anurag Yadav and others Vs. State of U.P. and others :** 2010 (3) UPLBEC 2261, **K. P. Sudhakaran and another Vs. State of Kerala and others** : 2006 (5) SCC 386, **Mahadev Bhau Khilare (Mane) and others Vs. State of Maharashtra and others** : (2007) 5 SCC 524.

(q) The other submission of Sri Chaturvedi is that in the guise of removing a difficulty, Government cannot change the scheme and essential provision of the Act. In support of his submission, he relied upon **Madeva Upendra Sinai and others vs. Union of India and others** : 1975 (6) SCC 765, **Delhi Development Authority and another Vs. Joint Action Committee Allottee of SF's Flats and others** : 2008 (2) SCC 672.

(r) The next submission of Sri Chaturvedi is that if there is conflict between specific provision and general provision, then, specific provision will prevail over general provision. In support of his submission, he relied upon **J.K. Cotton Spinning and Weaving Mills Company Ltd. Vs. State of U.P.** : AIR 1961 (SC) 1170, **Dharni Sugars and Chemicals Ltd. Vs. Union of India and others** : 2019 (5) SCC 480.

(s) Sri Chaturvedi has further stated that if a person has continued to work, that by itself will not confer any right upon him since principle of

holding over or concept of adverse possession is not applicable in service jurisprudence. In support of his submission, he relied upon **M. S. Patil (Dr.) Vs. Gulbarga University** : 2010 (10) SCC 63, **State of Orissa and another Vs. Mamta Mohanty :** 2011 (3) SCC 436, **A. Umarani Vs. Registrar Cooperative Societies and others** : 2004 (7) SCC 112.

(t) Sri Chaturvedi has stated that out of turn promotees Inspector cannot claimed equivalence with regularly promoted Inspectors keeping in view the Government Order dated 05.11.1965, 29.08.1983, 24.07.2003 and Rule 5 (2) (b) read with Rule 17 of the Rules, 2018 viz a viz Government Order dated 03.02.1994, I.G. (k) letter dated 10.02.1994, Government Order dated 02.01.1998, 01.05.1999 and 07.04.2014. In the intra court appeal, Courts Act as a Court of correction to correct its own judgment/order in exercise of the same jurisdiction as was vested in the Single Bench and not as a Court of error. In support of his submission, he relied upon **Baddula Lakshmaiah and others Vs. Sri Anjaneya Swami Temple & others** : 1996 (3) SCC 52 and **Managing Director, ECIL, Hyderabad and others Vs. B. Karunakar and others** : 1993 (4) SCC 727. He argued that the purpose of legislation /Government actions should be the happiness of greatest number. Its object should be with two motives procuring pleasure and avoiding pain. In the instant case, action of Government extents pleasure for few and inflicting pain to a large number and as such, action of Government, while issuing Government Order dated 23.07.2015 is not sustainable. Thus, the judgment and order dated 20.02.2019 do not suffer from any illegality, irregularity and impropriety and the same is just and proper.

DISCUSSION

(19) Before entering into the merits of the case, it would be apt to first deal with the following preliminary submissions of the learned Senior Counsel appearing on behalf of the appellants :-

"(a) 990 employees/persons, who were covered by the Government Order dated 23.07.2015 and who might be prejudicially and adversely affected by the outcome of the writ petitions, were not impleaded as party respondents in the writ petitions and only few of them were impleaded in the writ petitions as private respondents, hence the writ petitions ought to have been dismissed by the learned Single Judge for non-joinder of necessary parties but the learned Single Judge did not consider this aspect of the matter even though specific plea in this regard has been taken by the private respondents/appellants herein in the writ petitions but that too was not considered.

(b) The writ petitions were not maintainable and ought to be dismissed as no permission under Order I Rule 8 of the Code of Civil Procedure, 1908 was applied for, nor granted, prior to passing the judgment under appeal, hence necessary parties were not put to notice and as such, on this ground alone the judgment and order under appeal deserves to be set-aside.

(c) The impugned order under appeal is an ex parte order as it has been passed by the learned Single Judge without hearing the learned counsel for the appellants/private respondents in writ petitions.

(20) It transpires from the record of the writ petitions that by a common judgment and order dated 20.02.2019, the learned Single Judge decided three writ petitions i.e. writ petition No. 13625 (S/S) of 2016, 5677 (S/S) of 2016 and 10759 (S/S) of 2016. It comes out that in writ petition no. 13625 (S/S) of 2016, three out-of-turn promotees on ex cadre posts were impleaded as private respondents; in writ petition no. 5677 (S/S) of 2016, six out-of-turn promotees on *ex cadre* posts were impleaded as private respondents; and in writ petition no. 10759 (S/S) of 2016, four out-of-turn promotees

on ex cadre posts were impleaded as private respondents.

(21) It is not in dispute that by the final outcome of the writ petitions viz. by the impugned order under appeal, almost 990 non-gazetted police personnel might be affected. Further, learned Counsel for the appellants/private respondents were not present at the time of final hearing of the bunch of writ petitions and the impugned order under appeal has been passed by the learned Single Judge without hearing the learned Counsel for the appellants/private respondents. It also transpires from the impugned order under appeal that the aforesaid preliminary submissions of the appellants/private respondents have not been discussed or decided by the learned Single Judge.

(22) Now, the question whether the aforesaid preliminary submissions ought to be addressed by the learned Single Judge and whether the appellants/private respondents have ever raised the aforesaid preliminary submissions before the learned Single Judge or any assertion in this regard on behalf of the private respondents/appellants have been made in the counter version in the writ petitions or not.

(23) The specific stand of the appellants/private respondents is that respondent no.6/Uday Pratap Singh has filed a supplementary counter affidavit along with application for taking memo of appearance and supplementary counter affidavit on records (C.M. Application No. 59422 of 2017) in Writ Petition No. 13625 of 2016 (S/S) and in paragraphs 3 to 6 in the supplementary counter affidavit, it has been stated as under :-

"3. That the order impugned affects 990 non-gazetted police officers consisting of Head Constables, Sub-Inpsectors, Inspectors/ Company Commanders.

4. That the quashing of the Government Order dated 23rd July, 2015 has been prayed, however, neither any Head Constable nor any Sub Inspector, nor any Company Commander has been impleaded as party-respondent in the above noted writ petition.

5. That further, all the Inspectors covered under the Government Order dated 23rd July, 2015 have also not been made party-respondent in the Writ petition. Moreover, none of the Inspectors have been impleaded in representative capacity by seeking leave of the Court. It is specifically stated here that the neither any application for impleading any set of Inspectors under the representative capacity has been preferred nor any step whatsoever akin to the provisions contemplated under Order I Rule 8, 9, 9A C.P.C. have been taken.

6. In the circumstances the above writ petition deserves to be dismissed on the ground of non-impleadment of necessary and proper parties."

(24) Submission of the learned Senior Counsel appearing on behalf of the appellants/private respondents is that even if the learned Counsel for the private respondents were not present at the time of hearing of the writ petitions, the learned Single Judge ought to have taken into consideration the material brought by means of aforesaid supplementary counter affidavit by the private respondents but the learned Single Judge has not appreciated the aforesaid contents made in the supplementary counter affidavit filed on behalf of the private respondents in writ petition No. 13625 of 2016 (S/S) while passing the impugned order appeal even though in the absence of their counsel. According to them, there was no rebuttal on behalf of the writ petitioners to the aforesaid contents of the supplementary counter affidavit in the aforesaid writ petition.

(25) *Per contra*, it has been contended by the learned Senior Counsel appearing on behalf

of the writ petitioners/private respondents herein that since the number of ex cadre out of turn promotees Inspectors, who have been included in the seniority list dated 24.02.2016 was very large, therefore, thirteen ex cadre out of turn promotees Inspectors were made parties in the array of respondents in the writ petitions in the representative capacity to represent ex cadre out of turn promotees Inspectors, at the time of filing of the writ petition. Thereafter, few *ex cadre* out of turn promotees were impleaded in compliance of the orders passed by the learned Single Judge and few applications were allowed as intervener during the writ proceedings. However, only five ex cadre out of turn promotee, who were respondents in the writ petitions, have filed four special appeals and none else. In these backgrounds, his submission is that plea of the appellants for non-compliance of the principles of Order I Rule 8 of the Civil Procedure Code is not sustainable as the said ground only open to those who were not impleaded even in representative capacity.

(26) It is noted here that both the learned Senior Counsels i.e. appellants side and respondents side, have placed reliance upon **Prabodh Verma and others Vs. State of U.P. and others (supra)** in support of their contentions. Therefore, decision of the Apex Court in **Prabodh Verma and Others v. State of Uttar Pradesh and Others (supra)** requires to be addressed. The facts in the said case deserved to be stated. In the said case the principal question that arose for determination before the Apex Court was the constitutional validity of two Uttar Pradesh Ordinances, namely, (1) The Uttar Pradesh High Schools and Intermediate Colleges (Reserve Pool Teachers) Ordinance, 1978 (U.P. Ordinance 10 of 1978), and (2) The Uttar Pradesh High Schools and Intermediate Colleges Reserve Pool Teachers) (Second) Ordinance, 1978 (U.P. Ordinance 22 of 1978). This Hon'ble High Court for certain reasons had struck down the ordinance. Be it noted, the writ petition was filed by the Uttar Pradesh Madhyamik Shikshak Sangh. Apart from the question of validity, the subsidiary question that arose before the Apex Court is whether the termination of the services of the appellants and the petitioner before the Apex Court as secondary school teachers and intermediate college lecturers following upon the High Court judgment is valid and, if not, the relief to which they are entitled. After narrating the facts, the Apex Court observed that the writ petition filed by the Sangh suffered from two serious, though not incurable, defects. We think it appropriate to reproduce the statement of facts as reproduced in the judgment.

"28. The real question before us, therefore, is the correctness of the decision of the High Court in the Sangh's case. Before we address ourselves to this question, we would like to point out that the writ petition filed by the Sangh suffered from two serious, though not incurable, defects. The first defect was that of non-joinder of necessary parties. The only respondents to the Sangh's petition were the State of Uttar Pradesh and its concerned officers. Those who were vitally concerned, namely, the reserve pool teachers, were not made parties - not even by joining some of them in a representative capacity, considering that their number was too large for all of them to be joined individually as respondents. The matter, therefore, came to be decided in their absence. A High Court ought not to decide 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 by some of them being before it as respondents in a representative capacity if their number is too large, and, therefore, the Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh's writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being

made respondents in a representative capacity, and had the petitioners refused to do so, ought to have dismissed that petition for non- joinder of necessary parties."

(27) Thereafter, the Apex Court proceeded to summarise its conclusion and the relevant conclusion for the present purpose are reproduced below:-

"50 (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, then 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 v. State of Uttar Pradesh - 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."

(28) On perusal of the aforesaid dictum of the Apex Court, it is crystal clear that the Apex Court had opined that when the constitutional validity of a provision is challenged and there are beneficiaries of the said provision, some of them in a representative capacity have to be made parties failing which the writ court would not be justified in hearing a writ petition in the absence of the selected candidates when they are already appointed on the basis of the provision which was under assail before the Writ Court.

(29) On a perusal of the order impugned, we find that only 13 persons were made respondents in the writ petitions. It is well settled in law that no adverse order can be passed against persons who were not made parties to the litigation.

(30) In the case at hand neither any rule nor regulation was challenged. Thirteen persons, who were impleaded, were not treated to be in the representative capacity. In this regard, it is profitable to refer to some authorities.

(31) In **Indu Shekhar Singh and others v. State of U.P. and others** : 2006 (8) SCC 129, the Apex Court has held thus: -

"There is another aspect of the matter. The appellants herein were not joined as parties in the writ petition filed by the respondents. In their absence, the High Court could not have determined the question of inter se seniority."

(32) In **Km. Rashmi Mishra v. M.P. Public Service Commission and others** : (2006) 12 SCC 724, after referring to **Prabodh Verma (supra)** and Indu Shekhar Singh (supra), the Apex Court took note of the fact that when no steps had been taken in terms of Order 1 Rule 8 of the Code of Civil Procedure or the principles analogous thereto, all the seventeen selected candidates were necessary parties in the writ petition. It was further observed that the number of selected candidates was not many and there was no difficulty for the appellant to implead them as parties in the proceeding. Ultimately, the Apex Court held that when all the selected candidates were not impleaded as parties to the writ petition, no relief could be granted to the appellant therein.

(33) In **Tridip Kumar Dingal and others v. State of West Bengal and others** : (2008) 1 SCC 768, the Apex Court approved the view expressed by the tribunal which had opined that

for absence of selected and appointed candidates and without affording an opportunity of hearing to them, the selection could not be set aside. In paragraph-41, the Apex Court has held as under :-

"Regarding protection granted to 66 candidates, from the record it is clear that their names were sponsored by the Employment Exchange, they were selected and appointed in 1998-99. The candidates who were unable to get themselves selected who raised a grievance and made a complaint before the Tribunal by filing applications ought to have joined them (selected candidates) as respondents in the Original Application, which was not done. In any case, some of them ought to have been arrayed as respondents in a `representative capacity'. That was also not done. The Tribunal was, therefore, wholly right in holding that in absence of selected and appointed candidates and without affording opportunity of hearing to them, their selection could not be set aside."

(34) In **Public Service Commission, Uttaranchal v. Mamta Bisht and others** : AIR 2010 SC 2613, the Apex Court, while dealing with the concept of necessary parties and the effect of non-implementation of such a party in the matter when the selection process is assailed, observed thus: -

"In case the respondent No.1 wanted her selection against the reserved category vacancy, the last selected candidate in that category was a necessary party and without impleading her, the writ petition could not have been entertained by the High Court in view of the law laid down by nearly a Constitution Bench of this Court in Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar & Anr., AIR 1963 SC 786, wherein the Court has explained the distinction between necessary party, proper party and proforma party and further held that if a person who is likely to suffer from the order of the Court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. More so, proviso to Order I, Rule IX of Code of Civil Procedure, 1908 (hereinafter called CPC) provide that non- joinder of necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141 CPC but the principles enshrined therein are applicable. (Vide Gulabchand Chhotalal Parikh Vs. State of Gujarat; AIR 1965 SC 1153; Babubhai Muljibhai Patel Vs. Nandlal, Khodidas Barat & Ors., AIR 1974 SC 2105; and Sarguja Transport Service Vs. State Transport Appellate Tribunal, Gwalior & Ors. AIR 1987 SC 88)"

(35) In **Vijay Kumar Kaul and Ors. v. Union of India and Ors**. : 2008 (6) SCC 797, the Apex Court has ruled thus:

"Another aspect needs to be highlighted. Neither before the Tribunal nor before the High Court, Parveen Kumar and others were arrayed as parties. There is no dispute over the factum that they are senior to the Appellants and have been conferred the benefit of promotion to the higher posts. In their absence, if any direction is issued for fixation of seniority, that is likely to jeopardise their interest. When they have not been impleaded as parties such a relief is difficult to grant."

(36) In **State of Rajasthan v. Ucchab Lal Chhanwal :** (2014) 1 SCC 144, the Apex Court opined that: -

"Despite the indefatigable effort, we are not persuaded to accept the aforesaid preponement, for once the Respondents are promoted, the juniors who have been promoted earlier would become juniors in the promotional cadre, and they being not arrayed as parties in the lis, an adverse order cannot be passed against them as

that would go against the basic tenet of the principles of natural justice."

(37) In view of the aforesaid enunciation of law, it is crystal clear that in such a case when all the appointees were not impleaded, the writ petition was defective and hence, no relief could have been granted to the writ petitioners.

(38) In the instant case, undisputed facts are that prior to passing of the impugned judgment under appeal, no advertisement or publication was issued regarding the institution of the aforesaid writ petitions. Thus, it is clear that the judgment under appeal has been passed without granting opportunity to the necessary parties to a lis to come and defend themselves.

(39) At this stage, it would be relevant to reproduce Order I Rule 8 of the Code of Civil Procedure, which is as under :-

"Rule 8 - One Person May Sue Or Defend On Behalf Of All In Same Interest.- (1) Where there are numerous persons having the same interest in one suit,-

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted or defended, under sub-rule (1), may apply to the Court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation.-For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the person on whom behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be.]"

(40) Considering the aforesaid facts, it is noted here that the provisions of Order I Rule 8 of the Code of Civil Procedure have not been complied with by the writ petitioners. Thus, we are of the considered view that impugned order under appeal is liable to be dismissed on the ground of non-joinder of the parties in the writ petitions.

(41) However, since the dispute relating to seniority and promotion is pending for quite long time before this Court, therefore, with the consent of the learned Counsel for the parties, now we proceed to hear the matter on merits also.

(42) Before adverting to the rival submissions, it would be apt to have a glance to

the relevant statutes/statutory provisions, dealing with the recruitment and appointment as also the conditions of service of Police Officers of subordinate rank in U.P. Police Force.

(43) The Full Bench of this Court in **State of U.P. and others Vs. Rajendra Singh and others** : 2015 (4) ADJ 575 (LB) (FB) has held in para-25, 33 and 42 as under :-

"25. Now, it is in this background that we must have due regard to the applicability of the rules framed under Article 309 of the Constitution to the police force. Before we do so, it is necessary to recapitulate that Section 2 of the Police Act mandates that the entire police establishment under a State Government is deemed to be one police force for the purposes of the Act. The force is to be formally enrolled and is to consist of such number of officers and men, and shall be constituted in such manner, as shall from time to time be ordered by the State Government. Moreover, the pay and all other conditions of service of the members of subordinate ranks of the police force shall be such as may be determined by the State Government subject to the provisions of the Act. Three aspects of the provision stand out. The first is that for the purposes of the Act, the entire police establishment under a State Government is deemed to be one police force. The second is that the State Government is empowered, from time to time, to order the formal enrolment of the force, the strength of the force consisting of officers and men and the manner in which the force shall be constituted. The third aspect is that the pay and all other conditions of service of members of the subordinate ranks of the police force are to be such as is determined by the State Government subject, however, to the provisions of the Act. Under Section 7, the power to dismiss, suspend or reduce any police officer of the subordinate ranks is subject to Article 311 of the Constitution and to such rules as the State Government may, from time to time, make under the provisions of the Act. A specific rule-making power is conferred upon the State Government by Section 46 (2) (c) generally for giving effect to the provisions of the Act. The decision of the Constitution Bench in Babu Ram Upadhya (supra) holds that the Police Act and the rules framed under it constitute a self-contained Code."

"33. The judgment in A B Krishna (supra) was followed by another Bench of two learned Judges of the Supreme Court in Chandra Prakash Tiwari (supra). This judgment specifically dealt with the rules framed by the Governor of Uttar Pradesh under Article 309 of the Constitution and their applicability in view of an order which was made in pursuance of the Police Act. On 5 November 1965, the Governor issued a direction to the effect that promotions from the post of Sub Inspectors to Inspectors would be made on the basis of merit. Under the Uttar Pradesh Government Service (Criterion for Recruitment by Promotion) Rules, 1994 framed by the Governor under the proviso to Article 309 of the Constitution, the criterion for promotion was seniority subject to rejection of the unfit. The Supreme Court, after adverting to the earlier decision in A B Krishna, held that the Police Act was a complete Code in itself which had made special statutory provisions for appointment, dismissal, placement and all other steps required to reorganise the police and to make it a more efficient instrument for the prevention and detection of crime. The Supreme Court held that unless the specific provisions contained in the Government Order dated 5 November 1961 which have been framed under the provisions of the Police Act was repealed, the general rules framed under Article 309 of the Constitution would not prevail. In that context, the Supreme Court observed as follows:

"On a conspectus of the whole issue, it is thus difficult to comprehend that the General Rule framed under Article 309 should or would also govern the existing special rules concerning the police rules. Admittedly, the guidelines as

contained in the Government Order dated 5.11.1965 have been under and in terms of the provisions of the Police Act. There is special conferment of power for framing of Rules dealt with more fully herein before, which would prevail over any other Rule. Since no other rule stands formulated and the Government Order of 1965 being taken as the existing rule pertaining to the subject matter presently under consideration with recent guide-lines as noted above, its applicability cannot be doubted. Unless the General Rule specifically repeal the effectiveness of the special rules, question of the latter rule becoming ineffective or inoperative would not arise. In order to be effective, an express mention is required rather an imaginary repeal. It is now a well settled principle of law for which no relation is further required that law Courts rather loath repeal by implication. The General Rule framed under Article 309 has been for all State Government officials on and since 1994. List II (State List) of the 7th Schedule specially refers to the powers of the State Legislature to frame Rules specially for the Police. In this context Item 2 thereof would be significant which reads as follows:

"List II-State List"

"2 Police (including railway and village police) subject to the provisions of entry 2A of List I."

Police force admittedly has a special significance in the administration of the State and the intent of the framers of our Constitution to empower the State Government to make rules there-for has its due significance rather than being governed under a general omnibus rule framed under the provisions under Article 309. When there is a specific provision unless there is a specific repeal of the existing law, question of an implied repeal would not arise..."

"**42**. Insofar as the present controversy is concerned, it would now be necessary for the Court to formulate the basic principles which have emerged on the subject:

(i) The Police Act 1861 and the Rules framed under it constitute a self-contained Code and by virtue of the provisions of Article 313 of the Constitution, the Act and the Rules continue to remain in force, under Article 313 of the Constitution;

(ii) Rules and Government Orders referable to a specific source of power under the Police Act 1861 such as Section 2 or, as the case may be, Section 46 (2) (c) would continue to hold the field and would not be abrogated merely by the exercise of the general rule-making power conferred by the proviso to Article 309 of the Constitution;

(iii) Under the proviso to Article 309, rules regulating the recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the Union and of the States can be made until a provision in that behalf is made by or under legislative enactment of the appropriate legislature. Any rule so made will have effect subject to the provisions of the Act;

(iv) When there is a specific provision, unless there is a specific repeal of the existing law, the question of an implied repeal would not arise;

(v) The rules framed under the proviso to Article 309 of the Constitution would apply, generally speaking to Government servants appointed in connection with the affairs of the Union or, as the case may be, the States but the police force would be governed by the provisions of the Police Act 1861 and by the rules and administrative determinations referable to a specific source of power under the Police Act 1861;

(vi) Under Section 2 of the Police Act 1861, the State Government has been vested with power to determine the pay and all other conditions of service of members of the subordinate ranks of the police force. The determination within the meaning of Section 2

may be both by means of the exercise of the rule-making power as well as by an administrative direction. The Police Act 1861, being a complete Code as enunciated by the Constitution Bench of the Supreme Court, it occupies the entire field of the determination of service conditions. The power to determine all the conditions of service of members of the subordinate ranks of the police force is vested with the state government. The state government has the rule making power under Section 46 (2) (c) to carry out the purposes of the Act by framing rules;

(vii) Once a self-contained Code in the form of the Police Act has been enacted by the legislature and its continuance after the adoption of the Constitution is ensured by Article 313 and Article 372 of the Constitution, the field relating to recruitment and conditions of service of members of the police force in the State stands occupied by the legislation. Any rule or order relating to the determination of the conditions of service of the police force can be made only under the provisions of the Police Act or by the legislation enacted by the State legislature governing the service conditions of the police force. Section 2, Section 7 and Section 46 of the Police Act clearly evince an intent of the legislature to occupy the whole of the field relating to conditions of service of the police force;

(viii) The ratio of the decision of the Supreme Court in A B Krishna's case is that if the legislature has already made a law and the field is occupied, in such a situation, rules can be made under the law enacted by the legislature and not under Article 309;

(ix) The rules framed under a legislative enactment constitute delegated or subordinate legislation. The rules made under Article 309 are not of that nature. The rules which have been framed under Article 309 and the rules under an enactment of the state legislature are referable to two distinct sources of power. The rules made under the proviso to Article 309 are intended to deal with a situation where the President or the Governor, as the case may be, may regulate the recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the Union or, as the case may be, of the States until a provision in that behalf is made under an Act of the appropriate legislature under the Article. Though, the authority to frame rules in Article 309 vests with the Governor while the authority to frame subordinate legislation under the state enactment is vested with the State Government, the two jurisdictions are entirely different. One is referable to a transitional power which is vested in the President or the Governor, as the case may be, under the proviso to Article 309 while the other is traceable to the substantive power to frame subordinate legislation which is delegated to the State Government under a legislative enactment. Once a law has been enacted by the competent legislature and particularly in a situation where legislation, such as the Police Act is construed as a complete Code, it constitutes special statute governing the police force incorporating within its field, matters relating to appointment, dismissal, placement and all other steps required to reorganise the police and make it a more effective instrument for the prevention and detection of crime, as was held in Chandra Prakash Tiwari's case by the Supreme Court;

(x) In Chandra Prakash Tiwari, the Supreme Court after considering the consistent position of the State Department of Home, held that 'by reasons of the provisions of a special statute, namely, the Police Act read with the authorization contained therein by way of executive order, the Governor of Uttar Pradesh obviously did not in fact intend to apply the general law to all and sundry'16. In this background, it has been held that unless the general rules which are framed under Article 309 of the Constitution specifically repeal the special rules and unless there is a specific repeal of the existing law, the question of an implied repeal would not arise. The rules framed under

Article 309 are for Government servants in general while the police force would be guided by the provisions of the Police Act. This interpretation which has been placed by the Supreme Court has been held to be consistent with the position adopted in inter-ministerial correspondence of the State Government; and

(xi) The decision in Chandra Prakash Tiwari's case specifically deals with the Police Act and the applicability of the Rules framed under the proviso to Article 309 to members of the police force in the State of Uttar Pradesh. This decision of the Supreme Court has been duly followed by the Full Bench of this Court in Vijai Singh (supra) while holding that since the field of regulation of service conditions of members of the police force is occupied by the provisions of the Police Act and it continues to be in operation under Article 313, the Rules framed under Article 309 would not be attracted."

(44) From the aforesaid, it is crystal clear that the Police Act, 1861 is a special statute and a complete code.

(45) At the cost of repetition, it is relevant to mention here that selection of Inspectors in Uttar Pradesh stands effected on the basis of merit arranged in order of seniority and the Government Order dated 5.11.1965 being the background thereto. Thereafter, for the purpose of promotion from the post of Sub-Inspector (Civil Police) to Inspector, a Committee was constituted vide order dated 29.10.1983. Under Section 46 of Police Act, 1861, power to frame Rules has been conferred upon State Government.

(46) It is not disputed by the parties that till 2008 there were no Rules framed under Section 2 read with Section 46 of Act, 1861 so as to govern the matter of recruitment and appointment of Police Officers of subordinate rank, i.e. Constables, Head Constables and Sub-Inspectors. The entire matter earlier used to be governed by various orders issued by State Government from time to time which were considered to be "Statutory Orders" issued/ referable under/to Section 2 of Act, 1861.

(47) It is in this context, an Office Memorandum dated 3.2.1994 was issued by Principal Secretary (Home). This Office Memorandum was in reference to the appointment of a Police Inspector/ Company Commander on a non cadre post of Deputy Superintendent of Police where such Police Inspector/Company Commander P.A.C. has shown an act of exemplary courage and gallantry. Conditions on which such appointment against a non cadre post of Deputy Superintendent of Police, was permissible, provided in the Office Memorandum dated 03.02.1994.

(48) On the same date, i.e., 3.2.1994 another Government Order No. 605 (11) छ–पु–1–24/93 was issued by Principal Secretary (Home) providing for a similar ex cadre "Out of Turn" promotion to Constables and Sub-Inspectors/Platoon Commander on the post of Head Constable and Inspector/ Company Commander respectively. The conditions of such appointment are similar to the earlier Government Order except for the difference of designations of post and rank.

(49) The aforesaid Government Orders being orders relating to recruitment and conditions of service of Police Officers of subordinate rank, hence statutory by virtue of Section 2 of the Police Act, 1861.

(50) Thereafter, the Inspector General of Police has issued a Circular on 10.02.1994 laying down the procedure with regard to cash reward and out of turn promotion . This Circular dated 10.02.1994 was not under Section 12 of

the Police Act, 1861 as it was not approved by the State Government.

(51) Subsequently, the aforesaid Government Order dated 3.2.1994 was modified in respect of Constable by Government Order dated 02.01.1998. On 01.05.1999, another Government Order was issued, in which it was provided that out of turn promotion would be made against the vacant posts in the cadre, which will be treated as ex cadre promotion and no benefit of the same will be admissible in the fixation of seniority. It was also provided in paragraph-2 of the aforesaid Government Order dated 01.05.1999 that such promotions should not be more than 2% in the year. Another Government Order dated 07.06.2014 was issued by the State Government, whereby the Government Order dated 03.02.1994, which was related to ex cadre out of turn promotees of non-gazetted staff of the police department was cancelled and consequently, a decision was taken by the State Government to reward the non-gazetted staff of the police department who had shown exemplary courage, with the police medal, Chief Minister's appreciation letter and Rs.25,000/- cash reward instead of out of turn promotion in terms of the Government Order dated 07.06.2014. On 14.08.2014, the Director General of Police, U.P. has issued a circular with regard to the Government Order dated 07.06.2014.

(52) Thereafter, another Government Order dated 23.07.2015 was issued, whereby decision was taken by the State Government to give seniority to the ex cadre out of turn promotee non-gazetted police officers/employees.

(53) Thereafter, the Director General of Police (Establishment), Uttar Pradesh, Lucknow has issued the consequential order on 29.07.2015 in regard to Government Order dated 23.07.2015.

(54) It transpires from the aforesaid Government Orders that the State Government, while exercising the powers enshrined to it under Section 2 of the Police Act, 1861, issued order dated 03.02.1994, which shows that those Constables and Sub-Inspectors/Platoon Commanders, who have shown exemplary courage, be given appointment from the post of Constable to Head Constable and from the post of Sub-Inspector and Platoon Commander to Inspector/Company Commander on ex cadre posts. In the aforesaid Government Order dated 03.02.1994, it was clearly provided that for each year, such ex cadre posts would be created by the State Government on the proposal of Inspector General of Police, Lucknow. This Government Order dated 03.02.1994 has overriding effect over any other existing orders. The Government Order dated 03.02.1994 also contemplates that the promotions would be made on ex cadre posts, which were to be sanctioned by the State Government for the said purpose every year, however, no such posts were ever created and out of turn promotions were made on cadre posts of Inspectors and Head Constables, respectively.

(55) On 01.05.1999, the State Government had issued another statutory order referable to Section 2 of the Police Act, 1861, by which it transpires that out of turn promotions would be against the vacancies existing in the cadre, however, it would be on ex cadre basis and its benefit will not be available for the purposes of determination of seniority.

(56) It is relevant to mention here that Section 46 (2) of the Police Act, 1861 provides that the State Government may, from time to time, by notification in the official gazette, make Rules consistent with the Act. Enrolment/recruitment of police personnel or anything related to police personnel or anything related to that which is not provided under Section 46 (2) of the Police Act, 1861.

Therefore, Section 2 of the Police Act, 1861 is the exclusive provision empowering the State to issue Government Orders from time to time for enrollment of police personnel and constitution of police force.

(57) It is not in dispute that at the time of issuance of statutory orders dated 03.02.1994 and 01.05.1999, there were no service rules framed under Section 2 of the Police Act read with Section 46 of the Police Act, 1861 so as to govern the matter of recruitment and appointment of Police Officers of subordinate ranks i.e. Constables, Head Constables and Sub-Inspectors. The entire matter earlier used to be governed by various orders issued by the State Government from time to time which were considered to be "Statutory Orders' issued/referable under/to Section 2 of the Police Act, 1861.

(58) Here, it is relevant to mention that both orders under Section 2 of the Police Act, 1861 and rules framed under Section 46-2 (c) of the Police Act, 1861 have statutory origin and none is subordinate to the other.

(59) At this juncture, it would be apt to mention here that the Full Bench of this Court in **Vijay Singh Vs. State of U.P.** : 2005 (2) AWC 1191 (FB), while considering the dictum of the Apex Court rendered in various cases, has held that the legislature, while enacting the provisions of Section 2 of the Act, 1861 itself delegated the power to the statutory authorities to fix the eligibility including the age etc. and statutory authorities had performed their duties in exercise of the delegated powers from time to time without any deviation therefrom. Paras-61, 62, 63, 64 are reproduced as under :-

"61. It may be pertinent thereto that observation made by the Hon'ble Supreme Court in Ajay Kumar Bhuyan (supra) that unless the orders issued by the Government are published in the Official Gazette cannot be given effect to, are not applicable here as Section 2 of the Act, 1861 does not provide for it and Rules framed Under Section 46(2) of the Act, 1861 have to be published in the Official Gazette. More so, the Kerala Act provided for publication of orders in the State's Official Gazette.

62. Purpose of publication is to make the people aware of the law. The issue as to whether in every case, the law requires to be published in the Official Gazette, came for consideration before the Hon'ble Supreme Court in B.K. Srinivasan v. State of Karnataka : [1987] 1 SCC 658. The Court held as under :

"Where the parent Statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent Statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a made of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication.There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient. [Narayana Reddy v. State of A.P. : (1969) 1 Andh WR 77]."

63. So far as the police service is concerned, admittedly, it does not concern the masses. It may be relevant for those only, who have attained eligibility and went to join police service. Government Orders issued Under Section 2 of the Act, 1861 have never been published in the Official Gazette rather have always been published in the Police Gazette. Thus, we do not find any force in the submissions made by Mr. Chaudhary that Government Orders so issued can not be given effect to for want of publication in the Official Gazette.

64. In the view of the above, we reach the inescapable conclusion that statutory rules cannot be set at naught by issuing executive instructions. But the facts of the instant case do no make the said proposition of law applicable at all. As herein the field is already occupied by the provisions of Act, 1861 which is in operation by virtue of the provisions of Article 313 of the Constitution, thus. Rules, 1972 could not be attracted at all. The Government Orders issued for fixing the maximum age for recruitment on subordinate police posts operate in an entirely different field and are not in conflict with the Rules, 1972. The case stands squarely covered by the Apex Court judgment in Chandra Prakash Tiwari (supra) and, thus, it is not possible for us to take any other view. The main submissions made by Mr. Chaudhary that Pre-Constitutional law stands abrogated altogether by commencement of the Rules, 1972, is devoid of any merit. Therefore; our answer to question No. 1 is that the field stood occupied on account of the provisions of Section 2 of the Act, 1961. The Legislature while enacting the provisions of Section 2 of Act, 1961 itself delegated the power to the statutory authorities to fix the eligibility including the age etc, The statutory authorities had performed their duties in exercise of the delegated powers from time to time without any deviation therefrom.

65. In such facts and circumstances, there was no occasion for His Excellency, the Governor to frame the Rules under the proviso to Article 309 of the Constitution, also applicable in the case of recruitment of subordinate police officers."

(60) From the aforesaid Government Orders dated 05.11.1965, 29.08.1983 and 24.07.2003, it transpires that these Government Orders were provided selection process for normal promotion of the Sub-Inspectors to the rank of Inspectors. These Government Orders have been issued under Section 2 of the Police Act, 1861 and were having statutory force, hence they are having mandatory and binding effect as these are termed as statutory orders.

(61) The Government Order dated 03.02.1994 shows that this Government Order relates to out of turn promotion of the Sub-Inspector to the post of Inspector and the ground for such out of promotion was the indomitable courage shown by the Sub-Inspectors in discharge of their duties. This Government Order is also referable to Section 2 of the Police Act, 1861. Vide circular dated 10.02.1994 issued by the Director General of Police, Uttar Pradesh in pursuance of the statutory Government Order dated 03.02.1994, a complete mechanism/procedure was provided for out of turn promotion. The Government Order dated 03.02.1994 does not contemplate merely courage rather indomitable courage for grant of out of turn promotion. For an act of bravery, a police officer can be rewarded according to Chapter XXXI of the Police Regulations, but the Government Order dated 03.02.1994 required something more than good work and bravery.

(62) It is not disputed by the parties that Government Orders 05.11.1965, 29.08.1983 and 24.07.2003 are referable to the same source i.e. Section 2 of the Police Act, 1861 and further statutory order dated 03.02.1994 continuously remain in existence from 03.02.1994 till 07.06.2014 and all these Government Orders were co-existing as they were operating in different field providing for different contingencies.

(63) It is also not in dispute that under Section 2 of the Police Act, 1861, the State Government has been vested with power to determine the pay and all other conditions of service of members of the subordinate ranks of the police force. The determination within the meaning of Section 2 may be both by means of the exercise of the rule-making power as well as by an administrative direction. Thus, the Police

Act, 1861 being a complete code and it occupies the entire filed of the determination of service condition. The power to determine all the conditions of service of member of the subordinate ranks of the police force is vested with the State Government and the State Government has the rule making power under Section 46 (2) (c) of the Police Act, 1861 to carry out the purposes of the Act by framing rules.

(64) From perusal of the impugned order dated 20.02.2019, it transpires that the learned Single Judge has not considered the object of the Government Order dated 03.02.1994, its source, its nature etc., hence the nature of the appointment of the appellants by way of out of turn promotion appears to be not tested by the learned Single Judge while passing the impugned order dated 03.02.1994. It appears that the learned Single Judge, while passing the judgment and order dated 20.02.2019, has laid much emphasis upon Uttar Pradesh Sub-Inspectors and Inspector (Civil Police) Service Rules, 2008 and not considered the statutory Government Orders, as referred to hereinabove, which have been issued under Section 2 read with Section 46 (2) of the Police Act, 1861.

(65) Rule 28 of the Rules, 2008 empowers the State Government to grant relaxation from the conditions of service, if it is satisfied that operation of any rule, regulating the condition of service of persons appointed to the service cause undue hardship in any particular case, it may notwithstanding anything contained in the Rules applicable to the case, by order dispense with or relax the requirement of that rule to such extent and subject to such condition as it may consider necessary for dealing with the cases in just and equitable manner. Rule 30 of the Rules, 2008 grants overriding effect to the said rules notwithstanding anything contrary contained in any other rules, Government Order or administrative instructions made or issued by the State Government and further sub-rule 4 of Rule 30 also provides that notwithstanding such recission, the benefit of seniority and conformation etc. granted before 02.12.2008 under the prevalent rules, government orders or administrative instructions shall not be withdrawn.

(66) At the cost of repetition, it is apt to mention that on 07.04.2014, the State Government issued order under Section 2 of the Police Act, 1861, by which the mechanism of out of turn promotion was done away with and in its place, other arrangements, namely, cash, reward and grant of medals was brought into force, as such, prior to 07.06.2014, the Government Order dated 03.02.1994 and 01.05.1999 was being applied for granting out of turn promotion on cadre posts on personnel, who had shown exemplary courage, while carrying out their duties.

(67) It appears that in order to rectify the anomaly created vide earlier order dated 01.05.1999, by which although promotions would be made on cadre post but the same would be treated ex cadre and the same would not confer any benefit for determination of seniority and also considering the aforesaid order dated 07.06.2014 for rescinding its policy of granting out of turn promotion, the State Government, in exercise of powers available to it under Section 2 of the Police Act, 1861, issued an order dated 23.07.2015, rectifying the said seniority anomaly, by which the earlier order dated 01.05.1999 was rescinded with immediate effect and it was provided that 990 non-gazetted Police Officers/Employees, who had been granted out of turn promotion w.e.f. 1994 till 2014, their probation shall be counted w.e.f. their date of out of turn promotion. This order dated 23.07.2015 was challenged by the writ petitioners inter alia on the ground that the same has been issued in violation of the provisions of Rules, 2008 and operation of which would cause

them undue hardship, since the out of turn promotees would be placed higher in rank in the seniority list.

(68) In **Praful Kumar Das Vs. State of Orissa (Supra)**, the Constitution Bench of this Court has held that the seniority is a civil right available to the Government Servant to be determined by the policy of the employer and further it is always open for the employer/State Government to amend/modify its policy and thus, there is no vested right available to a Government Servant if such policy is changed.

(69) Rule 3 (i) of Rules, 2008 has clearly provided that any person substantively appointed under the orders enforced prior to the commencement of these Rules to a post of Cadre of the Service shall be deemed to be substantively appointed in service. The word "substantive appointment' defined in Rule 3(m) of Rules, 2008, which clearly provided that substantive appointment means an appointment, not being ad hoc appointment, on a post in the cadre of the service, made after selection in accordance with the rules and if there were no rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government. Sub-Rule 2 of Rule 19 of the Rules, 2008 provides that any person appointed to a post in the service prior to commencement of Rules, 2008 and was working on the post shall be deemed to be substantively appointed under the said Rules. "Cadre of service' has been defined in Rule 4 of the Rules, 2008, which lays down that the strength of service and of each category of service therein shall be such as may be determined by the Government from time to time.

(70) The question before the learned Single Judge in the writ petitions was that whether the Government Order dated 23.07.2015 and the seniority list of Inspectors in civil police dated 24.02.2016 are legal and valid or they are arbitrary, illegal and unjust.

(71) It transpires from the record that out of turn promotions have been granted to the private respondents on the *ex cadre* posts of Inspectors in pursuance to the Government Order dated 03.02.1994 for showing exemplary courage and gallantry by them. It is not in dispute that the Government Order dated 03.02.1994 has been issued by the State Government in exercise of power available to it under Section 2 of the Act, 1861. This Government Order dated 03.02.1994 contemplated that the promotions would be made on ex cadre posts, which were to be sanctioned by the State Government for the said purpose every year, however, no such post were ever created and the out of turn promotions were made on cadre posts of Inspectors and Head Constables, respectively. Subsequently, the State Government on 01.05.1999 issued another statutory order referable to Section 2 of the Act, 1861, which laid down that out of turn promotions would be against the vacancies existing in the cadre, however, promotion would be treated ex cadre and its benefit will not be available for the purpose of determination of seniority.

(72) It is not in dispute that at the time of issuance of the aforesaid statutory orders i.e. 03.02.1994 and 01.05.1999, there were no service rules framed by the State Government under sub-section 2 (c) of Section 46 of the Police Act, 1861. Thus, all the out of turn promotions were promoted on cadre posts and the said promotions were made by the State Government in accordance with the Government Orders, which were issued in exercise of the statutory powers available to it under the provisions of Police Act, 1861. In these backdrops of the matter, is appears that promotion of the appellants were made in accordance with the procedure then prevailing in law and were made on cadre posts.

(73) A bare reading of Rule 3 (i), 3 (l) and 3 (m) of Rules, 2008 and on considering the fact that out of turn promotees were appointed on

cadre posts as per the then existing procedure issued by the State Government under the provisions of Police Act, 1861, it transpires that such out of turn promotees were member of the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service having been substantively appointed on a cadre post prior to the issuance of the Rules, 2008 and after the advent of the Rules, 2008, they continued in the said capacity.

(74) On 07.06.2014, the State Government issued an order under Section 2 of the Police Act, 1861, by which the mechanism of out of turn promotion was rescinded and in its place, other arrangements, namely, cash reward and grant of medals was brought into force. Hence, prior to 07.06.2014, the Government Orders dated 03.02.1994 and 01.05.1999 were being applied for granting out of turn promotion on cadre posts of personnel who had shown exemplary courage, while carrying out their duties. It appears that once the State Government on 07.06.2014 took a decision of rescinding its policy of granting out of turn promotion and replacing the same with the other arrangement, the State Government in order to rectify the anomaly created vide order dated 01.05.1999, which provided that although promotions would be made on cadre post, the same would be treated ex cadre and the same would not confer any benefit for determination of seniority, issued the order dated 23.07.2015 rectifying the said anomaly by which earlier order dated 01.05.1999 was rescinded with immediate effect and it was provided that 990 Non-Gazetted Police Officers/employees who had been granted out of turn promotion w.e.f. 1994 till 2014, their probation shall be counted with effect from their date of out of turn promotion. This Government Order dated 23.07.2015 were challenged by the writ petitioners/private respondents before the learned Single Judge.

(75) It transpires from the impugned judgment and order dated 20.02.2019 that the learned Single Judge, while considering Rules, 2008, has not taken into consideration the meaning of term "members of service', which has been defined in Rule 3 (i) of the Rules, 2008. Further, the learned Single Judge, though considered Rule 3 (m) of the Rules, 2008 but part which was conjuncted after the word "and' i.e. *"and if there were no rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government'* has not been taken into account and the part which has highlighted in the bold in para-7 of the impugned judgment i.e. *"on a post in the cadre of the service'* has only been considered. It also transpires that proviso to sub-rule 2 of Rule 19 of the Rules, 2008 has also not been taken into consideration, which specifically provided that any person appointed to a post in the service prior to commencement of the Rules, 2008 and was working on the post shall be deemed to be substantively appointed under the said Rules. The learned Single Judge has also lost sight of the sub-rule (4) of Rule 30, which categorically provided that notwithstanding such recission, the benefit of selection, promotion, training, appointment, determination of seniority and confirmation etc. granted before 02.12.2018 (the date on which Rules, 2008 came into force) under the prevalent rules, Government Orders or Administrative instructions shall not be withdrawn. The learned Single Judge has also not considered the policy decision as contemplated under Government Order dated 07.06.2014.

(76) It reveals from perusal of Rule 3 (i) and 3 (n) of the Rules, 2015 that it provides for the term of members of the service and substantive appointment, whereas Rule 18 (2) of the Rules, 2015 provides that if more than one order of appointment are issued in respect of any one selection under Rule-17, then a combined order shall also be issued, mentioning the names of the persons in order of seniority as determined in the selection or, as the case may be, as it stood in the cadre from which they are

promoted. Proviso to sub-rule 2 of Rule 18 provides that any person appointed before the commencement of these rules to a post under the service and working on that post shall be deemed to have been substantively appointed under these rules and such substantive appointment shall be deemed to have been made under these rules.

(77) In the instant case, there are two classes i.e. (1) out of turn promotee cadre; (2) direct recruitee cadre. These two classes were subsequently merged into one class of cadre. However, a dispute arose. Direct recruitee/private respondents have claimed that they are senior to the out of turn promotee cadre, whereas out of turn promotee cadre/appellants claims that as they are being working since the date of giving out of turn promotion on the strength of the statutory orders which have been issued in terms of Section 2 of the Police Act, 1861, therefore, the policy decision taken by the State Government vide order dated 23.07.2015 and the consequential orders are perfectly justifiable.

(78) At this juncture, it is relevant to add that the issue of merger of cadres has been examined by the Apex Court repeatedly and it has been laid down as a principle of law that merger of cadre and the matter of creation of post is a prerogative of the State policy. It is always open to the State Government to create post or merge the cadres. No employee has the right to object to the merger/integration of the cadre of different departments on the ground that it will adversely affect the prospects of promotion or cover other service benefits. The Apex Court in **Shivprasad Pipal Vs. Union of India and others** : (1998) 4 SCC 598, after re-emphasising that merger of cadre was essentially a matter of policy went on to lay down certain guidelines, which had to be observed before any decision to merge the cadres can be said to be a valid merger. Paragraphs 4 and 5 of the aforesaid report is reproduced as under :-

"4.However, when different cadres are merged certain principles have to be borne in mind. These principles were enunciated in the case of State of Maharashtra and Anr. V. Chandrakant Anant Kulkarni & Ors. (1982 1 SCR 665 at page 678) while considering the question of integration of government servants allotted to the services of the new States when the different States of India were reorganised. This Court cited with approval the principles which had been formulated for effecting integration of services of different States. These principles are: In the matter of equation of posts, (1) where there were regularly constituted similar cadres in the different integrating units the cadres will ordinarily be integrated on that basis but (2) where there were no such similar cadres, the following factors will be taken into consideration in determining the equation of posts:-

(a) Nature and duties of a post;

(b) Powers exercised by the officers holding a post the extent of territorial or other charge held or responsibilities discharged;

(c) The minimum qualifications, if any, prescribed for recruitment to the post and;

(d) the salary of the post.

5. This court further observed that it is not open to the court to consider whether the equation of posts made by the central Government is right or wrong. This was a matter exclusively within the province of the Central Government. Perhaps the only question the Court can enquire into is whether the four principles cited above had been properly taken into account. This is the narrow and limited field within which the supervisory jurisdiction of the Court can operate."

(79) Keeping in mind the aforesaid dictum of the Apex Court, we find herein that before and after the merger of two cadres into one cadre, nature and duties of the post in question are more or less identical. Furthermore, the qualifications prescribed for appointment on the post in question on the date the private

respondents and appellants were appointed, were the same. The appellant's date of substantive appointment on the post in question is admittedly prior in the point of time to that of the private respondents.

(80) Now, the issue is as to what place is to be assigned to the officers, who are earlier ex cadre and have been subsequently merged with another cadre in the facts of the case in the cadre posts covered by Rules, 2008 and Rules 2015.

(81) In the case of **S. Sivaguru Vs. State of Tamil Nadu** : (2013) 7 SCC 335the Apex Court in paragraphs 60, 72, 72.7 & 72.9 has held as follows :

"60. Upon merger of the two posts, it was no longer permissible to treat the re-designated Health Inspector Grade IA differently from Health Inspector Grade IB. Since 1997, all incumbents on the posts of Health Inspector Grade IA and Health Inspector Grade IB were performing the same duties. There was intermixing of the duties performed by the two categories of the Health Inspector Grade IA and IB. Both the posts had lost their original identity since 27th June, 1997, and formed one homogenous cadre. Further, having relaxed the qualifications on the basis of their length of service and experience, they were at par with the Health Inspector Grade IA. Thereafter, the State was not justified in denying to the erstwhile Health Inspector Grade IB, the same treatment as was given to Health Inspector Grade IA. Therefore, the Respondents could not have been denied the benefit of service on the post of Health Inspector Grade I from the date of the initial integration. It would be appropriate to notice the ratio of law laid down in the case of Sub-Inspector Rooplal (supra), wherein it was inter-alia held that the previous service of the transferred officials who are absorbed in an equivalent cadre in the transferred post is permitted to be counted for the purpose of determination of seniority. It would be appropriate to notice here that Leprosy Inspectors re-designated as Health Inspector Grade IB have not been granted the benefit of seniority in their cadre from the date of their initial appointment. They have been deprived of their service on the post of Leprosy Inspector upto 27th June, 1997 when they were integrated and re-designated as Health Inspector Grade IB. However, upon merger w.e.f. 27th June, 1997, there was no distinction in the services rendered by Health Inspector Grade IA and Health Inspector Grade IB. Therefore, in our opinion, the provision in G.O. (MS) No. 382 of 2007 not to grant the Health Inspectors Grade IB/erstwhile Leprosy Inspectors the benefit of the service from 1997 for determination of their seniority for promotion to the post of Block Health Supervisor was completely unjustified.

72. At this stage, we may summarise the conclusions recorded by us in the following manner:

72.7 The denial of seniority to the redesignated Health Inspectors Grade IB i.e. Erstwhile Leprosy Inspectors on the post of Health Inspector Grade I w.e.f. 1-8-1997 to 12-10-2007 violated Articles 14 and 16 of the Constitution of India. The Division Bench of the High Court has correctly concluded that the integrated Leprosy Inspectors, redesignated as Health Inspector Grade IB are to be redesignated as Health Inspector Grade I and to be given seniority as well as consequential reliefs such as seniority and further promotions.

72.9 The continuance of the existing promotion channels as Non-Medical Supervisor and Health Educator to the redesignated Health Inspector Grade I (erstwhile Leprosy Inspectors) did not amount to bestowing a double benefit upon this category. Therefore, the High Court did not enforce negative equality. The High Court has correctly observed that upon integration and merger into one cadre, the pre-existing length of service of the Leprosy Inspectors redesignated as Health Inspector

Grade IB had to have been correctly placed at the bottom of the seniority list of the already existing Health Inspectors Grade I w.e.f. 27-6-1997. Therefore, it cannot be said that benefit has been given to the Leprosy Inspectors/Health Inspector Grade IB/Health Inspector Grade I with retrospective effect."

(82) Considering the aforesaid dictum of the Apex Court and the facts that the appellants are members of the service and substantively appointed out of turn on the strength of the statutory Government Orders, we are of the view that the policy of the State Government issued vide order dated 23.07.2015 was legally justified and the learned Single Judge erred in quashing the Government Order dated 23.07.2015 and the seniority list

(83) There is one another aspect also, of the issue. As stated hereinabove, the learned Single Judge, while passing the impugned order, has failed to appreciate the object of the Government Order dated 03.02.1994, its source, its nature etc. and also failed to appreciate the nature of the appointment of the appellants. Furthermore, the learned Single Judge has not considered Rule 3 (i) and part of Rule 3 (m) of the Rules, 2008, which was conjuncted after the word "and'. Even the Governments Orders dated 05.11.1965, 29.08.1983 and 24.07.2003, which are the statutory orders as held by the Apex Court in **Chandra Prakash Tiwari Vs. Shakuntala Shukla** : AIR 2002 SC 2322 and by the Full Bench of this Court in **State of U.P. and others Vs. Rajendra Singh and another** : 2015 (4) ADJ 575 (LB) (FB), has not been appreciated.

(84) It is settled law that when a judgment is rendered by ignoring the provisions of the governing statute and earlier larger Bench decision on the point such decisions are rendered per incuriam. This concept of per incurium has been explained in many decisions of the Apex Court, viz. **Government of A.P. and another Vs. B. Satyanarayan** : 2000 (4) SCC 262, **Nirmaljeet Kaur Vs. State of M.P. and another** : 2004 (7) SCC 558, **Tuples Educational Society and another Vs. State of U.P. and another** : 2008 (3) AWC 2499 (FB).

(85) For the reasons aforesaid, the special appeals are **allowed**. The impugned judgment and order dated 20.02.2019 is hereby set-aside. Consequently, writ petition Nos. 5677 of 2016 (S/S) : *Mahanth Yadav and 6 others Vs. State of U.P.*, 13625 of 2016 (S/S) : *Kamal Singh Yadav Vs. State of U.P. and others* and writ petition No. 10759 of 2016 (S/S) : *Prabhakar Tripathi and 6 others Vs. State of U.P. and others*, are hereby **dismissed.**

(2021)12ILR A1228
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.12.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

Service Single No. 11666 of 2021

Ravindra Singh ...Petitioner
Versus
U.P. Jal Nigam Lko. & Anr. ...Respondents

Counsel for the Petitioner:
Pradip Kumar Srivastava, Renu Misra

Counsel for the Respondents:
Rishabh Kapoor

A. Service Law – Right to seek voluntary retirement - U.P. Fundamental Rule 56(c) and (d) of the Financial Hand Book Vol. II (Parts II to IV) - The exercise of option to retire voluntarily is subject to the Government/employer's scrutiny and its acceptance on the anvil of public interest. It is not an absolute right of the employee that fructifies on the expiry of three months' notice period u/Rule 56(c) of the Rules. Therefore, the

Nigam had authority and jurisdiction to decline the petitioner's application/notice to retire voluntarily. (Para 19, 20)

The Explanation in the Rules in question has to be applied to both the situations as contemplated in Rule 56(c) and is applicable to both the exigencies not only when the Government decides to retire an employee, but also applicable where voluntary retirement is sought by an employee. It cannot be said that no further restriction by Explanation has been added in a case where an employee has decided to obtain voluntary retirement. **The public interest is the prime consideration** on which authority has to decide such a prayer as per the rules applicable in the State of Uttar Pradesh. (Para 19)

U/Rule 56 as applicable in the State of Uttar Pradesh, **notice of voluntary retirement does not come into effect automatically on the expiry of the three months' period.** Under the Rule in question, the appointing authority has to accept the notice for voluntary retirement or it can be refused on permissible grounds. (Para 19)

B. Public interest, is no cloak to shield the Administrator's arbitrary and whimsical decision, based on whims and caprice. It has to be a decision by the primary decision maker, that is to say, the Administrator taken bona fide to qualify for a valid decision. It has to be one that is free from the vice of arbitrariness and taken in public interest. **The assessment and conclusion from the relevant and objective material to judge public interest is the Administrator's determination. That would not be re-assessed and trampled upon by the Court to step into the Administrator's role as the primary decision maker, unless the Administrator's conclusion be perverse**. (Para 21)

Nigam is in a precarious financial position. At the same time, the Nigam is a public body charged with the duty of managing water supply and sewerage all over the State. The petitioner is a Senior Engineer and experienced in the particular nature of work, that is involved in the operations of the Nigam. If the Nigam say that there has been a reduction in the work force of their Class-A Officers (which implies Engineers), it would certainly and pre-eminently be the Nigam's decision to judge whether public interest would suffer if the petitioner is allowed to retire voluntarily and abandon post. The petitioner is not an entry- level Engineer or a fresh recruit, who can be replaced with another like him at short notice and before his scheduled retirement. Therefore, the discretion exercised by the Nigam to refuse voluntary retirement, cannot be said to be arbitrary, whimsical, capricious or perverse. It is in public interest, which does not warrant interference by this Court. (Para 23)

Writ petition dismissed.(E-4)

Precedent followed:

St. of U.P. & ors. Vs Achal Singh, (2018) 17 SCC 578 (Para 18)

Precedent distinguished:

Radha Saran Vs The General Manager, Central Railways, Bombay & anr., 1987 LAB. I.C. 716 (Para 11)

Present petition challenges orders dated 03.11.2020 and 24.02.2021, passed by Uttar Pradesh Jal Nigam.

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition is directed against orders dated 03.11.2020 and 24.02.2021 passed by the Uttar Pradesh Jal Nigam, refusing the petitioner's notice to voluntarily retire from service.

2. The petitioner is an Executive Officer in the employ of the Uttar Pradesh Jal Nigam, Lucknow. He is currently posted at the Construction Division of the Nigam at Baghpat. The petitioner completed the age of 59 years on December the 13th, 2020, rendering by that time more than 36 years of service. He was appointed as a Junior Engineer on 22.09.1984 and in course of time, was promoted to the post of an Assistant Engineer. He was further promoted to the post of an Executive Engineer, which he current holds. The petitioner submitted a request to the Managing Director of the Uttar Pradesh

Jal Nigam (for short, 'the Nigam') through an application dated 01.10.2020, seeking to voluntarily retire from service, in exercise of his right under the U.P. Fundamental Rule 56(c) of the Financial Hand Book Vol. II (Parts II to IV). The aforesaid Rules shall hereinafter be referred to as 'the Rules'.

3. It was indicated in the application dated 01.10.2020 that the request may be regarded as three months' notice to voluntarily retire from service. The petitioner's notice to voluntarily retire was rejected by the Nigam in terms of an order of November the 3rd, 2020 passed by the Secretary (Administration) to the Nigam. It was said in the order that the petitioner's request was considered, but was not acceded to in public interest.

4. On 11th November, 2020, the petitioner addressed another memo to the Managing Director of the Nigam and requested a review of the order dated 03.11.2020. It was said in the memo/ representation dated 11.11.2020 that the petitioner was finding himself unable to serve the Nigam any further on account of his family and personal circumstances and, therefore, the employers may reconsider his request, seeking voluntary retirement, sympathetically. The memo dated 11.11.2020 remained unresponded to.

5. The petitioner then made another application dated 02.12.2020, also addressed to the Managing Director of the Nigam. Here, the relevant provisions of Rule 56 of the Rules were quoted and the Nigam were informed that the petitioner had a right to retire voluntarily at the end of three months' notice period under Rule 56(c). It was said in this application that the three months' notice period would expire on 31.12.2020 and the petitioner would treat himself retired from the Nigam's service w.e.f. 31.12.2020. The Managing Director was requested to arrange transfer of charge by nominating an Officer for the purpose. The Superintending Engineer, First Division, U.P. Jal Nigam, Meerut addressed a memo dated 29.12.2020 to the Chief Engineer (Rural Area), U.P. Jal Nigam, Ghaziabad, apprising him of the petitioner's request. It was also requested by the Superintending Engineer that the Chief Engineer may ensure acceptance of the petitioner's request for voluntary retirement and make arrangement for transfer of charge.

6. It is the petitioner's case that no Officer was deputed to relieve him on 31.12.2020 by the Nigam and he could not relinquish charge on the said date. On the 24th of February, 2021, the Secretary (Administration) to the Nigam passed a further order, notifying the decision to reject the petitioner's request for a review of the earlier order dated 03.11.2020, declining the petitioner's notice seeking voluntary retirement. The order dated 24th February, 2021 indicated that the petitioner's request has been refused in public interest. The public interest was disclosed to be the fact that in comparison to the month of November, 2020, Officers working in the Class-A Cadre of the Nigam had witnessed a drastic reduction in strength. It was mentioned that in these circumstances, it was not possible to accede to the petitioner's request for a voluntary retirement from service.

7. Aggrieved by the orders dated 03.11.2020 and 24.02.2021 passed by the Nigam, the petitioner has instituted the present writ petition. He prays that both these orders be quashed and the respondents ordered to relieve him from service forthwith attended with a direction to pay his full retirement benefits due in accordance with the Rules.

8. This petition was instituted on 08.06.2021 and came up before the Court on 10.06.2021. The Court passed an order directing the respondents to file a counter affidavit. The petition was ordered to come up again on

12.07.2021. Between 12.07.2021 to 29.10.2021, it drifted across six dates. During this period of time, pending admission, the parties exchanged affidavits. On 29.10.2021, this petition was formally admitted to hearing. It was heard in part on that day and adjourned to 01.11.2021. It was heard further for remainder of the submissions on 10.11.2021, when judgment was reserved.

9. Heard Mr. Pradip Kumar Srivastava, learned Counsel for the petitioner and Mr. Rishabh Kapoor, learned Counsel appearing for the respondents.

10. The thrust of Mr. Pradip Kumar Srivastava's submission is that under Rule 56(c) of the Rules, an employee is entitled to retire as a matter of right at any time after attaining the age of 45 years or after he has completed the qualifying service of 20 years. He submits that the petitioner is entitled to voluntary retirement on both parameters. He was about two months shy of his 59th birthday when he served the notice of voluntary retirement dated 01.10.2020 and had put in, by that time, more than 36 years of service. It is emphasized by Mr. Srivastava that the only contingency under which a notice of voluntary retirement may be refused is that envisaged under the second proviso to Rule 56(d), which stipulates that a Government servant, against whom disciplinary proceedings are pending or contemplated, would have his notice of voluntary retirement effective only if it is accepted by the Appointing Authority. The proviso further says that in case of contemplated disciplinary proceedings against a Government servant, who has served a notice of voluntary retirement, shall be informed about the refusal of his notice before expiry of the notice period.

11. The learned Counsel for the petitioner has drawn the Court's attention to the provisions of Rule 56 of the Rules and submitted that the employers have no choice in the matter once a notice of voluntary retirement is served and the period of notice expires. It is emphasized that it is not the Nigam's case that there are any disciplinary proceedings pending or contemplated against the petitioner. Thus, the action of the Nigam in refusing to accept the petitioner's notice of voluntary retirement is without jurisdiction. The petitioner must be deemed to have retired on the expiry of the period of three months of service of the notice seeking voluntary retirement. In support of his contention, Mr. Srivastava has relied upon the decision of a Division Bench of this Court in **Radha Saran v. The General Manager, Central Railways, Bombay and another, 1987 LAB. I. C. 716**. In **Radha Saran**, it was held:

"8. From the facts discussed above it is apparent that the authorities adopted a negative approach in considering the application of petitioner seeking voluntary retirement after having rendered 27 years of service. Why was this request opposed in absence of any circumstance is indeed beyond comprehension. The unreasonable attitude adopted by the authorities which was not warranted in the circumstances has resulted in inordinate delay in granting pension and other benefits to petitioner. The petitioner had to approach this Court for relief and remedy which could have been easily granted to him without any delay."

12. It is submitted by the learned Counsel for the petitioner that in the present case too, assuming that the Authorities have power to decline a notice of voluntary retirement, there is no justification to do so. Learned Counsel for the petitioner has hastened to add that this submission is not in derogation of his stand that the Nigam have no authority under Rule 56(c) of the Rules to decline a notice of voluntary retirement. He adds, continuing on the second line of his submission, that if the Nigam are held to possess jurisdiction or authority to refuse the petitioner's notice of voluntary retirement, the

decision in the absence of a cogent reason is arbitrary.

13. It is argued by the learned Counsel for the petitioner that 'public interest' is a word of well acknowledged connotation, but with an equally acknowledged reputation for its misuse and abuse. He submits that the Nigam's financial circumstances, that are not in dispute, show them to be in dire financial straits, where they are embarrassed with inability to regularly pay salary and pension to their employees and ex-employees. Learned Counsel for the petitioner has drawn this Court's attention to assertions in paragraph no.14 to the above effect, which have not been denied by the Nigam. He has also invited the Court's attention to a memo dated 27.03.2021 from the State Government to the Nigam sanctioning an interest free loan in the sum of Rs.72 crores to enable the Nigam to disburse their employees' salaries and pensions. It has been most persuasively urged by Mr. Srivastava that the Nigam, placed in the circumstances that they are, could hardly tout a case of 'public interest' in support of their refusal to accept an employee's request for voluntary retirement.

14. Mr. Rishabh Kapoor, learned Counsel for the Nigam, on the other hand, has refuted the submissions of Mr. Srivastava with utmost vehemence. He submits that the Nigam may not be in the pink of financial health, but they are a public undertaking charged with the duty of the preparation, execution, promotion and financing the schemes for the supply of water and for sewerage and sewage disposal, amongst others, in rural and urban areas. Supply of water in an ordered and sustained manner is a concomitant of the fundamental right to life guaranteed to all citizens. The Nigam is engaged in the discharge of duties corresponding to that fundamental right of the citizens. It is submitted, therefore, that the decision to retain a particular employee in service or a class of their employees, so that the Nigam can discharge its duties, has to be their decision taken in public interest. It is submitted that the Nigam, therefore, have to take a decision on a case-to-case basis about the class of employees or individuals, who are to be retained in service in order to enable the Nigam to discharge its functions.

15. About the jurisdiction of the Nigam to refuse a notice of voluntary retirement, it is submitted by Mr. Rishabh Kapoor that the Nigam have an unfettered right to refuse the notice of voluntary retirement so long as it is in public interest. Mr. Kapoor urges that there has to be some material to support the public interest, on which the Nigam seek to base their decision. The decision ultimately is one of the Nigam's and they are the primary decision makers about the public interest involved. The scope for judicial review is very limited. It is argued by the learned Counsel for the Nigam that in reading the provisions of Rule 56(c), the way the learned Counsel for petitioner urges this Court to do, the Explanation to Rule 56(c) has been ignored. That Explanation, according to Mr. Rishabh Kapoor, empowers the Nigam to refuse a notice of voluntary retirement in 'public interest'.

16. The Court has carefully considered the rival submissions advanced and perused the record. In order to assess the worth of the petitioner's case that the Nigam have no jurisdiction or authority under Rule 56(c) of the Rules to refuse a notice of voluntary retirement, it would be gainful to refer to the provisions of Rule 56 of the Rules. The relevant part of Rule 56 reads:

Financial Hand Book Vol. II (Parts II to IV)

"CHAPTER IX-COMPULSORY RETIREMENT

56. (a) Except as otherwise provided in this Rule, every Government servant other than

a Government servant in inferior service shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty eight years. He may be retained in service after the date of compulsory retirement with the sanction of the Government on public grounds which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances.

(b) A Government servant in inferior service shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years. He must not be retained in service after that date, except in very special circumstances and with sanction of the Government.

(c) Notwithstanding anything contained in clause (a) or clause (b), the appointing authority may, at any time by notice to any Government servant (whether permanent or temporary), without assigning any reason, require him to retire after he attains the age of fifty years or such Government servant may by notice to the appointing authority voluntarily retire at any time after attaining the age of forty-five years or after he has completed qualifying service of twenty years.

(d) The period of such notice shall be three months:

Provided that-

(i) any such Government servant may by order of the appointing authority, without such notice or by a shorter notice, be retired forthwith at any time after attaining the age of fifty years, and on such retirement the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice, or as the case may be, for the period by which such notice falls short of three months, at the same rates at which he was drawing immediately before his retirement;

(ii) it shall be open to the appointing authority to allow a Government servant to retire without any notice or by a shorter notice without requiring the Government servant to pay any penalty in lieu of notice:

Provided further that such notice given by the Government servant against whom a disciplinary proceeding is pending or contemplated, shall be effective only if it is accepted by the appointing authority, provided that in the case of a contemplated disciplinary proceeding the Government servant shall be informed before the expiry of his notice that it has not been accepted:

Provided also that the notice once given by a Government servant under clause (c) seeking voluntary retirement shall not be withdrawn by him except with the permission of the appointing authority.

(e) A retiring pension shall be payable and other retirement benefits, if any, shall be available in accordance with and subject to the provisions of the relevant Rules to every Government servant who retires or is required or allowed to retire under this rule.

Provided that where a Government servant who voluntarily retires or is allowed voluntarily to retire under this rule the appointing authority may allow him, for the purposes of pension and gratuity, if any, the benefit of additional service of five years or of such period as he would have served if he had continued till the ordinary date of his superannuation, whichever be less;

Explanation.-(1) The decision of the appointing authority under clause (c) to require the Government servant to retire as specified therein shall be taken if it appears to the said authority to be in the public interest, but nothing herein contained shall be construed to require any recital, in the order, of such decision having been taken in the public interest.

(2) In order to be satisfied whether it will be in the public interest to require a Government servant to retire under clause (c) the appointing authority may take into consideration any material relating to the Government servant

and nothing herein contained shall be construed to exclude from consideration-

(a) any entries relating to any period before such Government servant was allowed to cross any efficiency bar or before he was promoted to any post in an officiating or substantive capacity or on an ad hoc basis; or

(b) any entry against which a representation is pending, provided that the representation is also taken into consideration along with the entry; or

(c) any report of the Vigilance Establishment constituted under the Uttar Pradesh Vigilance Establishment Act, 1965.

(2-A) Every such decision shall be deemed to have been taken in the public interest.

(3) The expression "appointing authority' means the authority which for the time being has the power to make substantive appointments to the post or service from which the Government servant is required or wants to retire; and the expression "qualifying service' shall have the same meaning as in the relevant Rules relating to retiring pension.

(4) Every order of the appointing authority requiring a Government servant to retire forthwith under the first proviso to clause (d) of this rule shall have effect from the afternoon of the date of its issue, provided that if after the date of its issue, the Government servant concerned, bona fide and in ignorance of that order, performs the duties of his office his acts shall be deemed to be valid notwithstanding the fact of his having earlier retired."

17. If one were not to read beyond the second proviso to Rule 56(c) & (d) of the Rules, the contention of Mr. Srivastava could be accepted. The provisions of Rule 56(c) together with its three provisos, including the two sub-clauses of the first, make out a clear distinction between a case of compulsory retirement by the Government, which here would mean the Nigam, on the one hand and a case of voluntary retirement sought by an employee on the other. The provision about the Government taking a decision to compulsorily retire a Government servant after he attains the age of 50 years, does not envisage assignment of reason. It is a well acknowledged principle that this power to compulsorily retire a Government servant under Rule 56(c) after he attains the age of 50 years, is to be exercised by the Government or any other employer, to whom the Rules are applicable in public interest. However, the right of the Government servant/ employee to seek voluntary retirement at any time after attaining the age of 45 years or after he has completed the qualifying service of 20 years, appears to be a right, at the first blush, that can be exercised unilaterally by the employee, with no right of refusal with the Government/ employer. The only ground that appears, if one were not to read beyond the three provisos to Rule 56(d), is the pendency or contemplation of disciplinary proceedings against the Government servant. If that be the case, there seems to be little quarrel that a notice of voluntary retirement cannot be declined.

18. The second part of the second proviso, which says that in a case of contemplated disciplinary proceedings, the Government servant shall be informed before the expiry of his notice that it has not been accepted, seems to reinforce the submission that the right to retire voluntarily at the expiry of three months' notice, is unqualified and unilateral, except in the case of pendency or contemplation of disciplinary proceedings. But, reading the provisions of Rule 56(c) this way, portrays half the picture. Explanation (1) added to Rule 56(c) says that the decision of the Appointing Authority under clause (c) to require the Government servant to retire, as specified therein, shall be taken if it appears to the Authority that it is in public interest so to do. Now, clause (c) of Rule 56 speaks both about compulsory retirement and voluntary retirement. If one were to go by the strict phraseology of the Explanation, the words

"require the Government servant to retire" would seem to refer to the contingency of compulsory retirement alone, and not voluntary retirement. The petitioner seems to have thought that this may not be said of voluntary retirement, and perhaps, has led him to believe it to be so, because "requiring' the Government servant to retire may possibly bear no reference to a case of voluntary retirement, where the Government servant opts to retire; and not "required' to retire. This construction placed upon the Explanation, however, does not appear to be sound, because the Explanation bears reference to clause (c) of Rule 56 of the Rules as a whole. If there were some avenue of doubt about it, the legal position stands concluded in favour of the view that the Explanation applies to cases both of compulsory retirement as well as voluntary retirement, as held by the Supreme Court in **State of Uttar Pradesh and others v. Achal Singh, (2018) 17 SCC 578**. The precise question that fell for consideration of their Lordships of the Supreme Court in **State of U.P. v. Achal Singh (supra)** may be best described by referring to paragraph no.2 of the report:

"2. The main question for consideration before us is as to whether under Rule 56 of the Uttar Pradesh Fundamental Rules (hereinafter referred to as "the Fundamental Rules") as amended, an employee has unfettered right to seek voluntary retirement by serving a notice of three months to the State Government or whether the State Government under the Explanation attached to Rule 56 of the Fundamental Rules, is authorised to decline the prayer for voluntary retirement in the public interest under clause (c) of Rule 56 of the Fundamental Rules as applicable to the State of Uttar Pradesh."

19. The controversy in **State of U.P. v. Achal Singh** arose in the context of a notice of voluntary retirement served by the Doctors of the Provincial Medical Services, under Rule 56 of the Rules. The Doctors served notices on various dates, seeking to voluntary retire from service. Their applications remained pending much beyond the period of three months, with no orders passed. They then approached the High Court, saying that their voluntary retirement has become effective at the expiration of three months of service of notice under Rule 56(c), which this Court accepted on the construction of Rule 56(c) and its provisos, the way the petitioner wants this Court to do. The State of Uttar Pradesh challenged the judgment and order of the Division Bench of this Court dated 27.11.2017 by Special Leave, that was granted. Allowing the Appeal of the State of Uttar Pradesh, in **State of U.P. v. Achal Singh**, it was held:

"11. The Explanation attached to Rule 56 makes it clear that the decision of the appointing authority under clause (c) of Rule 56 to retire a government servant shall be taken if it appears to be in public interest. The Explanation is applicable to both the exigencies viz. when the Government retires an employee or when an employee seeks voluntary retirement, not only when Government desires to retire an employee in public interest. The Explanation attached to Rule 56 as applicable in the State of Uttar Pradesh is clear and precise.

14. It was submitted that despite the absence of any identical language, the rule involved in Dinesh Chandra Sangma [Dinesh Chandra Sangma v. State of Assam, (1977) 4 SCC 441 : 1978 SCC (L&S) 7] is comparable with the Uttar Pradesh Fundamental Rules and therefore, the judgment is binding. The submission based upon the same cannot be accepted and Rules 56(b) and (c) came up for consideration was somewhat different and there was no such Explanation to Rule 56.

15. In *Dinesh Chandra Sangma [Dinesh Chandra Sangma v. State of Assam*, (1977) 4 SCC 441 : 1978 SCC (L&S) 7] he was the District and Sessions Judge at Dibrugarh in the

State of Assam. On account of domestic troubles, he did not want to continue after attainment of the age of 50 years. He served a notice under Rule 56(c) as amended by the Governor of Assam under Article 309 of the Constitution by the Notification dated 22-7-1975. The formal notice was served upon by him. The Government allowed him to retire from the State Government service and then there were certain developments in the Government and the Government sought to retrace its steps and passed an Order on 28-7-1976, countermanding its earlier order allowing him to retire from service. The High Court dismissed the writ application filed by him. The Fundamental Rule as applicable in the State of Assam came up for consideration. In our opinion, it was quite different. It is provided in Fundamental Rule 56(b) as applicable in the State of Assam that public interest was germane when a government servant retires. Under Rule 56(c), a government servant may retire by giving notice of not less than three months. Hence, it was observed that there was no question of acceptance of the request for voluntary retirement by the Government when the government servant exercises his right under Rule 56(c). Not only the Rule was different it was passed on the concession also, however, the Explanation given to Rule 56 in the State of Uttar Pradesh makes it completely different and the provisions in F.R. 56(c) are also quite different. The rules as applicable in Assam for the purpose of retirement by the Government are contained in F.R. 56(b) which require retirement in public interest whereas no such rider exists in F.R. 56(c) when an employee seeks voluntary retirement, whereas rule in the State of Uttar Pradesh both provisions are conjointly read, not only the language is different and the Explanation makes out the whole difference.

16. The Explanation attached to Rule 56 as applicable in the State of Uttar Pradesh makes it clear that when a decision is taken by the authority under clause (c) of Rule 56, the right of an employee to retire cannot be said to be absolute as in the case of resignation, voluntary retirement is with retiral benefits whereas it may not necessarily follow in case of resignation. The decision under the rules in U.P. is to be based upon considering the public interest, whether it is a case of retirement by the Government or a case of a government servant seeking voluntary retirement. The decision rendered in Dinesh Chandra Sangma [Dinesh Chandra Sangma v. State of Assam, (1977) 4 SCC 441 : 1978 SCC (L&S) 7] is distinguishable and was based on the differently couched rule. The Explanation added makes the provisions different in the State of Uttar Pradesh. The decision in Dinesh Chandra Sangma [Dinesh Chandra Sangma v. State of Assam, (1977) 4 SCC 441 : 1978 SCC (L&S) 7] cannot be said to be operative being quite distinguishable.

19. Reliance was also placed on the decision rendered by this Court in State of Bombay v. United Motors (India) Ltd. [State of Bombay v. United Motors (India) Ltd., AIR 1953 SC 252] and Bengal Immunity Co. Ltd. v. State of Bihar [Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1955 SC 661] , in which it has been observed that Explanation can be read as proviso and it explains the scope of the main provision and the Explanation becomes part of the main section. There is no dispute with the aforesaid proposition. The Explanation in the Rules in question has to be applied to both the situations as contemplated in Rule 56(c) and is applicable to both the exigencies not only when the Government decides to retire an employee, but also applicable where voluntary retirement is sought by an employee. It cannot be said that no further restriction by Explanation has been added in a case where an employee has decided to obtain voluntary retirement. The public interest is the prime consideration on which authority has to decide such a prayer as per the rules applicable in the State of Uttar Pradesh.

27. In our considered opinion, under Rule 56 as applicable in the State of Uttar Pradesh, notice of voluntary retirement does not come into effect automatically on the expiry of the three months' period. Under the Rule in question, the appointing authority has to accept the notice for voluntary retirement or it can be refused on permissible grounds.

28. In our opinion, Rule 56(c) does not fall in the category where there is an absolute right on the employee to seek voluntary retirement. In view of the aforesaid dictum and what is held by this Court, we find that the prayer made to make a reference to a larger Bench, in case this Court does not follow the earlier decision is entirely devoid of merit as on the basis of what has been held by this Court in the earlier decisions, we have arrived at the conclusion. This Court has authoritatively laid down the law umpteen number of times.

33. There is no doubt about it that Rule 56(d) provides that where a disciplinary enquiry is pending or contemplated and in the case of contemplated disciplinary enquiry, the government servant shall be informed before the expiry of notice that it has not been accepted. The proviso to Rule 56(d) has no application where a disciplinary enquiry is not contemplated or pending. When the proviso itself is not applicable, in no case it will dilute the provisions of the Explanation with respect to exigencies mentioned in clause (c) of Rule 56.

34. The submission made upon principle of liberty and its curtailment, the law must be just, fair and reasonable can also not be accepted as the Fundamental Rules are statutory rules and have been made by the Governor under Section 241(2)(b) of the Government of India Act, 1935 and the provisions of rule in question cannot be said to be unfair, unreasonable and oppressive."

(Emphasis by Court)

20. In view of the aforesaid holding of the Supreme Court in **State of U.P. v. Achal Singh (supra),** there cannot be any doubt that the exercise of option to retire voluntarily is subject to the Government/ employer's scrutiny and its acceptance on the anvil of public interest. It is not an absolute right of the employee that fructifies on the expiry of three months' notice period under Rule 56(c) of the Rules. Therefore, it has to be held that the Nigam had authority and jurisdiction to decline the petitioner's application/ notice to retire voluntarily.

21. The second limb of the submission is about the decision carried in the impugned orders being vitiated by the vice of arbitrariness. Public interest, that has been pleaded in justification of the orders impugned, it is true, is no cloak to shield the Administrator's arbitrary and whimsical decision, based on whims and caprice. It has to be a decision by the primary decision maker, that is to say, the Administrator taken bona fide to qualify for a valid decision. It has to be one that is free from the vice of arbitrariness and taken in public interest. The Administrator must act on relevant and objective material. The assessment and conclusion from that material to judge public interest is the Administrator's determination. That would not be re-assessed and trampled upon by the Court to step into the Administrator's role as the primary decision maker, unless the Administrator's conclusion be perverse. This is a principle, too well-acknowledged, to merit any further elucidation.

22. Here, the consideration on which the impugned orders are sought to be supported, appears in a few but meaningful words carried in the order dated 24.02.2021. These are recorded in Hindi and read:

"माह नवम्बर 2020 की तुलना में विभाग में समूह "क" के कार्यरत अधिकारियों की संख्या में और कमी आयी है। ऐसी स्थिति मे आपकी स्वैच्छिक सेवानिवृत्ति के अनुरोध को स्वीकार किये जाने का अवसर सक्षम प्राधिकारी द्वारा परिलक्षित नहीं पाया गया हैं। तद्नुसार आपको अवगत कराया जाता है।"

23. The parties at ad idem about the fact that the Nigam is in a precarious financial

position. At the same time, the Nigam is a public body charged with the duty of managing water supply and sewerage all over the State. The petitioner is obviously a Senior Engineer and experienced in the particular nature of work, that is involved in the operations of the Nigam. If the Nigam say that there has been a reduction in the work force of their Class-A Officers (which implies Engineers), it would certainly and pre-eminently be the Nigam's decision to judge whether public interest would suffer if the petitioner is allowed to retire voluntarily and abandon post. It also cannot be ignored that the petitioner is not an entry-level Engineer or a fresh recruit, who can be replaced with another like him at short notice and before his scheduled retirement. Therefore, in the circumstances, the discretion exercised by the Nigam to refuse voluntary retirement, cannot be said to be arbitrary, whimsical, capricious or perverse. The decision is one taken in public interest, which does not warrant interference by this Court.

24. The decision in **Radha Saran** (supra) relied upon by the petitioner to canvass a case of unreasonableness by the respondents in declining the petitioner's notice of voluntarily retirement is clearly distinguishable, because that decision was rendered in the context of a Voluntary Retirement Scheme for servants of the Indian Railways governed by the Circulars of 1977 and 1981. The employers in that case were left option-less in the matter of declining a notice of voluntary retirement, in view of the phraseology of Clause (vii) of the 1977 Circular, where the expression used was "such acceptance may be generally given in all cases except....." as would appear from Paragraph 4 of the report in **Radha Saran**. The exceptions there were pending or contemplated disciplinary proceedings involving the imposition of a major penalty, or a case where prosecution was contemplated or launched in a court of law. Else, the employer was without option but to accept the notice. This is not the position under Fundamental Rule 56(c) read with the Explanation, as held by the Supreme Court in **State of U.P. v. Achal Singh**.

25. In the result, this petition **fails** and is **dismissed**.

26. There shall be no order as to costs.

(2021)12ILR A1238
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.12.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 3667 of 2018

Sanjay Sharma ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Anil Kumar Jaiswal, Sri Diwan Saifullah Khan, Sri Nazrul Islam Jafri, Sri Ravindra Pratap Singh, Sri Akhilesh Srivastava, Sri Shaksham Srivastava, Sri Khalid Mahmood

Counsel for the Respondent:
A.G.A.

A. Criminal Law – Indian Penal Code,1860 - Sections 302 & 504 - Arms Act, 1947 - Section 25 - Code of Criminal Procedure 1973 - Sections 82 & 161 - The statement recorded u/s 161 Cr.P.C. is not a substantive piece of evidence and is inadmissible in evidence. It cannot be relied upon or used to convict the accused. The statement recorded u/s 161 Cr.P.C. can be used only to prove the contradictions and/or omissions. It may be used for the limited purpose of impeaching the credibility of a witness. (Para 26 to 30)

Section 162 Cr.P.C. bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such

witnesses as indicated there. The statements u/s 161 Cr.P.C. recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose: (i) of contradicting such witness by an accused u/s 145 of the Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and (iii) the re-examination of the witness if necessary. (Para 28)

In present case, prosecution has examined five witnesses of fact. During the course of trial, all of them denied their earlier statements given by them before the police i.e. to Investigating Officer u/s 161 Cr.P.C. One of them (PW-1) though supported the FIR version in his examination-in-chief but this witness is not an eye witness and his testimony is based on hearsay, therefore, his testimony given in examination-in-chief is of no help for the prosecution. (Para 24)

B. Merely narration of facts in the case diary, which do not emanate from substantive evidence cannot be taken into account - Trial court relied on a circumstance that in the ring ceremony (Sagai) function, appellant-Sanjay Sharma fired three celebratory shots, which shows appellant had used firearm on that day. This fact could not have been noticed as it does not emanate from substantive evidence. Though, it might be part of case diary. Perusal of the statement of S.I. Paan Singh (PW-9) shows that he received a C.D., from appellant's brother and noted its contents in the case diary too, but neither the C.D. was produced by the prosecution nor the contents of the C.D. noted in the case diary were proved during trial. (Para 33)

C. Merely on ground of delay in arrest, the appellant cannot be convicted. After the incident, the appellant could be arrested only after about one year and two months. Although **arrest of the appellant after such a long period of time may create suspicion against him, but merely on this basis he cannot be convicted.** Further, although, during investigation, the Investigating Officer moved an application u/s 82/83 Cr.P.C. against the appellant, but this application was rejected by the trial court. (Para 32)

D. In a criminal trial it is the duty of the prosecution to prove its case beyond all reasonable doubts and prosecution will have to stand on its own leg. The burden in the criminal trial is upon the prosecution to prove the guilt of the accused. The prosecution cannot take advantage of the weakness of the defence case. If appellant failed to produce any evidence in his defence, then also he cannot convicted. His conviction can only be recorded on the basis of substantive evidence. (Para 34)

The prosecution, in the present case, has failed to prove the guilt of the appellant beyond all reasonable doubt and the evidence produced by the prosecution is of such nature, on the basis of which, the conviction of the appellant is not possible. (Para 35, 36)

Acquitted. Appeal allowed. (E-4)

Precedent followed:

1. Ram Swaroop & ors. Vs St. of Raj., 2005 SCC (Cri) 61 (Para 27)

2. Tehsildar Singh & ors. Vs The St. of U.P., AIR 1959 SC 1012 (Para 28)

3. V.K. Mishra & anr. Vs St. of Uttarakhand & anr., (2015) 9 SCC 588 (Para 28)

4. Parvat Singh & ors. Vs St. of M.P., (2020) 4 SCC 33 (Para 29)

Precedent distinguished:

Bhagwan Das Vs State (NCT) of Delhi, (2011) 6 SCC 396 (Para 26)

Present appeal challenges judgment and order dated 08.06.2018, passed by learned Additional District and Sessions Judge, District Bulandshahar.

(Delivered by Hon'ble Sameer Jain, J.)

1. The present appeal has been preferred by the appellant against the judgment and order dated 8.6.2018 passed by Additional District and Sessions Judge, Court No.9, Bulandshahar in Sessions Trial No. 247 of 2017 (State Vs. Sanjay Sharma) arising out of Case Crime No. 69 of

2016, under Section 302 IPC and Sessions Trial No.69 of 2018 (State Vs. Sanjay Sharma), under Section 25 of Arms Act arising out of Case Crime No. 70 of 2016, by which, learned trial court convicted the appellant under Section 302 IPC and sentenced him to undergo life imprisonment with fine of Rs.25,000/- (Rs. Twenty Five Thousand) and in default of payment of fine one year additional imprisonment; and under Section 25 of Arms Act and sentenced the appellant to undergo three years rigorous imprisonment with fine of Rs.5000/- (Rs. Five Thousand) and in default thereof three months additional imprisonment.

2. The prosecution story, in nutshell, is that on 16.02.2016, Rajendra Sharma (PW-1) lodged First Information Report of the present case under Sections 302, 504 IPC at Police Station Gulawathi, District Bulandshahar against appellant-Sanjay Sharma, which was registered as Case Crime No. 69 of 2016 with the allegation that on 16.02.2016 his wife Smt. Laxmi (PW-3) and his son Ankit @ Lala (deceased) aged about 15 years along with his nephew Rakesh Sharma (PW-2) went to attend the function of ring ceremony (Sagai) of his relative, namely, Dev Dutt Sharma, and in the function of ring ceremony (Sagai), the appellant, who is son-in-law of Dev Dutt Sharma, was also present; at about 3.00 P.M. the appellant Sanjay Sharma called Ankit (deceased) on the roof and asked him to bring water for liquor; when Ankit (deceased) refused, appellant Sanjay Sharma started abusing him. On hearing the noise, PW-1's wife Smt. Laxmi and nephew Rakesh Sharma (PW-2) arrived at the roof and they witnessed that appellant-Sanjay Sharma, in a fit of anger, shot Ankit at about 3.30 P.M., as a result whereof, his son Ankit fell down and appellant-Sanjay Sharma managed to escape. It is mentioned in the FIR that information of the incident was given by informant's wife.

3. After registration of the FIR, police arrived at the house of Dev Dutt Sharma and investigation was started. During investigation, on same day i.e. on 16.02.2016, a country made pistol was recovered from the roof of the house of Dev Dutt Sharma in the presence of Rajendra Sharma (informant) P.W.-1 and Sri Nanak Chandra Sharma. The Investigating Officer prepared recovery memo of country made pistol as (Ext.Ka-11). On same day i.e. on 16.02.2016, Investigating Officer collected blood stained and plain scrape of roof from the spot and prepared recovery memo (Ext. Ka-12). Thereafter, inquest report of the dead body of Ankit was prepared on 16.02.2016 as (Ext.Ka-2) and post-mortem report of the deceased (Ankit) was prepared as (Ext.Ka-8). During post-mortem, doctor found two firearm wounds on the body of the deceased, one was entry and the other was exit. Both injuries communicating to each other. After investigation, Investigating Officer submitted charge-sheet on 23.05.2017 against the appellant, under Sections 302, 504 IPC as (Ext. Ka-14) and also submitted charge-sheet against him under Section of 25 Arms Act on 30.06.2017. As the case under Arms Act was related to the present case both the cases were committed to the Court of Session. After committal of the case, on 29.07.2017, the trial court framed charges against the appellant under Sections 302 and 504 IPC. On 22.02.2018 charge was also framed under Section 25 of Arms Act. Appellant pleaded not guilty and claimed trial.

4. During trial, prosecution examined 13 witnesses. Out of 13 witnesses, 5 witnesses, namely, Rajendra Sharma (PW-1), Rakesh Sharma (PW-2), Smt. Laxmi (PW-3), Smt. Seema (PW-4) and Virendra (PW-5) are the witnesses of fact whereas the rest are formal witnesses.

5. After recording the statement of prosecution witnesses, learned trial court examined the appellant-Sanjay Sharma under Section 313 Cr.P.C. and convicted him on the

basis of evidence available on record, under Section 302, 504 IPC and Section 25 Arms Act.

6. We have heard Sri Akhilesh Srivastava and Sri Shaksham Srivastava, learned counsel for the appellant; and Ms. Sanyukta Singh, Brief holder and Sri J.K. Upadhyay, learned A.G.A. for the State.

7. Learned counsel for the appellant contended that PW-1, Rajendra Sharma, the informant was not an eye witness. He was not present at the spot. He arrived at the place of incident after receiving information and he did not support the FIR version during his cross examination. Smt. Laxmi (PW-3) mother of the deceased also did not support the prosecution case. Similarly, Rakesh Sharma (PW-2), the nephew of informant Rajendra Sharma (PW-1) and cousin brother of deceased Ankit, who accompanied Ankit along with his mother to attend the function of ring ceremony (Sagai) at the house of Dev Dutt Sharma also did not support the prosecution case before the trial court. Similarly, Smt. Seema (PW-4) wife of Rakesh Sharma and Virendra (PW-5) independent witnesses have also turned hostile. Learned counsel further contended that as all the witnesses of fact have turned hostile, conviction of the appellant on the basis of their testimony is unsustainable. Learned counsel further argued that as country made pistol was not recovered either from the possession of appellant or on his pointing out, therefore, his conviction under Section 25 Arms Act is also unsustainable.

8. Per contra, learned State counsel argued that the FIR of the present case was lodged promptly and Rajendra Sharma (PW-1) in his examination-in-chief supported the version of FIR though he turned hostile during his cross examination. The witnesses, who turned hostile during trial, namely, Smt. Laxmi (PW-3), Rakesh Sharma (P-2), Smt. Seema (PW-4) and Virendra (PW-5), have supported the prosecution case in their statements recorded under Section 161 Cr.P.C. by the Investigating Officer, therefore, under the facts and circumstances of the present case, trial court has rightly relied on their statements recorded during investigation. Learned State counsel further argued that the testimony of a hostile witness can be believed and in the present case a young boy of 15 years was murdered on trivial issue and as the appellant was the person, who caused the death of deceased Ankit, and, immediately after the incident, the country made pistol, which was used in the commission of crime, was recovered from the roof, possession of recovered country made pistol can very well be attributed to appellant Sanjay Sharma. Learned State counsel further contended that during investigation the country made pistol and cartridges were sent for forensic examination. As per forensic report, the recovered country made pistol and empty cartridge matched with each other, therefore, conviction recorded by the trial court in respect of appellant is sustainable and present appeal filed by the appellant is liable to be dismissed.

9. We have given our thoughtful consideration on the rival submissions and perused the entire evidence on record.

10. Before analysing the evidence available on record, it is necessary to notice in brief the evidence provided by the prosecution during trial.

11. Prosecution examined Rajendra Sharma (informant of the case) as PW-1, who lodged the FIR of the present case and proved the FIR as (Ext.ka-1). In his examination-in-chief, this witness although supported the version of the FIR, but in cross examination he did not support his statement recorded during examination-in-chief. This witness in cross examination stated that Panna lal, who is scribe the FIR, is his brother-in-law and he never told

him that appellant Sanjay Sharma caused firearm injury to his son Ankit. He further stated that he, under the pressure of villagers, gave his statement earlier during examination-in-chief. This witness did not support his statement recorded by the Investigating Officer under Section 161 Cr.P.C. This witness is not an eye witness and FIR (Ext.Ka-1) of the present case lodged by him was based on hearsay.

12. Next witness produced by the prosecution is Rakesh Sharma (PW-2). He is the nephew of Rajendra Sharma (PW-1) and he was the person, who, accompanied the deceased Ankit along with Smt. Laxmi (PW-3) to the function of ring ceremony (Sagai) arranged at the house of Dev Dutt Sharma. This witness also did not support the prosecution case and stated in his examination-in-chief that he is the cousin brother of deceased (Ankit) and on 16.02.2016 he attended the function of ring ceremony (Sagai) at the house of Dev Dutt Sharma along with his wife Smt. Seema (PW-4). He further stated that his aunt, Smt. Laxmi (PW-3), and his cousin brother Ankit also attended the function and at about 3.30 PM, he heard the sound of gun shot coming from the roof of the house of Dev Dutt Sharma during the function of ring ceremony and when he reached there, there were number of people gathered there. This witness further stated that his aunt also arrived at the spot and he did not witness the appellant causing firearm injury to Ankit because at the time of incident he was not present. This witness was also declared hostile. During his cross examination, PW-2 did not support his statement recorded by the Investigating Officer under Section 161 Cr.P.C.

13. Next witness examined by the prosecution is Smt. Laxmi (PW-3). This witness is the mother of deceased (Ankit) and wife of PW-1 Rajendra Sharma (informant). During her examination-in-chief, this witness also did not support the prosecution case and stated that in the function of ring ceremony (Sagai), at about 3.30 PM, she heard gun shot. At that time she was attending ladies sangeet and when she reached the spot, she saw that somebody had shot his son Ankit. She further stated that she did not witness the appellant fire the shot upon his son Ankit because she was not present at the spot. Prosecution also declared her hostile. In her cross examination, this witness also did not support her earlier statement recorded by the Investigating Officer during investigation. She futher stated that she never told her husband Rajendra Sharma (PW-1) that appellant shot dead Ankit.

14. Smt. Seema was examined by the prosecution as PW-4. She is the wife of Rakesh Sharma (PW-2). She also accompanied her husband Rakesh Sharma in the function of ring ceremony (Sagai) arranged at the house of Dev Dutt Sharma along with Laxmi (PW-3) and Ankit (deceased). She, in her examination-in-chief, denied the prosecution case and stated that as soon as she reached the spot, the person who had caused firearm injury to Ankit had already managed to escape and she did not witness the appellant firing at Ankit (deceased). This witness further stated that she was also sitting along with Laxmi (PW-3) in the programme of ladies sangeet. In her cross examination, she also did not support her statement recorded by the Investigating Officer during investigation. This witness was also declared hostile by the prosecution.

15. Virendra was examined by the prosecution as PW-5. This witness is an independent witness, who was a resident of the village of Dev Dutt Sharma, where the function of ring ceremony (Sagai) was arranged. This witness also did not support the prosecution case and was declared hostile. This witness in his cross examination stated that the incident did not occur in his presence and he reached the spot after hearing the sound of gunshot and he did not

witness the appellant causing gunshot injury to Ankit. In his cross examination, this witness also did not support his earlier statement recorded under Section 161 Cr.P.C. during investigation by the Investigating Officer.

16. The prosecution next examined Brijesh Kumar Yadav, S.S.I. as PW-6. This witness was the first Investigating Officer of the case. He stated in his examination-in-chief that he was posted as Station House Officer at Police Station Jewar, District Gautam Budh Nagar and he started investigation of the case and recorded the statement of informant Rajendra Sharma (PW-1) and arrived at the spot and made the recovery of country made pistol and cartridge. Recovery memo of the same was prepared by S.S.I. Paan Singh and inquest report of deceased (Ankit @ Lala) was prepared by S.I. Neeraj Kumar under his supervision. This witness proved the inquest report as (Ext. Ka-2). After sending the body for post mortem examination, this witness prepared site plan and proved the same as (Ext. Ka-7). PW-6 further stated that in spite of his best effort, appellant could not be arrested as he was trying to avoid his arrest, therefore, he moved an application under Section 82 Cr.P.C. against the appellant. This witness also recorded statements of Smt. Laxmi (PW-3), Rakesh Sharma (PW-2) and scribe of the FIR, Panna Lal (not examined). In his cross examination, he stated that he tried to receive finger print from the country made pistol, but he could not get the finger print.

17. The prosecution next examined Dr. Pushpendra Kumar as PW-7. He is the doctor, who conducted post mortem of the dead body of deceased. He stated that on 17.02.2016 at about 11.05 AM he started the post mortem examination of the deceased, which was completed by about 11.35 AM. He found following injuries on the body of deceased Ankit:-

"(1) A firearm wound of entry size 1.0 cm x 1.0 cm abdominal cavity deep present on right upper part of abdomen 12 cm below right nipple at 4 o' clock position blackening and tattooing present. Margins are inverted on exploration liver found lacerated about one liter blood present in abdominal cavity.

(2) A firearm wound of exit size 1.0 cm x 1.5 cm abdominal cavity deep present on left side back of abdomen 18 cm below from left scapula at 3 o' clock position margins are everted on exploration left kidney found lacerated.

Injury no.1 and injury no.2 communicating to each other."

He proved the post mortem of deceased Ankit as (Ext. Ka-8). According to this witness, rigor mortis was present all over the body.

18. The prosecution next examined constable Adesh Kumar as PW-8. This witness proved the chik FIR of the case as (Ext Ka-9) and G.D. entry as (Ext. Ka-10). This witness in his cross examination stated that at the police station informant of the case came along with some other person, but scribe of the FIR Panna Lal did not come with him.

19. The prosecution next examined S.I. Paan Singh as PW-9. This witness in his statement stated that after registration of the FIR, he along with Brijesh Kumar arrived at the place of incident, which was roof of the house of Dev Dutt Sharma. This witness further stated that on 16.02.2016 at about 07.50 PM he prepared recovery memo of the country made pistol under the direction of Station House Officer, Brijesh Kumar (PW-6). He sealed the pistol. This witness proved recovery memo of pistol as (Ext. Ka-11). He also prepared the memo of blood stained and plain scrape of roof of the house of Dev Dutt Sharma and proved the same as (Ext. Ka-12). This witness further stated that he registered the case against the appellant

Sanjay Sharma, under Section 25 of Arms Act. This witness proved that the sealed bundle was sent to Forensic Science Laboratory. He further stated that he did not recover the country made pistol and cartridge from the possession of appellant Sanjay Sharma. He further stated that at the time of preparing the recovery memo, he did not try to take finger print from country made pistol and he did not call any expert in this regard.

20. Prosecution next examined Prabhat Kumar Sharma, S.H.O. as PW-10. This witness was second Investigating Officer of the case. He recorded statements of informant (PW-1), Smt. Laxmi (PW-2) and other witnesses under Section 161 Cr.P.C. On 24.08.2016, he sent the recovered country made pistol and its cartridge for Forensic Examination. In his examination-in-chief, this witness further stated that on 29.10.2016, the brother of appellant Sanjay Sharma provided him a C.D., but after that he was transferred and the case was further investigated by some other Investigating Officer. In his cross examination, this witness stated that the C.D. provided by the brother of appellant was visualized by him and its contents were noted by him in the case diary. This witness neither proved the contents of C.D. nor he proved his noting made in the case diary in this regard.

21. The prosecution next examined H.C.P., Shri Ram Kashyap as PW-11. He was head constable and was posted at Police Station Gulawati. He stated in his statement that he received the investigation of the case under Section 25 Arms Act in respect of appellant Sanjay Sharma. He, during investigation, reached at the spot and prepared site plan and proved the same as (Ext. Ka-13) and recorded statement of witnesses. This witness in his examination-in-chief stated that on 26.04.2017 he received an information that on 25.04.2017 appellant was arrested and with the permission of the Court, he recorded the statement of the appellant in jail. This witness after receiving sanction from District Magistrate submitted charge-sheet against the appellant and proved the same as (Ext. Ka-14). He also proved the sanction given by the District Magistrate, Roshan Jaikab and proved the same as (Ext. Ka-15). In his cross examination, he stated that he conducted the investigation of the case under Section 25 Arms Act on the instruction of S.H.O. concerned. He further stated that the country made pistol was not recovered on the pointing out of the appellant.

22. The prosecution next examined Prabhas Chand as PW-12. This witness is the third Investigating Officer of the case. He stated in his statement that he received investigation of the case from S.O. Mahaveer after his transfer and during investigation he recorded the statement of Smt. Seema (PW-4) and other witnesses and after investigation on 23.05.2017 he submitted charge-sheet against the appellant under Sections 302, 504 IPC and proved the same as (Ext. Ka-16). This witness also proved the report of Forensic Science Laboratory as (Ext.Ka-17). In his cross examination, this witness stated that when he received the investigation of the case, its investigation was almost complete. He further stated in his cross examination that it is true that he did not inquire about the innocence of the appellant.

23. Last witness examined by the prosecution was Md. Shadab (PW-13). He was the person, who made G.D. entry in respect of the case registered under Section 25 Arms Act and he proved the G.D. Entry as (Ext. Ka-18).

Arguments and analysis

24. Perusal of the record of the present case reveals that prosecution has examined five witnesses of fact, namely, Rajendra Sharma (PW-1), Rakesh Sharma (PW-2), Smt. Laxmi (PW-3),

Smt. Seema (PW-4) and Virendra (PW-5). During the course of trial, PW-2 to PW-5 have turned hostile. They did not support the prosecution version. During their cross examination, these witnesses denied their earlier statements given by them before the police i.e. to Investigating Officer under Section 161 Cr.P.C. These four witnesses (PW-2 to PW-5) did not support the prosecution version even in their examination-in-chief. As far as PW-1, Rajendra Sharma (informant) is concerned, he though supported the FIR version in his examination-in-chief, but in his cross examination he did not support his earlier version given in examination-in-chief. This witness even discredited the FIR, which was lodged by him against the appellant by stating that on Nakal Tehrir he put his signature on the instructions of the villagers. PW-1 also disapproved his earlier statement recorded by the Investigating Officer during investigation under Section 161 Cr.P.C. Nonetheless, this witness is not an eye witness and his testimony is based on hearsay, therefore, his testimony given in examination-in-chief is of no help for the prosecution.

25. Learned trial court while convicting the appellant in the present case relied upon the judgment of Hon'ble Supreme Court in **Bhagwan Dass Vs. State (NCT) of Delhi (2011) 6 SCC 396** and accepted the testimonies of witnesses, namely, Rakesh Sharma (PW-2), Smt. Laxmi (PW-3), Smt. Seema (PW-4) and Virendra (PW-5) recorded by the Investigating Officer during investigation under Section 161 Cr.P.C.

26. The law is well settled that the statements recorded under Section 161 Cr.P.C. can only be used for the purpose of contradiction and it is not a substantive piece of evidence and such statements cannot be used against the accused persons.

27. In **Ram Swaroop and others Vs. State of Rajasthan 2005 SCC (Cri) 61**, the Apex Court in paragraph no.23 of the said judgment observed as follows:-

"We have also noticed that the High Court has attached undue importance to the statements made in the course of investigation and recorded under Section 161 of the Code of Criminal Procedure. It is well settled that a statement recorded under Section 161 of the Code of Criminal Procedure cannot be treated as evidence in the criminal trial but may be used for the limited purpose of impeaching the credibility of a witness."

28. In **Tahsildar Singh and others Vs. The State of Uttar Pradesh AIR 1959 SC 1012,** six Judges Bench of the Apex Court observed that the statements recorded by the police officer during the course of investigation can only be used to contradict the evidence and not for other purpose. Further three Judges Bench of the Apex Court in **V.K. Mishra and another Vs. State of Uttarakhand and another (2015) 9 SCC 588** after scrutinizing the scope of Section 162 Cr.P.C. observed in paragraph 16 as follows:-

"Section 162 Cr.P.C. bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police under Section 161(1) Cr.P.C. can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162(1) Cr.P.C. The statements under Section 161 Cr.P.C. recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose: (i) of contradicting such witness by an accused under Section 145 of the Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and (iii) the re-examination of the witness if necessary."

29. Recently in **Parvat Singh and others Vs. State of Madhya Pradesh (2020) 4 SCC**

33, Hon'ble Apex Court observed that "as per settled position of law, the statement recorded under Section 161 Cr.P.C. is inadmissible in evidence and cannot be relied upon or used to convict the accused. As per the settled position of law the statement recorded under Section 161 Cr.P.C. can be used only to prove the contradictions and/or omissions".

30. Thus law with regard to use of the statement recorded by the Investigating Officer during investigation under Section 161 Cr.P.C. is well settled that on the basis of such statements, accused cannot be convicted.

31. The judgment of Bhagwan Das (supra) relied upon by the trial is distinguishable on facts. In Bhagwan Das case (supra) mother of accused turned hostile during trial and she resiled from her earlier statement recorded under Section 161 Cr.P.C. during investigation. Hon'ble Supreme Court accepted her statement recorded under Section 161 Cr.P.C. only due to the fact that accused was her son and in view of the Apex Court she obviously wanted to save her son. In the present case, appellant is not even related to any of the witnesses of facts produced by prosecution including PW-1 (informant), PW-2 (mother of deceased) and PW-3, PW-4 and PW-5. Therefore, in our view, statement of prosecution witnesses recorded under Section 161 Cr.P.C. cannot be used against appellant in present case.

32. One more fact, which was taken into account by the learned trial court against the appellant is that after the incident, the appellant could be arrested only after about one year and two months. In this regard, our considered view is that although arrest of the appellant after such a long period of time may create suspicion against him, but merely on this basis he cannot be convicted. Further, although, during investigation, the Investigating Officer moved an application under Section 82/83 Cr.P.C. against the appellant, but the application under Section 83 Cr.P.C. moved by the Investigating Officer was rejected by the trial court, therefore, merely on ground of delay in arrest, the appellant cannot be convicted.

33. Trial court also relied on a circumstance that in the ring ceremony (Sagai) function, appellant-Sanjay Sharma fired three celebratory shots, which shows appellant had used firearm on that day. In our view, this fact could not have been noticed as this fact does not emanate from substantive evidence. Though, it might be part of case diary. Perusal of the statement of S.I. Paan Singh (PW-9) shows that he received a C.D., which was given by the brother of appellant, and he noted the contents of the C.D. in the case diary too, but neither the C.D. was produced by the prosecution nor the contents of the C.D. noted in the case diary were proved during trial. Therefore, merely on narration of these facts in the case diary, it cannot be accepted that the appellant Sanjay Sharma fired three shots by way of celebratory fire.

34. Trial court also observed that there was an opportunity to the appellant to produce evidence in his defence, but he failed to do so. This observation, in our considered view, is misconceived. In a criminal trial it is the duty of the prosecution to prove its case beyond all reasonable doubts and prosecution will have to stand on its own leg. The burden in the criminal trial is upon the prosecution to prove the guilt of the accused. The prosecution cannot take advantage of the weakness of the defence case and, therefore, if appellant failed to produce any evidence in his defence, then also he cannot convicted. His conviction can only be recorded on the basis of substantive evidence.

35. Trial court further noticed that during investigation eye witnesses had filed their respective affidavits before the Investigating

Officer to the effect that appellant is innocent but in any of the affidavit it was not mentioned as to who caused the death of the deceased. Further, on the basis of the affidavit filed by Virendra (PW-5), trial court drew an inference that there was pressure to compromise the matter. Whereas, PW-5 stated that the affidavit was typed by the villagers with the help of a lawyer and his signature was taken without reading out the contents of the affidavit to him. Hence, the affidavit cannot be taken as evidence. Similarly, Smt. Seema (PW-4) in her statement stated about the affidavit that the affidavit was prepared by the villagers with the help of a lawyer and the contents of the affidavit were not read over to her, therefore, the affidavit filed by PW-4 could also not be used in the evidence. The finding of the learned trial court that eye witnesses only with the intention to save the appellant did not support the prosecution case and have not given true facts in their statements during trial, in our view, is uncalled for and is also not sustainable, as it is based purely on surmises and conjectures. The trial court accepted the report of Forensic Science Laboratory to connect the firearm, recovered from the roof of Dev Dutt Sharma with the empty cartridge. But, admittedly, the country made pistol was neither recovered from the possession of appellant nor at his pointing out. There is no evidence in this regard that the recovered country made pistol belongs to him, therefore, it cannot be said that appellant was the person, who used the country made pistol in the commission of crime. Thus, conviction of the appellant under Section 25 of Arms Act is also unsustainable.

36. From the discussion made above, we are of the considered view that the prosecution, in the present case, has failed to prove the guilt of the appellant beyond all reasonable doubt and the evidence produced by the prosecution is of such nature, on the basis of which, the conviction of the appellant in the present case is not possible.

37. As a result, the appeal is **allowed**. The judgement and order of conviction as well as sentence recorded by the trial court vide order dated 8.6.2018 passed by Additional District and Sessions Judge, Court No.9, Bulandshahar in Sessions Trial No. 247 of 2017 (State Vs. Sanjay Sharma) arising out of Case Crime No. 69 of 2016, under Section 302 IPC and Sessions Trial No.69 of 2018 (State Vs. Sanjay Sharma), under Section 25 of Arms Act arising out of Case Crime No. 70 of 2016 are hereby set aside. The appellant is acquitted of all the charges for which he has been tried. The appellant (Sanjay Sharma) is said to be in Jail, he be set at liberty forthwith, if not wanted in any other criminal case. The appellant (Sanjay Sharma) will fulfill the requirement of Section 437-A Cr.P.C. to the satisfaction of the trial court at the earliest.

38. Let a copy of this order/judgement and the original record of the lower court be transmitted to the trial court concerned forthwith for necessary information and compliance. The office is further directed to enter the judgement in compliance register maintained for the purpose of the Court.

(2021)12ILR A1247
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.12.2021

BEFORE

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

Criminal Appeal No. 7945 of 2007

Eeda Khan **...Appellant**

Versus

State Of U.P. **...Opposite Party**

Counsel for the Appellant:
Sri Manoj Singh, Sri Ajay Pal , Sri Anvir Singh, Sri Shashi Shekhar Mishra, Sri Sukhvir Singh

Counsel for the Opposite Party:
A.G.A., Sri Anup Upadhyay

A. Criminal Law – Rape - Indian Penal Code,1860 - Sections 452, 375, 376 & 506 - SC/SCT Act, 1989 - Section 3(1)(xii).

Reformative theory of punishment – 'Principle of Proportionality' - Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically. (Para 13)

Law should adopt corrective machinery or deterrence based on factual matrix. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. **The criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective.** At the same time, **undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.** (Para 14, 23)

This Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream. (Para 15)

Appellant is in jail for more than 14 years and the age of appellant at the time of occurrence was nearly 26/27 years. He has been awarded punishment u/s 376 IPC for life imprisonment which is very harsh. Court opined that ends of justice would be met if sentence of life imprisonment awarded u/s 376, I.P.C. is reduced to the rigorous imprisonment of 15 years and fine Rs. 10,000/-. The appellant shall undergo simple imprisonment for one year in case of default of fine. Amount of fine shall be paid to the prosecutrix as compensation. Conviction and sentence awarded for the rest of the offences shall remain intact. (Para 20, 21, 24, 25)

B. Evidence of hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence. Evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. (Para 17, 18, 19)

Appellant was held guilty by the Trial Court on the basis of medical evidence and evidence of PW-3 Jaivir, who turned hostile after supporting the prosecution case while in examination in chief evidence of hostile witnesses cannot be discarded on this ground alone, but reliance can be placed on the testimony of hostile witnesses to the extent it supports the case of prosecution or defence. (Para 16)

Occurrence of this case took place on 17.4.2004 and the FIR was lodged on 17.4.2004 at 8.45 p.m. and medical examination of the prosecutrix (aged 3 years at that time) was conducted in hospital just after three hours. In medical examination hymen was fresh torn as evident from the medical report and there was injury of the size of length of 1 c.m.. It was bleeding also. Doctor expressed the possibility of rape and clearly stated in her cross examination that such types of injuries can be sustained by falling on any blunt object which includes Lathi or Danda but cannot include wood sticks. Learned trial court has committed no error in appreciation of evidence. The appeal is devoid of merit and is liable to be dismissed. (Para 20)

Appeal partly allowed. (E-4)

Precedent followed:

1. Mohd. Giasuddin Vs State of A.P., AIR 1977 SC 1926 (Para 12)

2. Deo Narain Mandal Vs St. of U.P., (2004) 7 SCC 257 (Para 13)

3. Ravada Sasikala Vs St. of U.P., AIR 2017 SC 1166 (Para 14)

4. Jameel Vs St. of U.P., (2010) 12 SCC 532 (Para 14)

5. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734 (Para 14)

6. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323 (Para 14)

7. St.of Pun. Vs Bawa Singh, (2015) 3 SCC 441 (Para 14)

8. Raj Bala Vs St. of Har., (2016) 1 SCC 463 (Para 14)

9. Koli Lakhmanbhai Chandabhai Vs St. of Guj., 1999 (8) SCC 624 (Para 17)

10. Ramesh Harijan Vs St. of U.P., 2012 (5) SCC 777 (Para 18)

11. St. of U.P. Vs Ramesh Prasad Misra & anr., AIR 1996 SC 2766 (Para 19)

Present appeal challenges judgment and order dated 16.11.2007, passed by Special Judge, SC/ST. Act, District –Etah.

(Delivered by Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the appellant-Eeda Khan has challenged the Judgment and order 16.11.2007 passed by Special Judge (SC/ST Act), Etah in Session Trial No.406 of 2004 (State v. Eeda Khan) arising out of Case Crime No.116 of 2004 under Sections 452, 376, 506 Indian Penal Code (hereinafter referred to as, "IPC') and under Section 3(1)(xii) of SC/SCT Act, Police Station-Aliganj, District-Etah whereby the accused-appellant was convicted and sentenced to undergo rigorous imprisonment for a period of four years under Sections 452, 506 IPC and 3(1)(xii) SC/ST Act and life imprisonment under Section 376 IPC. All the sentences were directed to run concurently.

2. The brief facts as per written report dated 17.4.2004, submitted by complainant, father of the prosecutrix at Police Station Alignaj, District Etah are that today on 17.4.2004 at about 7.30 p.m. his daughter (prosecutrix) aged about two and half years was lying in the courtyard of his house and wife of his elder brother Anjali was cooking the food. His wife Reena had gone to the shop nearby his house. By that time accused Eeda Khan of his village entered his house and raped his daughter (prosecutrix). On listening to her cry, Anjali came out and saw that accused was raping his daughter. On her hue and cry, his wife Reena and elder brother Mahaveer came there and then accused ran away from the house. When they tried to catch him, he showed countrymade pistol and fled away by giving life threat to them. On the basis of aforesaid written report, a first information report was lodged at Police Station Aliganj, District Etah as Case Crime No.116 of 2004.

3. Investigation was taken up by C.O., Aliganj. Investigating Officer visited the spot, prepared site plan and he recorded the statements of witnesses under Section 161 of Cr.P.C.. Medical examination of prosecutrix was conducted and medical as well as supplementary report was prepared. Pathologist's reports were also made part of the case diary. After completing the investigation, charge sheet was submitted by Invesigating Officer agianst the accused-appellant. The case being exclucively triable by court of sessions was committed to Sessions Court by competent Magistrate for trial.

4. The learned trial court framed charges against the accused-appellant under Sections 452, 376, 506 IPC and Section 3(1)(xii) SC/ST Act. The accused denied the charges and claimed to be tried. The prosecution so as to bring home the charges, examined eight witnesses, who are as under:-

1. Anjali P.W.1

2.	Mahavir	P.W.2
3.	Jaivir	P.W.3
4.	Reena	P.W.4
5.	Prosecutrix	P.W.5
6.	Rajveer Singh	P.W.6
7.	Dr. Surendar Patkar	P.W.7
8.	Dr. Sunita Sagar	P.W.8

5. In support of ocular version prosecution filed following documentary evidence and get it proved by leading evidence:

1.	F.I.R.	Ext. Ka-2
2.	Written report	Ext. Ka-1
3.	Injury Report (22.4.2004)	Ext. Ka-4
4.	Injury report (18.4.2004)	Ext. Ka-5
5.	Supplementary Report	Ext. Ka-6
6.	Site Plan with Index	Ext. Ka-7

6. After completion of prosecution evidence, statement of accused was recorded under Section 313 of Cr.P.C. in which he said that he was falsely implicated in this case. No witness was examined in defence.

7. Heard Shri Sukhvir Singh, learned Amicus Curie for the appellant; learned AGA for the State; and also perused the record.

8. Learned counsel for appellant first of all submitted that in this case all prosecution witnesses of fact have turned hostile and nobody has supported the prosecution version. Learned counsel submitted that as per prosecution case, Smt. Anjali wife of Mahavir, who is elder brother of complainant, said to be the eye witness of this occurrence. She has been produced by prosecution as PW-1, but she has not supported the case as alleged by the prosecution. Learned counsel has submitted that PW-1 Smt. Anjali has specifically denied the factum of rape by appellant rather she has specifically stated that prosecutrix was playing inside the house and fall on wood sticks due to which she sustained injuries on her private parts. Learned counsel for the appellant also submitted that rest of the witnesses of fact, namely, PW-2 Mahavir, PW-3 Jaivir and PW-4 Smt. Reena are not eye witnesses although they have also turned hostile. Hence no witness has supported the prosecution case but learned trial court has convicted the appellant on the basis of medical evidence only.

9. Learned AGA submitted that it is correct to say that prosecution witnesses of fact have turned hostile but the complainant PW-3 Jaivir is father of the prosecutrix and he has fully supported the prosecutrix case in his examination in chief. His testimony fully corroborates the medical evidence also. Learned trial court has rightly appreciated the evidence and convicted the accused appellant.

10. After some arguments, learned counsel for the appellant submitted that he is not pressing this appeal on its merit, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for the last more than 14 years.

11. This case pertains to the offence of 'rape', defined under Section 375 IPC, which is quoted as under:

*[**375. Rape**.- A man is said to commit "rape" if he-*

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions :-

***First.-** Against her will.*

***Secondly.-** Without her consent.*

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

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

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

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

***Seventhly.-** When she is unable to communicate consent.*

***Explanation 1**.- For the purposes of this section, "vagina" shall also include labia majora.*

***Explnation 2.-** Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.*

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

***Exception 1.**- A medical procedure or intervention shall not constitute rape.*

***Excpetion 2.**- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]*

12. In ***Mohd. Giasuddin Vs. State of AP***, [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the

focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

13. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

14. In ***Ravada Sasikala vs. State of A.***P. AIR 2017 SC 1166, the Supreme Court referred the judgments in Jameel vs State of UP [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak***, [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh,*** [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh***, [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana***, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

15. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

16. Learned trial court has made the evidence of PW-3 Jaivir and medical evidence as the basis of holding the appellant guilty. Perusal of record shows that PW-3 Jaivir has

turned hostile after supporting the prosecution case while in examination in chief evidence of hostile witnesses cannot be discarded on this ground alone, but reliance can be placed on the testimony of hostile witnesses to the extent it supports the case of prosecution or defence.

17. Hon'ble Apex Court in **Koli Lakhmanbhai Chandabhai vs. State of Gujarat [1999 (8) SCC 624],** as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

18. In **Ramesh Harijan vs. State of U.P. [2012 (5) SCC 777],** the Hon'ble Apex Court has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

19. In **State of U.P. vs. Ramesh Prasad Misra and another [1996 AIR (Supreme Court) 2766],** the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

20. It is very relevant to mention that occurrence of this case took place on 17.4.2004 and the FIR was lodged on 17.4.2004 at 8.45 p.m. and medical examination of the prosecutrix was conducted in hospital just after three hours. In medical examination hymen was fresh torn as evident from the medical report Ext. Ka-5. Dr. Sunita Sagar conducted the medical examination is produced before trial court as PW-8. She has stated in her statement that at the time of internal medical examination of prosecutrix hymen was found fresh torn and there was injury of the size of length of 1 c.m.. It was bleeding also. The age of prosecutrix was found three years. PW-8, Dr. Sunita Sagar has very clearly stated in her cross examination that such types of injuries can be sustained by falling on any blunt object which includes *Lathi or Danda* but cannot include wood sticks. She has expressed the possibility of rape in supplementary report. After perusal of medical evidence and other supporting evidence in this case, we are of the considered view that learned trial court has committed no error in appreciation of evidence. Hence we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld. But since the learned counsel for appellant has not pressed this appeal on merit, we threadbare considered the principles of proportionality regarding the imposition of sentence by learned trial court. It is submitted by learned counsel for the appellant that appellant is in jail for more than 14 years and he has been awarded punishment under Section 376 IPC for life imprisonment which is very harsh.

21. It is also submitted by learned counsel for appellant that appellant is in jail for more than 14 years and the age of appellant at the time of occurrence was nearly 26/27 years.

22. Learned AGA also admitted the fact that appellant is in jail for more than 14 years.

23. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

24. It is admitted fact that appellant is in jail for more than 14 years. Having in view the offence committed by the appellant, life sentence seems to be very harsh. Hence keeping in view the harshness of sentence of life term awarded to the accused-appellant, we are of the considered view that it should be reduced to a fixed term sentence. Hence, we opine that ends of justice would be met if sentence of life imprisonment awarded for the offence under Section 376 of I.P.C. is reduced to the rigorous imprisonment of 15 years and fine Rs.10,000/-.

25. Hence, the sentence awarded to the appellant by the learned trial court for the offence under Section 376 IPC is reduced to 15 years rigorous imprisonment and fine Rs.10,000/-. The appellant shall undergo simple imprisonment for one year in case of default of fine. Amount of fine shall be paid to the prosecutrix as compensation. Conviction and sentence awarded for the rest of the offences shall remain intact.

26. Accordingly, the appeal is **partly allowed** with the modification of the sentence, as above.

(2021)12ILR A1254
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.11.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 44 of 2013

Shiv Prasad & Ors. ...Appellant
Versus
Deo Nrain Singh & Ors. ...Respondents

Counsel for the Appellant:
R.P. Shukla, A.K. Shukla

Counsel for the Respondents:
Kumwar Bahadur Singh, Waquar Hasim

Civil Law - Motor Accident Claim - Motor Vehicles Act, 1988 - Section 173 - Claim petition by widow of deceased - Insurance Company did not lead any evidence - Claim petition dismissed - Tribunal answered issue about the factum of the accident involving the offending vehicle against the claimant - Tribunal rejected evidence of PW-2 eye witness on the ground he did not carry the victim to the hospital soon after accident, number of the offending vehicle not figured in FIR, witness in not chasing and apprehending the bus, makes his presence doubtful - security personnel employed by the brick kiln, the Students' Hostel or the Mahendra Tractor Agency, not being called as witnesses by the claimant to prove the factum of accident - *Held* - once PW-2 had testified as an eye-witness to the accident, it was imperative for the Insurance Company to have produced evidence to rebut the claimants' case - Tribunal, in the absence of any evidence led by the Insurance Company, or by the driver or the owner, has committed a manifest error of law in disbelieving the claimants' case - Matter remanded to Tribunal to try and decide claim petition afresh (Para 23, 24, 28)

Allowed. (E-5)

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a claimants' appeal under Section 173 of the Motor Vehicles Act, 1988.

2. By the impugned judgment and award dated 18.10.2012, the Motor Accident Claims Tribunal/Additional District Judge Court No.2, Faizabad has dismissed the appellants' Claim Petition No. 28 of 2012.

3. The motor accident claim arises from an accident that occurred on 24th of November, 2011 at 5:30 in the evening. The victim was one Surendra Kumar Verma. Verma was on his way to his in-laws from Faizabad after doing his days' work. He was proceeding to Village Pure Kashinath, Haripur Jalalabad, P.S. Cantt, District Faizabad, where his in-laws lived. Verma was hit by a Tata Bus bearing Registration No. UP 42B 1968, that is said to have been driven rashly and negligently. Verma, who was on his side of the road, was hit by the bus and crushed under its wheels. He sustained grievous injuries. The passers-by took him to the District Hospital, Faizabad, but he died on way to the hospital.

4. The claimant-appellant-Phoola Devi is Verma's widow. It is asserted in the claim that Verma was aged 30 years at the time of accident and was a healthy youngman. He was gainfully self employed as a mason and was also into farming. He had an income of Rs.9,000/- per month. The claim petition was instituted by Varma's widow alone, though in the column of dependents, besides the deceased's widow, Shiv Prasad Verma, his father, Bittan Devi, his mother, Vikas Verma, Vishal Verma and Abhishek Verma, his brothers are also shown. The claim made is for a sum of Rs.47,80,000/- together with interest.

5. A written statement was filed on behalf of Deo Narain Singh, who is the owner of the offending vehicle. He has acknowledged the fact of being the registered owner of the vehicle and the further fact that opposite party no. 2 to the claim petition, Awadhesh Kumar Singh, who is the third respondent here, is the driver. It was asserted that Awadhesh Kumar Singh had a valid driving license to drive the bus and commands experience on the job. It was pleaded that no First Information Report about the incident was lodged. It is averred that the offending vehicle is registered with the Oriental Insurance Company Ltd., Faizabad, with a policy valid upto 05.01.2012 until midnight. The further stand taken is that the offending vehicle was not involved in the accident. It was asserted that in the event the Tribunal reached conclusion that the offending vehicle was indeed the one involved, liability would fasten upon the Insurance Company to indemnify.

6. The second opposite party to the claim petition, who are second respondent here, that is to say, the Oriental Insurance Company Ltd., Faizabad, represented by its Regional Manager put in their written statement. The appellants' claim was denied. It was asserted that the Insurance Company dispute the factum of accident as also the involvement of the offending vehicle insured by them. It was pleaded that unless the claimant establishes the factum of accident, the Insurance Company had no onus. It was also pleaded that the Insurance Company deny insuring the offending vehicle as well as its validity, unless the registered owner of the vehicle does not prove those facts. The Insurance Company would have onus about the aforesaid fact after the registered owner established the vehicle's insurance and its validity. It was asserted that the registered owner has to prove that the driver possessed a valid and effective driving license and that in case the driver failed to establish a valid and effective driving license on the date of accident, the Insurance Company would have no liability. A plea was also raised that the owner of the vehicle

has to establish the validity of other documents, authorizing him to ply the vehicle. The compensation claimed was dubbed as excessive. It was also pleaded that the claim petition is not in the prescribed proforma and was liable to be rejected.

7. The Tribunal, on the basis of parties' pleadings, framed the following issues (translated into English from Hindi vernacular):-

(i) Whether on 24.11.2011, at about 5:30 in the evening, when Surender Kumar Verma was proceeding from Faizabad after doing his day's work to his in-laws at Village Pure Kashinath, Haripur Jalalabad, P.S. Cantt, District Faizabad, Tata Bus No. UP 42B 1968, coming on from the direction of Faizabad, that was driven rashly and negligently by its driver, hit Surendra Kumar Verma, leading him to suffer serious injuries which resulted in his death?

(ii) Whether at the time of accident the vehicle bearing Registration No. UP 42B 1968 was insured with the office of the Oriental Insurance Company?

(iii) Whether vehicle bearing Registration No. UP 42B 1968, at the time of accident, was driven by a driver possessed of a valid driving license?

(iv) To what relief the claimant is entitled?

8. In support of the claim, a photostat copy of the First Information Report, a photostat copy of photo I.D. Card issued by Election Commission of India, a certified copy of the charge-sheet filed by the Police, a certified copy of the postmortem report, a certified copy of the site plan drawn by the investigating officer in the relative criminal case, besides a photostat copy of the death certificate of the deceased and the basic labour rate list have been filed. Phoola Devi, the claimant, entered the dock and testified in support of the claim petition as CPW1. One Keshav Ram was also examined in support of the claim petition as CPW2. On behalf of the owner and the driver, a photostat copy of the driving license, a photostat copy of the registration certificate of the offending vehicle and a photostat copy of the insurance cover note have been filed. No one testified orally on behalf of the owner and the driver.

9. The Insurance Company did not lead any evidence, either documentary or oral.

10. The crucial issue, on which the event has turned in the claim petition, is issue no.(i). It is about the factum of the accident involving the offending vehicle. This issue has been answered against the claimants and in favour of the respondents/opposite parties. It must be remarked that issue nos. 2 and 3 have been answered in the affirmative, holding that the offending vehicle was insured with the Oriental Insurance Company and that the driver held a valid driving license on the date of the accident. Nevertheless, on the basis of the findings recorded on issue no.1, the claim petition has been ordered to be dismissed.

11. Aggrieved this, the present First Appeal From Order has been preferred by the claimants, who, for some reason here, include all the dependents of the deceased shown in the claim petition.

12. Heard Mr. R.P. Shukla, learned counsel for the appellants and Mr. Waquar Hasim, learned counsel appearing on behalf of the Oriental Insurance Company Ltd. No one appears on behalf of respondent nos.1 and 3.

13. Mr. Shukla, learned counsel for the appellants, submits that the findings on issue no.1 are based on conjectures and are

perfunctory. He submits that the Tribunal has rejected the evidence of PW-2- Keshav Ram Verma, who is an eye witness to the incident. by doubting his presence on the scene of accident. He submits that these conclusions have been drawn by the Tribunal by judging the witness's conduct at the time of accident and soon thereafter, which, according to Mr. Shukla, has been projected as an imaginary model about the manner in which the witness ought to have acted, had he really been present at the scene of accident. And then a comparison of the witness's conduct has been made by the Tribunal to that model to disbelieve his presence.

14. The learned counsel for the Insurance Company, on the other hand, submits that the Tribunal has carefully evaluated the evidence on record and disbelieved the factum of accident. The Tribunal has considered the conduct of PW-2- Keshav Ram Verma, who claims to be an eyewitness of accident and rightly concluded that he was a got up witness.

15. Learned counsel for the Insurance Company, Mr. Waquar Hasim, also submits that the Tribunal has rightly opined that the evidence of PW-1 is hardly relevant because she is not an eyewitness at all. Her evidence is hearsay. Learned counsel for the Insurance Company has also laid much emphasis on the fact that the accident occurred at 5:30 in the evening and by that time, it is quite dark in the month of November. The Tribunal has rightly held that the witness's motorcycle was moving ahead of the offending vehicle, when the latter caused the accident and that, therefore, it is not believable that the witness could have seen the vehicle's registration number on the back side. The evidence of PW-2 has also been castigated by the learned counsel for the Insurance Company on the same lines as done by the Tribunal, on ground that this witness has said that he knew Verma personally and yet, after witnessing him suffer a serious accident, did not carry the victim to the hospital. Instead, he went off to Verma's home to inform his relatives about the accident. It is also submitted by the learned counsel for the Insurance Company that the postmortem report has been rightly read and understood by the Tribunal to infer that the injuries sustained by the deceased could well be the result of any kind of violence or occurrence. The injuries shown in the postmortem report do not show the victim's death to have been caused by a motor accident.

16. We have carefully considered the submissions advanced by the learned counsel for both parties and also perused the record.

17. This Court must say at once that the various inferences drawn by the Tribunal about the veracity of PW-2- Keshav Ram are indeed conjectural. The Tribunal has recorded the presence of PW-2 as one made up, because he did not carry Verma to the hospital soon after the accident. To this end, the Tribunal has reasoned that the witness says that he knew Verma and if that were the case, the conduct of the witness in not rushing the victim to the hospital, makes his presence at the scene of the accident impossible to believe. We do not think so. The deceased had suffered an accident, where he was crushed under the wheels of a bus. The precise manner, in which a person would react in a given situation, cannot be judged by stereotypes of behavior. There could be a great variation in responses based on the personality, training, the nature of the injury sustained by the victim and the other circumstances, such as ready help of others to ferry the victim to medical aid. A man with a timid heart or one who lacks confidence or by his training is not used to handling victims of a gory incident, may not have the guts of carrying an acquaintance or a friend in a badly or fatally injured state to the hospital. The decision to do so or not to do so can also be conditioned by the presence of others, who might have volunteered to take the

victim to the hospital. Here, there is evidence that the victim was indeed taken to the hospital by the passersby. In these circumstances, if the witness thought it better to inform Verma's relatives about the misshappening, the fact that he did not, in the first instance, rush Verma to hospital, cannot make the presence of PW-2 doubtful. There is no evidence that PW-2 is into a kind of a job, such as a paramedic or a member of the Armed Forces, where he is trained to handle victims of serious injuries or accidents, particularly his acquaintances. Apparently, he is a man with no special training or particular station in life, that would equip him to readily rush the victim of a major accident to the hospital. There could be many more reasons for the witness not to carry the victim to the hospital, but this Court does not want to record further findings in the matter, considering the course of action which we propose to adopt in this case.

18. The other findings of the Tribunal that in case this witness had, in fact, read or noted the number of the offending vehicle, he would have communicated it to the members of Verma's family and in that case, it would have figured in the FIR lodged by the family on the following day, are equally flawed. This again is an assumption not based on responses of men, who were in the midst of a trauma. It is not unreasonable to believe that a person, who has seen a fatal accident, informs the family about it, but omits to mention the registration number of the offending vehicle. The family, who lodged the FIR on the following day, would not be in the best serenity of mind to script the FIR in all its minutest details. It is a bit unreasonable and pedantic to assume that the FIR, in not carrying the registration number of the offending vehicle, when lodged on the following day, shows that the witness PW-2 had never noted that number. In the melee that follows a mishap of this kind, there could be many a slip contributing to omission of the registration number in the FIR or even in a later statement.

19. The matter requires to be considered more carefully. There is then this finding recorded by the Tribunal that PW-2- Keshav Ram was riding a motorcycle and his presence is not believable because he did not give the offending vehicle, a bus, a chase and force it to stop. The Tribunal has most wildly conjectured to say that it is definite that the speed of a motorcycle is far greater than that of a bus and that, therefore, the witness not chasing and apprehending the bus, makes his presence doubtful. It is not always necessary that a motorcycle may move faster than a bus. It depends on the road conditions and many other factors. It also depends on the condition of the motorcycle as well as the bus and the technical specifications. There cannot be a generalization about it in the manner done by the Tribunal also. The task of giving a chase to a large vehicle, like a bus, on a two wheeler and bringing it to a halt, is no trifling, and an untrained man may never have the nerve to do it or the necessary skill. He may even fear for his own life that the once killer bus, in order to escape liability, may turn a twice killer. These are all possibilities that may have legitimately prevented the witness in opting for the course that the Tribunal has thought to be decisive about the falsehood of this witness's testimony.

20. Again, this Court refrains from expressing any final opinion, but wishes to indicate that these are possibilities which require more objective assessment.

21. The adverse inference drawn against the presence of this witness for his inaction in reporting the matter to the Police, has also been given undue weight. In the sequence of events, once the witness thought that he should rush to the family, informing the Police could have become a secondary priority. The victim had already been rushed to the hospital by those present on the spot, and the Police, in any case, had reached the hospital. There is then another

finding recorded by the Tribunal, which says that PW-2 has admitted the fact that his motorcycle's headlight was functional, but that of the bus was not. It was, therefore, unnatural for the witness to have noted down the registration number of the vehicle at 5:30 in the evening when it is dark. It is beyond understanding how the non-functional headlight of the bus would prevent the witness, who had a working headlight on his motorcycle, from noting down its registration number. This conclusion recorded by the Tribunal is perverse. It is possible for the witness to have noted down the registration number of the bus from a distance of 10-15 feet at 5:30 in the evening of 24.11.2011, despite darkness setting-in, employing that headlight on his motorcycle that would have caught the rear number plate of the bus.

22. The other findings recorded is about the security personnel employed by the brick kiln, the Students' Hostel or the Mahendra Tractor Agency, not being called as witnesses by the claimant to prove the factum of accident.

23. In our opinion, once PW-2 had testified as an eye-witness to the accident, it was imperative for the Insurance Company to have produced evidence to rebut the claimants' case. The evidence of PW-2 is sufficient to discharge the claimants' onus on principle akin to Section 101 of the Indian Evidence Act, 1872. The Act last mentioned though not applicable to proceedings before the Tribunal *proprio vigore*, the principle is well established.

24. *Onus probandi* is the burden to lead evidence on an issue that rests at a particular point of time on the shoulders of one party or the other. It shifts during trial and is different from burden of proof, which is the overall burden to be discharged on an issue. Here, the Insurance Company, as already said, has not led any evidence. The Tribunal, in the absence of any evidence led by the Insurance Company, or for that matter, by the driver or the owner, has committed a manifest error of law in disbelieving the claimants' case. There is too much of conjuncture running through every limb of the findings on issue no.1, recorded by the Tribunal.

25. Nevertheless, this Court does not wish to express a final opinion in the matter, inasmuch as we think that the case should go back to the Tribunal, who should try and re-determine it, affording further opportunity to both parties to lead such evidence, as may be advised.

26. This Court also notices the fact that the findings on issue nos.2 and 3, have been recorded rather cursorily, because the approach of the Tribunal was one under the shadow of its finding on issue no.1. Learned counsel for the Insurance Company says that those findings are also required to be gone into afresh, with opportunity to them to produce evidence in support of the pleas raised in their written statement. Learned counsel for the appellants also submits that the Tribunal has not framed any issue about the quantum of compensation claimed, which ought to have been framed. It is true that if the claim succeeds, as a result of return on other findings, which the Tribunal shall now do afresh, the quantum would have to be worked out. As such, the Tribunal ought to frame an issue about the quantum of compensation payable, about which too, parties would be at liberty to lead evidence.

27. Before parting with the matter, it is made clear that apart from the guidance about the approach of the Tribunal while judging issue no.1, this judgment shall not be regarded as an expression of opinion on the merits of the appellants' claim or against it. The Tribunal shall be free, bearing in mind what has been indicated hereinabove, to try and decide the matter afresh

in accordance with law. It is also made clear that the evidence already on record shall be taken into consideration, together with any further evidence that the parties may now be advised to lead.

28. In the circumstances, this appeal partly succeeds and is **allowed in part.** The impugned judgment and award dated 18.10.2012, passed by the Motor Accident Claims Tribunal/ Additional District Judge, Court No.2, Faizabad in Claim Petition No.28 of 2012, Phoola Devi vs. Deo Narain and Others, is hereby **set aside**, with a **remit** of the matter to the Tribunal to try and decide the claim petition afresh, in accordance with the guidance in this judgment. It is also ordered that the Tribunal shall endeavor to decide the claim petition within a period of **six months** of the date of receipt a copy of this judgment.

29. Costs easy.

(2021)12ILR A1260
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2021

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Matters Under Article 227 No. 5552 of 2021

Ram Ashish Yadav ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri R.K. Shahi

Counsel for the Respondents:
G.A.

Criminal Procedure Code, 1973 - Section 457 – Seizure of currency notes by police - Release of such notes - Magistrate rejected petitioner's application to release Rs. 4,00,300/-, seized by police during raid of his house - Magistrate rejected application only on the ground that the currency notes were case property which were required to be produced during the trial - *Held* - currency notes and ornaments etc. cannot be withheld by the court till disposal of the trial only on the ground that such properties are case properties - valuable articles like ornaments, domestic articles and currency notes etc. can be returned to the person entitled to the possession thereof - Magistrate should have ascertained as to who was entitled to the custody of currency notes - After ascertaining the person entitled to the custody of currency notes he should have passed order for custody of currency notes - Matter remitted back to pass fresh order (Para 10, 11)

Allowed. (E-5)

List of Cases cited:

1. Manjit Singh Vs St.LAWS(DLH)-2014-9-311

2. Sundar Bhai Ambalal Desai Vs St.of Guj. 2003(1), J.I.C.615, SC

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard learned counsel for the petitioner and Shri Rakesh Srivastava and Shri Madnesh Prasad Singh, learned AGAs for the State.

2. This petition has been filed praying for the following reliefs:

"(i) Issue a order or direction to set-aside the impugned order dated 03.03.2021 passed by the learned Court of Judicial Magistrate, Court No.11, Deoria, passed in Misc. No. 58/21 State vs. Krishna Kumar and others AND the order dated 13-08-2021 passed by the learned Sessions Judge, Deoria in Criminal Revision No. 45/2021 C.N.R. No.- UPDEO1001041 2021 Ram Ashish Yadav vs. State of U.P. (Annexure No. 1 and 2 to this writ petition).

(ii) Issue a order or direction commanding and directing the learned Court of Judicial Magistrate, Court No. 11, Deoria, to act in accordance with law and release 4,00,300/- Rs., related with Case Crime No. 32/20 registered under section 60, 63, 72 of the Excise Act, P.S. Bankata, District Deoria, in favour of the petitioner forthwith."

3. The brief facts of the case are that on the basis of the FIR lodged by the opposite party No.2 at Police Station Bankata, District Deoria, F.I.R. No.0032 of 2020 was registered against the petitioner under Section 60, 63, 72 of the Excise Act. During the alleged raid of the house of the petitioner the police recovered Rs. 4,00,300/- which was said to have been obtained by the petitioner after the sale of liquor etc.

4. Learned counsel for the petitioner submits that the allegations levelled against the petitioner regarding possession of liquor etc. is totally false and no such item has been recovered from the possession of the petitioner or from his house as has been alleged. Further submission is that the police has illegally entered in the house of the petitioner and taken away cash of Rs.4,00,300/- kept for expanses to be incurred in marriage of the petitioner's daughter. It is also contended that arbitrary and illegal act of seizure of personal rupees of the petitioner by the police is high handed, callous & capricious in nature and hence was challenged before both the learned courts below were under legal obligation to release the seized amount in favour of the petitioner but illegally the same has been negatived hence the impugned orders dated 03.03.2021 and 13.08.2021 are not sustainable in the eye of law and are liable to be quashed.

5. Learned counsel for the petitioner submitted that the prayer for releasing the currency notes recovered from the possession of the accused could not be withheld by the court till conclusion of the trial.

6. Further, learned counsel for the petitioner has placed reliance upon the judgment of Apex Court in case of ***Manjit Singh Vs. State LAWS(DLH)-2014-9-311*** in which it has been held as under :-

"53. In Nidhi Kaushik v. Union of India, LPA No.736/2013, decided on 26th May, 2014, the Division Bench of this Court, in which I was a member, examined the aforesaid judgments and summarized the law as under:

"Consequences of refusing to follow well settled law If an authority does not follow the well settled law, it shall create confusion in the administration of justice and undermine the law laid down by the constitutional Courts. The consequence of an authority not following the well settled law amounts to contempt of Court as held by the Supreme Court in East India Commercial Co. Ltd. (supra), Makhan Lal (supra), Baradakanta Mishra (supra), M.P. Dwivedi (supra), T.N. Godavarman Thirumulpad (supra), Maninderjit Singh Bitta (supra), Priya Gupta (supra) and various High Courts in Hasmukhlal C. Shah (supra), Secretary, Labour Social Welfare and Tribunal Development Deptt. Sachivalaya (supra), C.T. Subbarayappa (supra), Parmal Singh (supra), Ex-CT Nardev (supra) and Head of Department, Air Force Station Amla."

Summary of principles of law The following principles emerge from the above judgments:

54. The properties seized by the police during investigation or trial have to be produced before the competent Court within one week of the seizure and the Court has to expeditiously pass an order for its custody in terms of the directions of the Supreme Court in Basavva Kom Dyamangouda Patil v. State of Mysore (supra), Sunderbhai Ambalal Desai v. State of Gujarat (supra 1), Sunderbhai Ambalal Desai v.

State of Gujarat (supra 2) and General Insurance Council v. State of A.P. (supra).

55. The Court has to ensure that the property seized by the police should not be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary and in any case, for not more than one month.

56. If the property is subject to speedy and natural decay or if it is otherwise expedient to do so, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

57. The expeditious and judicious disposal of a case property would ensure that the owner of the article would not suffer because of its remaining unused or by its misappropriation; Court or the police would not be required to keep the article in safe custody; and onerous cost to the public exchequer towards the cost of storage and custody of the property would be saved.

Time limit for release

58. Whenever a property is seized by the police, it is the duty of the seizing officer/SHO to produce it before the concerned Magistrate within one week of the seizure and the Court, after due notice to the concerned parties, is required to pass an appropriate order for its disposal within a period of one month. Valuable articles

59. The valuable articles seized by the police may be released to the person, who, in the opinion of the Court, is lawfully entitled to claim such as the complainant at whose house theft, robbery or dacoity has taken place, after preparing detailed panchnama of such articles; taking photographs of such articles and a security bond.

60. The photographs of such articles should be attested or countersigned by the complainant, accused as well as by the person to whom the custody is handed over. Wherever necessary, the Court may get the jewellery articles valued from a government approved valuer.

61. The actual production of the valuable articles during the trial should not be insisted upon and the photographs along with the panchnama should suffice for the purposes of evidence.

62. Where such articles are not handed over either to the complainant or to the person from whom such articles were seized or to its claimant, then the Court may direct that such articles be kept in a locker.

63. If required, the Court may direct that such articles be handed back to the Investigating Officer for further investigation and identification. However, in no circumstance, the Investigating Officer should keep such articles in custody for a longer period for the purposes of investigation and identification.

64. If articles are required to be kept in police custody, the SHO shall, after preparing proper panchnama, keep such articles in a locker.

Currency notes

65. The currency notes seized by the police may be released to the person who, in the opinion of the Court, is lawfully entitled to claim after preparing detailed panchnama of the currency notes with their numbers or denomination; taking photographs of the currency notes; and taking a security bond.

66. The photographs of such currency notes should be attested or countersigned by the complainant, accused as well as by the person to whom the custody is handed over and memo of the proceedings be prepared which must be signed by the parties and witnesses.

67. The production of the currency notes during the course of the trial should not be insisted upon and the releasee should be permitted to use the currency."

7. He further submitted that since there is no dispute about the fact that the currency notes belong to the petitioner, he is entitled for custody of the same in view of the provisions of Section 457 Cr.P.C.

8. He lastly submitted that the reason given by the learned Magistrate in the impugned order for rejecting the petitioner's prayer for releasing the currency notes of Rs.4,00,300/- in his favour is contrary to the law laid down by the Apex Court in the case of ***Sundar Bhai Ambalal Desai Vs State of Gujrat 2003(1), J.I.C.615, SC*** and hence the impugned order can not be sustained and is liable to be quashed.

9. Per contra learned AGAs made their submissions in support of the impugned order.

10. I have heard learned counsel for the parties present, perused the impugned order as well as other materials brought on record and the case law cited on the subject by the learned counsel for the petitioner. In view of the law laid down by the Apex Court in the case of ***Sundar Bhai Ambalal Desai (Supra)*** as well as this Court in the case of ***Manjit Singh (supra),*** the currency notes and ornaments etc. which are case property can not be withheld by the court till disposal of the trial only on the ground that such properties are case properties. The valuable articles like ornaments domestic articles and currency notes etc. which case property can be returned to the person entitled to the possession thereof. Section 457 of the Code lays down the provision for releasing the property seized by the police which is not produced before the Court during inquiry or trial. The provision under Section 457 of the Code is being extracted below:

"457. Procedure by police upon seizure of property-(1)Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial , the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof or if such person can not be ascertained respecting the custody and production of such property.

(2)If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall , in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation"

11. As per requirement of the provisions under Section 457 of the Code the property which has been seized by the police under the provision of the Code and has not been produced before the criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof. In this case, what was required of the learned Magistrate was that he should have ascertained

as to who was entitled to the custody of currency notes. After ascertaining the person entitled to the custody of currency notes he should have passed order for custody of currency notes in view of the provisions under Section 457 of the Code. The learned Magistrate rejected the application only on the ground that the currency notes were case property which were required to be produced during the trial but the custody of currency notes could not have been denied to the petitioner by the learned Magistrate, rather the property should have been disposed of by him in accordance with the provision under Section 457 of the Code . Thus the impugned order is bad in the eyes of law and is liable to be set aside and the matter deserves to be remanded back to the learned Magistrate for his fresh decision in the matter in accordance with the provisions of Section 457 of the Code.

12. The impugned order dated 03.03.2021 passed by the learned Court of Judicial Magistrate, Court No.11, Deoria, passed in Misc. No. 58/21 State vs. Krishna Kumar and others AND the order dated 13-08-2021 passed by the learned Sessions Judge, Deoria in Criminal Revision No. 45/2021 C.N.R. No.-UPDEO1001041 2021 Ram Ashish Yadav vs. State of U.P. are hereby quashed and the matter is remitted back to the learned Magistrate with a direction to him to dispose of the application moved by the complainant-petitioner afresh keeping in view of the Provisions of 457 of the Code within a period of three months from the date of production of certified/ computerized copy of this order before him.

(2021)12ILR A1264
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 2211.2021

BEFORE

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

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Government Appeal No. 413 of 2021

State of U.P. **...Appellant**

Versus

Mankeshwar **...Respondent**

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:

Criminal Procedure Code, 1973 – Section 378 - Appeal against acquittal - Powers of appellate Court - while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court - in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasoning, when the reasons assigned by the Court below are found to be just and proper. (9, 14)

Accused charged for commission of offences under Sections 363, 366, 376 of Indian Penal Code, 1860 & also under Section 3/4 of Protection of Children from Sexual Offences Act, 2012 - Special Judge (POSCO Act) acquitted the accused - incident occurred on 11.11.2019 and the F.I.R. was lodged on 25.12.2019 - there is no explanation for delay of one and half month in lodging the F.I.R. - Evidence of the prosecutrix in favour of the accused-respondent - She called the accused to her home and at 10.00 p.m. they went away - They got themselves married in the temple - both stayed in Mumbai and only after the complaint was lodged and F.I.R. was noted, prosecutrix came back - She conceived - She was taken to Mahila Police Station - Her medical test was performed - mother of the prosecutrix mentioned the age of the prosecutrix to be 20 years - Even in her statement under Section 164 Cr.P.C., the prosecutrix has mentioned that her age is 20 Years - All these facts go to show that she was not a minor - there was no forcible sex as per Section 375 of IPC - father of the prosecutrix only with a view to pressurize the accused and his family members lodged the F.I.R. - prosecturix has not supported the prosecution version - judgment of acquittal passed by the Trial Court confirmed. (Para 21)

Dismissed. (E-5)

List of Cases cited:

1. M.S. Narayana Menon @ Mani Vs St.of Kerala & anr., (2006) 6 S.C.C. 39

2. Chandrappa Vs St. of Karn., reported in (2007) 4 S.C.C. 415

3. St.of Goa Vs Sanjay Thakran & anr., reported in (2007) 3 S.C.C. 75

4. St. of U.P. Vs Ram Veer Singh & ors., 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (Dead) by L.R.s Vs St. of M.P., 2007 A.I.R. S.C.W. 5589

6. Luna Ram Vs Bhupat Singh & ors. (2009) SCC 749

7. Mookkiah & anr. Vs St.Representatives by the Inspector of Police, Tamil Nadu AIR 2013 SC 321

8. St.of Karn. Vs Hemareddy, AIR 1981, SC 1417

9. Shivasharanappa & ors. Vs St. of Karn., JT 2013 (7) SC 66

10. St.of Pun.Vs Madan Mohan Lal Verma, (2013) 14 SCC 153

11. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219

12. Shailendra Rajdev Pasvan Vs St. of Guj. (2020) 14 SC 750

13. Samsul Haque Vs St. of Assam, (2019) 18 SCC 161

14. Guru Dutt Pathak Vs St. of U.P., LAWS (SC) 2021 (5) 5

15. St. of Pun. Vs Gurmeet Singh & ors., AIR 1996 SC 1393

16. Sahnawaj Vs St. of U.P., 2011 (1) J.I.C. 02 Ald.

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

1. Heard learned A.G.A. for the State and perused the judgment and order impugned.

2. The State has felt aggrieved as accused-respondent, Mankeshwar son of Ram Murat alias Bawali who was charged for commission of offences under Sections 363, 366, 376 of Indian Penal Code, 1860 (in brevity 'IPC') and also under Section 3/4 of Protection of Children from Sexual Offences Act, 2012 (in brevity 'POSCO Act') in Sessions Trial No.91 of 2020 has been acquitted by the Special Judge (POSCO Act), Azamgarh vide order dated 5.8.2021.

3. The prosecution story as it unfurls from the record is that prosecutrix, the daughter of the complainant, when she was studying in class 11, the accused enticed her away. The incident occurred on 11.11.2019 when the prosecutrix/victim had gone to school. The accused even threatened them with dire consequences, but unperturbed by the dire consequence, the complainant lodged First Information Report on 25.12.2019 for commission of the aforesaid offences. The accused, having been committed to the Court of Sessions, denied the prosecution allegation and claimed to be tried. In order to prove its case, the prosecution examined prosecutrix (P.W.1), Brijbhan, complaiant, (P.W.2), Shiv Prashad Mishra (P.W.3), Chandra Shekhar Yadav (P.W.4), Radhika Yadav (P.W.5), Dr. Roshan Ara (P.W.6) and Dr. Dharmendra Kumar Singh (P.W.7). The prosecution also filed documentary evidence so as to bring home the charges levelled against the accused-respondent.

4. Learned A.G.A. has taken us through the record and has submitted that the version of defence has been given more importance rather than sifting the evidence on record. The acquittal has resulted into perversity of the judgment and even on the contours for hearing the appeal against the acquittal, this is a clear case where the accused should be punished as done in the decision of the Apex Court in **Guru Dutt**

Pathak Vs. State of Uttar Pradesh, LAWS (SC) 2021 (5) 5.

5. It is further submitted by learned A.G.A. that the version of the medical evidence has been given less importance to come to the conclusion that the prosecutrix was not a minor. It is further submitted that the learned Trial Judge has given undue importance to the fact that there was delay in filing of the F.I.R. though the delay has been properly explained. The incident occurred on 11.11.2019 and the F.I.R. was lodged on 25.12.2019. On this basis, it is submitted that the judgment of acquittal be reversed and the accused be convicted.

6. Before we embark on testimony and the judgment of the Court below, the contours for interfering in criminal appeals where accused has been held to be not guilty would require to be discussed.

7. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of **"M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39**, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

8. Further, in the case of **"CHANDRAPPA Vs. STATE OF KARNATAKA", reported in (2007) 4 S.C.C. 415,** the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless

he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

9. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

10. In the case titled **"STATE OF GOA Vs. SANJAY THAKRAN & ANR.",** reported in **(2007) 3 S.C.C. 75,** the Apex Court has reiterated the powers of the High Court in appeals against acquital. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

11. Similar principle has been laid down by the Apex Court in cases titled **"STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553** and in "**GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP", 2007 A.I.R. S.C.W. 5589**. Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

12. In the case of "**LUNA RAM VS. BHUPAT SINGH AND ORS**.", reported in **(2009) SCC 749,** the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

13. In a recent decision of the Apex Court in the case titled "**MOOKKIAH AND ANR. VS. STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU**", reported in **AIR 2013 SC 321**, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

14. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of "**STATE OF KARNATAKA VS. HEMAREDDY", AIR 1981, SC 1417**, wherein it is held as under:

"...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

15. The Apex Court in "**SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA", JT 2013 (7) SC 66** has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

16. Further, in the case of **"STATE OF PUNJAB VS. MADAN MOHAN LAL VERMA", (2013) 14 SCC 153**, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the

explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

17. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219,*** has laid down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10.It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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 the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

18. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750,*** has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption stands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161***

held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

19. Provisions of sections 363, 366 & 376 read as follows :

*"**363. Punishment for kidnapping.**--Whoever kidnaps any person from 1[India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

***366. Kidnapping, abducting or inducing woman to compel her marriage, etc**.--Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; 1[and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid].*

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

(First) -- Against her will.

(Secondly) --Without her consent.

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

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

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

(Sixthly) -- With or without her consent, when she is under sixteen years of age. Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

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

(Manipur) --(a) in clause sixthly, for the word "sixteen" substitute the word "fourteen"; and

(b) in the Exception, for the word "fifteen" substitute the word "thirteen". [Vide Act 30 of 1950, sec. 3 (w.e.f. 16-4-1950) (made earlier than Act 43 of 1983)].

***COMMENTS** Absence of injury on male organ of accused Where a prosecutrix is a minor girl suffering from pain due to ruptured*

hymen and bleeding vagina depicts same, minor contradictions in her statements they are not of much value, also absence of any injury on male organ of accused is no valid ground for innocence of accused, conviction under section 375 I.P.C. proper; ***Mohd. Zuber Noor Mohammed Changwadia v. State of Gujarat, 1999 Cr LJ 3419 (Guj).*** *Penetration Mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case;* ***Prithi Chand v. State of Himachal Pradesh, (1989) Cr LJ 841: AIR 1989 SC 702."***

20. The learned Trial Judge has heavily relied on the decisions on which we also place reliance and come to the conclusion that there is no explanation for delay of one and half month in lodging the F.I.R. It is no doubt true that the decision of 1996 in the case of ***State of Punjab Vs. Gurmeet Singh and others, AIR 1996 SC 1393*** has been also looked into by the learned Special Judge. Learned Special Judge while recording its finding as to the offence under POSCO Act has given cogent reasons and has relied on the oral testimony of Dr. Dharmendra Kumar Singh, Principal, Patel Inter College, and has come to the conclusion that the prosecutrix was major and has relied on the judgment of this Court in **Sahnawaj Vs. State of U.P., 2011 (1) J.I.C. 02 Ald.** The mother of the prosecutrix has also mentioned the age of the prosecutrix to be 20 years. Even in her statement under Section 164 Cr.P.C., the prosecutrix has mentioned that her age is 20 years. Thus, it can be said that offences under Section 363 & 366 are not made out.

21. We now turn to offence alleged to have committed under Section 376 of IPC. The evidence of the prosecutrix namely P.W.1 is also in favour of the accused-respondent. She had called the accused to her home and at 10.00 p.m. they went away. They got themselves married in the temple on 20.11.2019. They both stayed in Mumbai and only after the complaint was lodged and F.I.R. was noted, the prosecutrix came back. She had conceived and on 23.5.2020, she gave her statement that the police official read over what she had mentioned. She was taken to Mahila Police Station. Her medical test was performed. All these facts go to show that she was not a minor, there was no forcible sex as per Section 375 of IPC. We are convinced that the father of the prosecutrix only with a view to pressurize the accused and his family members has lodged the F.I.R.. The prosecturix has not supported the prosecution version.

22. After considering the facts and circumstances of the present case and appreciation of the evidence available on record, we are satisfied that it is not a case where the appeal can be allowed and the acquittal can be converted into conviction of the accused. Judgment in **Guru Dutt Pathak (Supra)** would not apply to the facts of this case.

23. In view of the above, judgment of acquittal passed by the Trial Court is hereby confirmed and the instant appeal on behalf of the State is dismissed with no order as to costs. Record and proceedings be sent back to to Court below forthwith. Bail and bail bonds are cancelled.

(2021)12ILR A1271
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.11.2021

BEFORE

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

Government Appeal No. 4035 of 2012

State of U.P. ...Appellant
Versus
Avaneesh Kumar Lodhi & Ors ...Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:

Criminal Procedure Code, 1973 – Section 378 - Appeal against acquittal - Powers of appellate Court - while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court - in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasoning, when the reasons assigned by the Court below are found to be just and proper. (12, 17)

Accused-Avaneesh Kumar was charged under Sections 363, 366 & 376 IPC whereas Smt. Girja Devi, Viresh Kumar, Arvind Kumar and Rajveer under Sections 363 & 366 IPC - trial-court acquitted the accused-respondents - prosecutrix was above 18 years - prosecutrix admitted in her deposition that her court-marriage was performed at Delhi and she lived with accused Avaneesh at Delhi for eight months as husband and wife and she used to put Sindoor at Delhi during that period – prosecutrix nowhere St.d that the accused committed rape upon her prior to the court-marriage - doctor who medically examined the prosecutrix, did not find any injury on the person of the prosecutrix at the time of medical examination - it cannot be said that the accused committed rape upon the prosecutrix without her consent - ingredients of rape are not attracted– High Court concurred with the learned trial judge (Para 22, 23, 25)

Dismissed. (E-5)

List of Cases cited:

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr., (2006) 6 S.C.C. 39

2. Chandrappa Vs St. of Karn., reported in (2007) 4 S.C.C. 415

3. St. of Goa Vs Sanjay Thakran & anr., reported in (2007) 3 S.C.C. 75

4. St.of U.P. Vs Ram Veer Singh & ors., 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (Dead) by L.R.s Vs St. of M.P., 2007 A.I.R. S.C.W. 5589

6. Luna Ram Vs Bhupat Singh & ors. (2009) SCC 749

7. Mookkiah & anr. Vs St. Representatives by the Inspector of Police, Tamil Nadu AIR 2013 SC 321

8. St. of Karn. Vs Hemareddy, AIR 1981, SC 1417

9. Shivasharanappa & ors. Vs St. of Karn. JT 2013 (7) SC 66

10. St.of Punj. Vs Madan Mohan Lal Verma, (2013) 14 SCC 153

11. Jayaswamy Vs St.of Karn., (2018) 7 SCC 219

12. Shailendra Rajdev Pasvan Vs St. of Guj. (2020) 14 SC 750

13. Samsul Haque Vs St. of Assam, (2019) 18 SCC 161

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

(Oral Judgment by Hon'ble Ajai Tyagi, J.)

1. This appeal under Section 378 (3) of Criminal Procedure Code (in short 'Cr.P.C.'), at the behest of the State, has been preferred against the judgment and order dated 6.7.2012.2017, passed by learned Additional Sessions Judge, Court No.4, Mainpuri, in Session Trial No.299 of 2003 *(State of Uttar Pradesh vs. Avaneesh Kumar)* arising out of Case Crime No.67 of 2001 under Sections 363, 366 & 376 IPC and in Session Trial No.204 of 2004 *(State of UP vs. Smt.Girja Devi, Viresh Kumar, Arvind Kumar and Rajveer)* under Sections 363 & 366, Police Station-Bhongaon, District-Mainpuri, whereby the learned trial-court acquitted the accused-respondents.

2. The brief facts of this case are that on 24.2.2001, written report has been lodged by the

complainant-Surendra Kumar alleging therein that at about 12:00 (afternoon) on 20.2.2001, when he and Rajesh (brother) were taking lunch at his house, the wife of the owner of his house along with her brother Avaneesh and Viresh Kumar reached there and told the complainat that some relatives had arrived at their house, therefore, she is taking his daughter, prosecutrix to help her in cooking the food. Since, those persons had terms to visit his house occasionally, therefore, he did not object to it, and, as such, those persons took his daughter with them. When the prosecutrix did not come back even in the evening, he reached at the house of Jang Bahadur in Village-Milika, but no one met him there. Thereafter, the complainant made efforts to trace out his daughter with above noted persons. During the course of search, Pradeep Kumar and Shanker Lal r/o Village-Alipur Khera, told him that they have seen the prosecutrix in the company of above persons at the Bhongaon road crossing at about 4:00 pm. The complainant made his best efforts to trace out his daughter, but in vain.

3. On the basis of this written report, a case was registered against the wife of Jang Bahadur, Viresh Kumar and Avaneesh. After registration of the case, the investigation followed. The Investigating Officer recorded the statements of the complainant and other witnesses, visited the site and prepared the site-plan. The prosecutrix was recovered on 8.11.2001 from the custody of accused Avaneesh Kumar during the course of investigation. After investigation, the Investigating Officer of the case submitted charge-sheet against the accused, namely, Arvind Kumar, Rajveer, Smt.Girja Devi and Viresh Kumar.

4. Accused-Avaneesh Kumar was charged under Sections 363, 366 & 376 IPC whereas Smt.Girja Devi, Viresh Kumar, Arvind Kumar and Rajveer under Sections 363 & 366 IPC. The case being exclusively triable by court of session was committed for trial to the court of session by competent Magistrate. Accused persons denied charges and claimed to be tried.

6. To bring home the charges, the prosecution produced following witnesses, namely:

1.	Surendra Singh (Complainant)	PW1
2.	Rajesh Kumar	PW2
3.	Prosecutrix	PW3
4.	Dr.R.D. Yadav	PW4
5.	Constable Chandan Singh	PW5
6.	Dr.Smt.Sunita Sharma	PW6
7.	SI-D.C.Yadav	PW7
8.	Brijesh Bhadauria	PW8
9.	Retd.SI Ved Prakash	PW9

7. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	Written Report	Ex.ka1
2.	Pathological Report	Ex.ka2
3.	Chik Report	Ex.ka3
4.	Copy of GD Entry	Ex.ka4
5.	Medical Examination Report	Ex.ka5
6.	Supplementary Medical Report	Ex.ka6

8. After prosecution evidence, the accused persons were examined under Section 313

Cr.P.C. in which they told that false evidence has been led against them. They did not examine any witness in defence.

9. We have heard Shri Janardan Prakash, learned AGA for the State-appellant and perused the record. None appears for the acquitted accused-respondents.

10. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

11. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***M.S. Narayana Menon @ Mani vs. State of Kerala and another,*** *(2006) 6 S.C.C. 39,* the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

12. Further, in the case of *Chandrappa vs. State of Karnataka,* reported in *(2007) 4 S.C.C. 415,* the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record,

the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

13. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

14. Even in the case of ***State of Goa vs. Sanjay Thakran and another,*** reported in *(2007) 3 S.C.C. 75,* the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

15. Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others***, *2007 A.I.R. S.C.W. 5553* and in ***Girja Prasad (Dead) by L.R.s vs. State of MP***, *2007 A.I.R. S.C.W. 5589*. Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

16. In the case of Luna Ram vs. Bhupat Singh and others, reported in (2009) SCC 749, the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

17. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives by the Inspector of Police, Tamil Nadu,*** reported in *AIR 2013 SC 321*, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the

appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

18. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Karnataka vs. Hemareddy***, *AIR 1981, SC 1417*, wherein it is held as under:

" ... This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

19. In a recent decision, the Hon'ble Apex Court in ***Shivasharanappa and others vs. State of Karnataka***, *JT 2013 (7) SC 66* has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

20. Further, in the case of ***State of Punjab vs. Madan Mohan Lal Verma,*** *(2013) 14 SCC 153*, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested

and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

21. The Apex Court recently in ***Jayaswamy vs. State of Karnataka***, *(2018) 7 SCC 219*, has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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 the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

22. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat,*** *(2020) 14 SC 750*, has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam,*** *(2019) 18 SCC 161* held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

23. In the case in hand, the prosecutrix was above 18 years and the court-marriage of the prosecutrix was performed with the consent of the prosecutrix, therefore, it cannot be said that the accused committed rape upon the prosecutrix without her consent. The prosecutrix has nowhere stated that the accused committed rape upon her prior to the court-marriage. Hence, the remaining other ingredients of rape are also not attracted in the present case. PW3, namely, the prosecutrix has admitted in her deposition that her court-marriage was performed at Delhi and she lived with accused Avaneesh at Delhi for eight months as husband and wife and she used to put Sindoor at Delhi during that period. Dr.Sunita Sharma (PW6), who has medically examined the prosecutrix, did not find any injury on the person of the prosecutrix at the time of medical examination. Hence, the charge of rape is also not proved in the facts and circumstances of the present case.

24. Learned trial-court rightly appreciated the evidence on record. The evidence produced by prosecution does not inspire confidence at all as already held by learned trial Judge.

25. In view of above, we are of the considered opinion that no two views are possible and we cannot take different view from that taken by the learned trial-court. We also do not find any infirmity in the impugned judgment and order, therefore, we have no other option, but to concur with the findings recorded by the learned trial Judge.

26. The appeal sans merit and is **dismissed,** accordingly.

27. The record and proceedings be sent back to the court-below.

(2021)12ILR A1278
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.11.2021

BEFORE

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

Government Appeal No. 3804 of 2001

State of U.P. ...Appellant
Versus
Subedar & Ors. ...Respondents

Counsel for the Appellant:
Sri R.P. Dubey,A.G.A.

Counsel for the Respondents:
Sri Punit Kumar Gupta

Criminal Procedure Code, 1973 – Section 378 - Appeal against acquittal - Powers of appellate Court - while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court - in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasoning, when the reasons assigned by the Court below are found to be just and proper. (12, 17)

F.I.R u/s 364 I.P.C. - trial-court acquitted the accused-respondents - main accused who is alleged to have committed the rape, passed away - no injury on prosecutrix private parts - St.ment given by prosecutrix under Section 164 Cr.P.C. was also full of flaws - Contradictions in the St.ment of the prosecutrix are such that it has led to infirmity - admitted position of fact that the prosecutrix had old enmity therefore, the accused were roped in the aforesaid crime - independent witness opined against the St.ment of the prosecutrix – High Court concurred with the learned Sessions Judge (Para 22, 23, 25)

Dismissed. (E-5)

List of Cases cited:

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr., (2006) 6 S.C.C. 39

2. Chandrappa Vs St. of Karnataka, reported in (2007) 4 S.C.C. 415

3. St. of Goa Vs Sanjay Thakran & anr., reported in (2007) 3 S.C.C. 75

4. St. of U.P. Vs Ram Veer Singh & ors., 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (Dead) by L.R.s Vs St. of M.P., 2007 A.I.R. S.C.W. 5589

6. Luna Ram Vs Bhupat Singh & ors. (2009) SCC 749

7. Mookkiah & anr. Vs St. Representatives by the Inspector of Police, Tamil Nadu AIR 2013 SC 321

8. St. of Karnataka Vs Hemareddy, AIR 1981, SC 1417

9. Shivasharanappa & ors. Vs St. of Karn., JT 2013 (7) SC 66

10. St. of Punjab Vs Madan Mohan Lal Verma, (2013) 14 SCC 153

11. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219

12. Shailendra Rajdev Pasvan Vs St. of Guj., (2020) 14 SC 750

13. Samsul Haque Vs St. of Assam, (2019) 18 SCC 161

(Delivered by Hon'ble Hon'bleVikas Budhwar, J.)

1. This appeal under Section 378 (3) of Criminal Procedure Code (in short 'Cr.P.C.'), at the behest of the State, has been preferred against the judgment and order dated 21.8.2001, passed by learned IIIrd Additional Sessions Judge, Banda, in Criminal Session Trial No.520 of 1995 arising out of Case Crime No.135 of 1992 under Sections 364/34, 323/34, 336/34 and 376 of Indian Penal Code (in short 'IPC'), Police Kotwali Dehat, District-Banda, whereby the learned trial-court acquitted the accused-respondents.

2. The brief facts of this case are that prosecutrix W/o Sadla Yadav R/o village Chhehraon, under precincts of P.S. Kotwali Dehat, district Banda was sleeping in her house on 30.7.92 in the night. All the accused persons came to her house at about 11 P.M. Accused Subedar Singh jumped into the house of prosecurtrix woke up, the accused entered in her room in the mean time, the house was locked from outside. The accused Subedar Singh caught hold of prosecutrix and dragged her in the courtyard. He was armed with gun (country made). Prosecutrix started crying and became much frightened. The accused asked her to hand over the keys. She was thrown away outside the house when she refused to handover the key. Accused Jageshwar, Munna and Rajju were present outside the house. These persons tied up prosecutrix and accused Subedar Singh also came out of the house. The accused persons had ligated the rope around the neck of prosecutrix and dragged her upto the bank of river Jamuna. Thereafter accused Subedar Singh, Munna Singh and Rajju committed rape upon her at the bank of Jamuna. Accused Jageshwar had assisted the accused persons at the house of prosecutrix but had not come to the bank of Jamuna while the rape was committed by the aforesaid three accused. All the accused were under the influence of liquor and committed rape one by one. Thereafter accused Subedar Singh hit prosecutrix at the point of left eye with butt of the gun. Thereafter she was stripped, by stripping her petticoat and sari. The petticoat was torn away and thrown. The sari was torn into pieces and her hands and legs were tied up with pieces of Sari and she was put in a boat. The boat was rowed in the middle of the river by the accused persons and the tied body of prosecutrix was thrown into the river. She was drowned and she started suffocating and thereafter she succeeded in releasing her hands and legs from the tying position and was pushed to the bank of river by heavy flow of water at the distance of 1 km. from the place she was thrown. Her left eye was not working

due to injury. She remained sit at the bank of river the whole night and a person came there at about 4A.M. and made inquiry from her when prosecutrix narrated her story, the gentlemen provided her a lungi which she put on her body. She was brought to Kotwali Dehat on 31.7.92 and was medically examined. It is noteworthy that the matter of her kidnapping was reported by the Chaukidar of the village on 31.7.1992 at about 2.30 P.M. on the basis of which an unnamed F.I.R. was lodged U/s 364 I.P.C. and the police has already came into action after the registration of the F.I.R. prosecutrix was brought to District Hospital, Banda where she was medically examined.

3. On the basis of this report, Case Crime bearing No.135 of 1992 was registered against all the accused-respondents under Sections under Sections 364/34, 323/34, 336/34 and 376 of Indian Penal Code (in short 'IPC'), Police Kotwali Dehat, District-Banda,

4. Investigation started by SI-M.P. Pal, who recorded statement of witnesses under Section 161 Cr.P.C., visited the spot, prepared site-plan and after completing the investigation, submitted charge-sheet against all the respondents. The case being exclusively triable by court of session was committed for trial to the court of session by competent Magistrate.

5. Accused Raju the main culprit died during the trial. Therefore, proceedings against him were abated. Learned trial-court framed charges against the accused Dharmendra and Subedar Singh, Munna Singh and Jagewshwar Singh under Sections 364/34,323/34, 376 and 336/34 IPC. Accused denied the charges and claimed to be tried.

6. To bring home the charges, the prosecution produced following witnesses, namely:

1.	Prosecutrix	PW1
2.	Shiv Narain	PW2
3.	Maiyadeen	PW3
4.	Dr. P.M. Kalani	PW4
5.	S.I. M.P. Pal (IO)	PW5

7. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	**Statement u/S 164 Cr.P.C**	**Ex.ka1**
2.	**F.I.R.**	**Ex.ka2**
3.	**Injury Report**	**Ex.ka4**
4.	**Injury Report**	**Ex.ka5**
5.	**Pathology Report**	**Ex.ka6**
6.	**Site-plan**	**Ex.ka7**
7.	**Recovery memo**	**Ex.ka8**

8. We have heard Shri Ashwani Prakash Tripathi, learned AGA for the State-appellant.

9. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

10. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***M.S. Narayana Menon @ Mani vs. State of Kerala and another***, *(2006) 6 S.C.C. 39*, the Apex Court has narrated the powers of

the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

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"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

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"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would

not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

14. Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others,*** *2007 A.I.R. S.C.W. 5553* and in ***Girja Prasad (Dead) by L.R.s vs. State of MP,*** *2007 A.I.R. S.C.W. 5589.* Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

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"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

16. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives by the Inspector of Police, Tamil Nadu,*** reported in AIR 2013 SC 321, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

17. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Karnataka vs. Hemareddy, AIR 1981, SC 1417,*** **wherein it is held as under:**

" ... This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

18. In a recent decision, the Hon'ble Apex Court in ***Shivasharanappa and others vs. State of Karnataka,*** *JT 2013 (7) SC 66* has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

19. Further, in the case of ***State of Punjab vs. Madan Mohan Lal Verma***, *(2013) 14 SCC 153*, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

20. The Apex Court recently in ***Jayaswamy vs. State of Karnataka,*** *(2018) 7 SCC 219,* has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in

grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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 the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

21. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat,*** *(2020) 14 SC 750,* has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam,*** *(2019) 18 SCC 161* held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

22. On the contours of the decisions referred herein above, the judgment of the trial court will have to be looked into. It is an admitted position of fact that the prosecutrix had old enmity and, therefore, it was alleged that the accused were roped in the aforesaid crime. The independent witness Devraj son of Jageshwar has opined against the statement of the prosecutrix.

23. The main accused Raju, who is alleged to have committed the rape, has passed away. The statement given by prosecutrix under Section 164 Cr.P.C. was also full of flaws. Contradictions in the statement of the prosecutrix are such that it has led to infirmity. Sattu who happened to be the husband of the prosecutrix has been examined in defence.

24. Findings recorded by the learned Sessions Judge in exonerating the accused, who had no role to play in the aforesaid crime, are reproduced herein below in verbatim :

"The defence witness D.W.1 Sadlu who happened to be the husband of the proscutrix

has been examined in defence. He has stated that his wife prosecutrix disappeared from the house on 30.7.92 and did not turn back and came back the next day. When he made an inquiry she had told that some outsiders had dragged her but has not revealed the complicity of the accused persons. He has further stated that his wife is a lady of dubious character and she had been made a tool of certain influential persons of the village for falsely implicating the accused persons. He has further stated that she had illicit relations with one Mangal Singh of Village Pathri and, therefore, she has been acting at their behest. Though I do not find the defence story as gospel truth but in such confusing circumstances as unfolded against the accused persons might have been falsely implicated due to local rivalry.

25. It is evident from the record that there was oral rivalry and enmity and the prosecution story was not plausible story even as per the medical evidence, though there were multiple injuries found on her body, they were simple in nature. There was no injury on her private parts and therefore also we cannot differ with the view taken by the learned Judge.

26. Hence, in view of the matter & on the contours of the judgments of the Apex Court, we have no other option but to concur with the learned Sessions Judge.

27. The appeal lacks merit and is **dismissed**, accordingly.

28. The record and proceedings be sent back to the court-below.

(2021)12ILR A1285
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.11.2021

BEFORE

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

Government Appeal No. 2599 of 1987

State of U.P. ...Appellant
Versus
Anil Kumar & Anr. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Sri Arvind Kumar

Criminal Procedure Code, 1908 – Section 378 - Appeal against acquittal - Powers of appellate Court - while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court - in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasoning, when the reasons assigned by the Court below are found to be just and proper. (11, 16)

F.I.R. under section 376 IPC against accused - Prosecutrix was medically examined - Doctor stated in her statement before court that at the time of internal examination of prosecutrix, she did not find any mark of injury on her private-parts - Hymen was old torn and healed - there was no bleeding at all - Vaginal-smear was taken, no spermatozoa was found - medical evidence does not support the version of prosecutrix at all - Held - evidence of prosecutrix (PW1) does not inspire confidence, mainly in the light of medical evidence - trial court rightly appreciated the evidence on record (Para 22)

Dismissed. (E-5)

List of cases cited:

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr., (2006) 6 S.C.C. 39

2. Chandrappa Vs St. of Kar., reported in (2007) 4 S.C.C. 415

3. St. of Goa Vs Sanjay Thakran & anr., reported in (2007) 3 S.C.C. 75

4. St. of U.P. Vs Ram Veer Singh & ors., 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (Dead) by L.R.s Vs St. of M.P., 2007 A.I.R. S.C.W. 5589

6. Luna Ram Vs Bhupat Singh & ors. (2009) SCC 749

7. Mookkiah & anr. Vs State Representatives by the Inspector of Police, Tamil Nadu AIR 2013 SC 321

8. St. of Karn. Vs Hemareddy, AIR 1981, SC 1417

9. Shivasharanappa & ors. Vs St. of Karn., JT 2013 (7) SC 66

10. St. of Pun. Vs Madan Mohan Lal Verma, (2013) 14 SCC 153

11. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219

12. Shailendra Rajdev Pasvan Vs St. of Guj. (2020) 14 SC 750

13. Samsul Haque Vs St. of Assam, (2019) 18 SCC 161

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

(Oral Judgment by Hon'ble Ajai Tyagi, J.)

1. This appeal, under Section 378 (3) Cr.P.C. at the behest of the State, has been preferred against the judgment and order dated 13.7.1987, passed by the learned Additional Sessions Judge-VIII, Agra, in Session Trial No.193 of 1986 *(State vs. Anil Kumar and another)* arising out of Case Crime No.96 of 1985 under Sections 366, 376, 376/114 and 201 IPC, Police Station-Jagdishpura, District-Agra, whereby learned trial Judge acquitted both the accused persons of all the charges.

2. Brief facts of this case are that a written-report dated 26.5.1985 was submitted by complainant, namely, Raj Narayan Sharma (father of the prosecutrix) stating that on 25.5.1985 at about 6:00-6:30 pm, his daughter, namely, the prosecutrix aged about 14 years, was coming to home after fetching a bucket of water from the well. At that time, Smt.Raj Kumari w/o Om Prakash Sharma was standing on balcony of her house. She called his daughter to her house. His daughter went to the house of Raj Kumari after giving bucket to him. After some time, his daughter came back crying. Her clothes were having blood. On hearing the hue and cry, Munna Lal, Bhagwati Prasad, Deena Nath, etc. gathered there. In front of all, his daughter told the entire story that Anil Kumar was already in the house of Raj Kumari and he forcibly caught her and tried to commit rape. She called Raj Kumari to save her, but Raj Kumari pushed her inside the room. Then Anil Kumar committed rape with her. Subsequently, Anil and Raj Kumari cleaned the blood from the floor of the room and Raj Kumari gave safe escape to Anil Kumar from backdoor of her house.

3. On the basis of above written-report, a first information report was lodged as Case Crime No.96 of 1985. Investigation was taken up by SI Bacchu Lal Verma. Investigating Officer visited the spot, prepared site-plan and statements of witnesses under Section 161 Cr.P.C. were also recorded. During the course of investigation, medical examination of the victim was conducted and medical report as well as supplementary report were prepared. After completing the investigation, charge-sheet was submitted against the accused persons, namely, Anil Kumar and Raj Kumari. The case being triable exclusively by court of session was committed to the court of session for trial by competent Magistrate. The learned trial court framed charges against accused Anil Kumar under Sections 376 and 201 IPC and against Raj Kumari under Section 376/114 and 201 of IPC. Accused persons denied charges and claimed to be tried.

4. To bring home the charges, the prosecution produced the following witnesses, namely:-

1.	Prosecutrix	PW1
2.	Raj Narayan Sharma	PW2
3.	Dr. Sudha Rani Agrawal	PW3
4.	Constable Parushuram	PW4
5.	S.I. Bacchoo Lal Verma	PW5

5. In support of the ocular version of the witnesses, following documentary evidence was produced and contents were proved by leading the evidence :-

1.	Written Report	Ex.ka1
2.	FIR	Ex.ka4
3.	Medico Legal Examination	Ex.ka2
4.	Supplementary Report	Ex.ka3
5.	Report of FSL	Ex.ka13
6.	Copy of G.D.	Ex.ka9
7.	Site-plan	Ex.ka10

6. After completion of prosecution evidence, statements of accused persons were recorded under Section 313 Cr.P.C., in which they denied the evidence and said that false evidence has been led against them. No evidence was examined in defence.

7. We have heard Shri Ashwini Prakash Tripathi, learned AGA for the State of UP as well as Shri Arvind Kumar, learned counsel for the accused respondents and perused the record.

8. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

9. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***M.S. Narayana Menon @ Mani vs. State of Kerala and another,*** *(2006) 6 S.C.C. 39,* the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

10. Further, in the case of ***Chandrappa vs. State of Karnataka***, reported in *(2007) 4 S.C.C. 415*, the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate

Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

11. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

12. Even in the case of ***State of Goa vs. Sanjay Thakran and another***, reported in *(2007) 3 S.C.C. 75*, the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

13. Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others***, *2007 A.I.R. S.C.W. 5553* and in ***Girja Prasad (Dead) by L.R.s vs. State of MP***, *2007 A.I.R. S.C.W. 5589*. Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

14. In the case of ***Luna Ram vs. Bhupat Singh and others,*** reported in *(2009) SCC 749*, the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable.

Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

15. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives by the Inspector of Police, Tamil Nadu***, reported in AIR 2013 SC 321, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

16. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Karnataka vs. Hemareddy***, *AIR 1981, SC 1417,* wherein it is held as under:

" ... This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

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"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

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"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of 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 the accused and the other to his innocence, the

view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

20. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat,*** *(2020) 14 SC 750,* has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam,*** *(2019) 18 SCC 161* held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

21. Learned AGA submitted that prosecutrix and his father, both, have supported the prosecution version in their respective statements, but now the main accused Anil Kumar has passed away. Hence, now respondent accused-Raj Kumari is left, against which appeal remains to be decided. Learned AGA submitted that he was not submitting the factual and legal arguments against main accused Anil Kumar, since he is no more now. It is next submitted that role of remaining respondent, namely, Raj Kumari confines to the extent of abetment only and there is ample evidence on record to show that Raj Kumari called the prosecutrix to her house where Anil Kumar was already present. Raj Kumari also facilitated the commission of crime, i.e., rape by Anil Kumar. It is also in evidence that after the commission of rape, Raj Kumari gave the safe passage to Anil Kumar from backdoor of her house. Therefore, Raj Kumari should have been held guilty for abetment of commission of the crime, but the court below did not appreciate the evidence in this regard at all and acquitted respondent-Raj Kumari also.

22. Perusal of record shows that FIR of this case is delayed by a day. It is explained by prosecution that keeping in view social reputation, Raj Nath Sharma resisted the complainant to lodge FIR on the date of occurrence, but it is no where explained as to under what circumstances, the FIR was lodged on the very next day by the complainant. We have perused the oral testimony. PW1 prosecutrix narrated story in her statement as mentioned in FIR, but she did not tell that story to Investigating Officer in her statement under Section 161 of Cr.P.C., which was recorded after 15-20 days of the occurrence. Prosecutrix has clearly stated whatever is asked by defence counsel in cross-examination was told to investigation officer, but this is not mentioned in her statement because accused-Anil etc. had greased the palm of Investigating Officer, but in our opinion, there is no iota of evidence in this regard, rather it is clear that narration of story as told in cross-examination by the prosecutrix was not told to Investigating Officer. Analysis of the evidence of prosecutrix (PW1) does not inspire confidence, mainly in the light of medical evidence. Prosecutrix was medically examined by Dr.Sudha Rani Agrawal, who was produced before the trial court as PW3. She has clearly stated in her statement that at the time of internal examination of prosecutrix, she did not find any mark of injury on her private-parts. Hymen was old torn and healed. It is also stated that there was no bleeding at all. Vaginal-smear was taken by doctor for chemical examination and

supplementary report on record shows that no spermatozoa was found. In this way, the medical evidence does not support the version of prosecutrix at all.

23. In view of above, we are of the considered opinion that learned trial court rightly appreciated the evidence on record, the evidence produced by the prosecution does not inspire confidence as held by learned trial Judge. We cannot take a different view from that of taken by learned trial Judge. We also do not find any infirmity in the impugned judgment and order regarding the role of accused-Raj Kumari.

24. It is made clear that no argument is submitted by learned AGA regarding the role of respondent Anil Kumar, since he has passed away during the pendency of this appeal.

25. Therefore, in view of above discussion, facts and circumstances of the case, we have no other option, but to concur with the findings recorded by learned trial court. The appeal is liable to be dismissed.

26. Hence, the appeal sans merit and is **dismissed.**

27. We are thankful to Shri Ashwini Prakash Tripathi, learned AGA for the State of UP and Shri Arvind Kumar, learned counsel for the accused respondents for ably assisting the Court.

(2021)12ILR A1292
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.12.2021

BEFORE

THE HON'BLE RAJAN ROY, J.

Civil Revision No. 45 of 2018

Waqf No. 34-A, Ashiq Abbas Khan ...Revisionist

Versus

U.P. Sunni Central Board of Waqfs, Lucknow & Ors. ...Opposite Parties

Counsel for the Revisionist:
Yogesh Kesarwani, Dharmendra Kumar Bhatt, Yogesh Kesarwani

Counsel for the Opposite Parties:
Mohd. Shakeel

Waqf Act, 1995 - Section 83(8) - Execution of any decision of the Tribunal - execution of any decision of the Tribunal shall be made by the civil court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 - Tribunal does not itself have any power to execute any decision taken by it and is required to send the same for execution in accordance with the provisions of the Code of Civil Procedure to the civil court (Para 12)

Central Sunni Waqf Board entered into a contract with the respondents no. 2 to 6 for sale of a property which was part of the Waqf - Board did not perform its part of the contract - Suit for specific performance of contract was instituted, which was decreed on 20.01.2001 - Execution Case was filed before civil court for executing the aforesaid decree - Civil Judge transferred the records of the Execution Case to the U.P. Waqf Tribunal Lucknow in view of the general Administrative Order of the High Court whereby it was directed that all matters pertaining to the Waqf to be transferred to the Tribunal - Tribunal returned back the records for execution by the civil court in view of the provisions of S. 38 CPC & S. 83 of the Waqf Act, 1995 - Held - order passed by the civil court transferring the records of the execution case to the U.P. Waqf Tribunal merely on the basis of the orders of the Registrar General & District Judge on the Administrative side, which were general orders, which was not specifically with regard to execution of any decree, is without any application of judicial mind, and unsustainable - generally speaking no doubt - Tribunal was justified in transferring the records of Execution Case back to the civil court for execution which does not suffer from any error (Para 17)

Dismissed. (E-5)

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Shri Yogesh Kesarwani, learned counsel for revisionist, Mohd. Shakeel, learned counsel for respondents no. 2 to 6 and Shri Q.H. Rizvi, learned counsel for respondent no. 1.

2. This is a revision under Section 83(9) of the Waqf Act, 1995 by the Mutwalli of the Waqf challenging an order dated 20.06.2018 passed by the U.P. Waqf Tribunal, Lucknow in Execution Case No. 04 of 2001; Khawaja Raziuddin Vs. U.P. Sunni Central Waqf Board by which it has returned the records of the said execution case to the Civil Court for execution.

3. A Suit for specific performance of contract bearing R.S. No. 4 of 1981 was filed by the respondent in the civil court which was decreeed by the civil on 20.01.2001. Execution Case No. 4 of 2001 was filed for executing the aforesaid decree. As informed by Mohd. Shakeel, learned counsel the Board had challenged the said decree in Appeal which was rejected. Shri Yogesh Kesarwani, learned counsel for revisionist says that the revisionist-Mutwalli had challenged the judgment and decree in First Appeal which was dismissed on the ground of limiation. Thereafter, the matter was not taken any further either by the Board or by the revisionist- Mutwalli.

4. It is not out of place to mention that by an order dated 17.02.2018 the Court of Additional Civil Judge (Senior Division), Court No. 2, Lucknow had transferred the records of the Execution Case No. 04 of 2001 referred hereinabove to the U.P. Waqf Tribunal Lucknow on the ground that in view of the Administrative Order of the High Court issued through the Registrar General dated 13.04.2016 and thereafter an order dated 23.02.2017 issued by the District Judge on the Administrative side all matters pertaining to the Waqf are to be transferred to the Tribunal. However, while doing so the civil court did not notice not consider the provisions of the Waqf Act, 1995.

5. It is not out of place to mention that the respondents no. 2 to 6 or their predecessor in interest opposed the transfer of the records of the Execution Case No. 4 of 2001 from the civil court to the Waqf Tribunal as is recorded in the order dated 17.02.2018 and subsequently, another application was filed before the Waqf Tribunal that it does not have the power to execute the said decree, which has been allowed.

6. Now, the revisionist- Mutwalli, who was the defendant in the Suit and whose objections under Section 47 CPC filed before the Civil Court in Execution Case No. 04 of 2001, prior to its transfer to the Waqf Tribunal, have been rejected on 07.11.2008 against which a petition under Article 227 of the Constitution of India is pending before the High Court as informed by Sri Yogesh Kesarwani, learned counsel for revisionist and in which there is an interim order allegedly to the effect that any order in the execution proceedings shall abide by final decision in those proceedings under Article 227 of the Constitution of India, has challenged the aforesaid subsequent order of the Tribunal dated 20.06.2018 sending back the records to the civil court for execution.

7. On a perusal of the order impugned before this Court which is dated 20.06.2018 it is revealed that the Tribunal was persuaded to return back the records for execution by the civil court in view of the provisions of Section 38 CPC as also Section 83 of the Waqf Act, 1995.

8. Now, the question before this Court is as to whether the Judgement and Decree dated 20.01.2001 passed in Regular Suit No. 4 of 1981 is executable by the civil court or by the Waqf Tribunal. In this context it may be pointed out that the Suit was for specific performance of contract. It was alleged that the Central Sunni

Waqf Board entered into a contract with the respondents no. 2 to 6 for sale of a property which was part of the Waqf in question, for various reasons, and as the Board did not perform its part of the contract, therefore, the Suit was filed for specific performance, which, as already stated, was decreed on 20.01.2001.

9. The Suit for specific performance was instituted by the predecessor in interest of respondents no. 2 to 6 in 1981. It is an admitted factual position that the objections of the revisionist- Mutwalli under Section 47 CPC before the civil court in Execution Case No. 04 of 2001 have already been rejected as noticed hereinabove subject of course to the proceedings under Article 277 of the Constitution of India which are said to be pending, if it is so.

10. According to Section 38 CPC a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. The Court also notices the provisions of Section 37 CPC explains the expression- 'Court which passed a decree' it reads as under:-

*"**37. Definition of Court which passed a decree. -** The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,-*

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

Explanation.-- The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the jurisdiction of that Court to the jurisdiction of any other Court; but, in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making the application for execution of the decree it would have jurisdiction to try the said suit."

11. Now, the provisions of the Waqf Act, 1995 need to be considered. Judicial proceedings at the Tribunal are referred in Chapter VIII of the Waqf Act, 1995. Section 83 reads as under:-

*"**83. Constitution of Tribunals, etc.--** (1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals.*

(2) Any mutawalli or person interested in a waqf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the waqf.

(3) Where any application made under sub-section (1) relates to any waqf property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the mutawalli or any one of the mutawallis of the waqf actually and voluntarily resides, carries on business or personally works for gain, and, where any such application is made to the Tribunal aforesaid, the other Tribunal or

Tribunals having jurisdiction shall not entertain any application for the determination of such dispute, question or other matter:

Provided that the State Government may, if it is of opinion that it is expedient in the interest of the waqf or any other person interested in the waqf or the waqf property to transfer such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such waqf or waqf property, transfer such application to any other Tribunal having jurisdiction, and, on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage which was reached before the Tribunal from which the application has been so transferred, except where the Tribunal is of opinion that it is necessary in the interests of justice to deal with the application afresh.

(4) Every Tribunal shall consist of -

(a) one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, who shall be the Chairman;

(b) one person, who shall be an Officer from the State Civil Services equivalent in rank to that of the Additional District Magistrate, Member;

(c) one person having knowledge of Muslim law and jurisprudence, Member,

and the appointment of every such person shall be made either by name or by designation.

(4)(A) The terms and conditions of appointment including the salaries and allowances payable to the Chairman and other Members other than persons appointed as ex officio members shall be such as may be prescribed.

(5) The Tribunal shall be deemed to be a civil court and shall have the same powers as may be exercised by a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, or executing a decree or order.

(6) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a civil court.

(8) The execution of any decision of the Tribunal shall be made by the civil court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit."

12. Sub-section (5) of Section 83 of Waqf Act, 1995 says that the Tribunal shall be deemed to be a civil court and shall have the same powers as may be exercised by a civil court under the Code of Civil Procedure, 1908, while trying a suit, or executing a decree or order. The nature and scope of this provision is with regard to conferring the status of a deemed civil court upon the Tribunal for certain purposes i.e. for trial of a suit or executing of a decree or order and essential and substantially it is a provision deeming it to be a civil court for certain purposes. As regards execution of the decisions of the Tribunal a separate provision is contained in Sub-section (8) of Section 83 of the Act, 1995 which says that the execution of any decision of the Tribunal shall be made by the civil court to which such decision is sent for execution in

accordance with the provisions of the Code of Civil Procedure, 1908. Sub-section 8 of Section 83 of the Waqf Act, 1995 leaves no doubt that the Tribunal does not itself have any power to execute any decision taken by it and is required to send the same for execution in accordance with the provisions of the Code of Civil Procedure to the civil court. If Sub-section 5 of Section 83 of the Act, 1995 is read, understood and applied as conferring powers upon the Tribunal to executive any decree or order passed by it, then, it would render Sub-section (8) superfluous and otiose. On the other hand if Sub-section (8) of Section 83 of the Waqf Act, 1995 is read and understood as it is on a simple and bare reading of it, then, it will not render Sub-section (5) of Section 83 of the Waqf Act, 1995 otiose for the reason, as already stated that, Sub-section (5) essentially deals with the issue of Tribunal being treated as deemed civil court for certain purposes and it can not be understood and applied as a provision vesting powers of execution upon the Tribunal unless it is provided elsewhere in the Act. Therefore, what Sub-section (5) of Section 83 means is that if the Tribunal otherwise has powers to execute a decree or order, then, it will be deemed to be a civil court for the said purpose also. However, if it does not have the power to execute its decision, which is to be treated as a decree under Sub-section (7) of Section 83 of the Waqf Act, 1995, then, Sub-section (5) of Section 83 of the Act, 1995 can not be pressed into the service to confer such power of execution upon the Tribunal.

13. Rules known as the U.P. Waqf Tribunal Rules, 2017 have been framed under Section 109 of the Waqf Act, 1995, but, the said Rules do not help the casue of the revisionist, as, they only provide for payment of Court fee on an application for exectuion as prescribed by the Court Fees Act, 1870 which obvisouly has to be sent to the civil court for execution as already discussed.

14. As regards the provisions of Section 37 and the explanation of the term 'Court which passed a decree' as contained in Clause- (b) thereof which says that where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit, as, the Waqf Tribunal does not have the jurisdiction in the first place to execute such decree or decision, therefore, this provision does not make any difference to the legal or factual position in this case. If the Tribunal had the jurisdiction to execute the decree, then, of course this provisions would have relevance.

15. Shri Yogesh Kesarwani, learned counsel for revisionist could not point out any such provision under which the Waqf Tribunal had the power to execute a decree passed by the civil court.

16. Based on a conjoint and harmonious reading and interpretation of the aforesaid provisions, this Court concludes that the Tribunal does not have the power to execute its decisions and has to send the same to the civil court for execution in accordance with the provisions of the Code of Civil Procedure.

17. Now, having said so, this Court is of the opinion that the order passed by the civil court on 17.02.2018 transferring the records of the execution case no. 04 of 2001 to the U.P. Waqf Tribunal merely on the basis of the orders of the Registrar General and the District Judge on the Administrative side which were general orders and not specifically with regard to execution of any decree without any application of judicial mind, was incorrect and unsustainable. Generally speaking no doubt after coming into force of the Waqf Act, 1995 all matters where there is a dispute relating to Waqf

have to be transferred to the Waqf Tribunal for adjudication, but, in a case where the decree has been passed and execution is going on before the civil court, the question to be considered was as to whether the Tribunal has power to execute such decree which as stated hereinabove it does not have, but, this aspect of the matter was not considered. No doubt the order dated 17.02.2018 was not challenged by the respondents herein but then the question involved herein is one of the jurisdiction and merely because it was not, it can not confer jurisdiction upon the Tribunal to execute the decree dated 20.01.2001. In this view of the matter we hold that the Tribunal was justified and correct in transferring the records of Execution Case No. 4 of 1981 back to the civil court for execution by its order dated 20.06.2018, which does not suffer from any error.

18. Whether the civil court had jurisdiction to pass the decree dated 20.01.2001 or not was raised an objection by the revisionist-Mutawalli under Section 47 CPC before the civil court when the decree was being executed by it and the same has already been rejected, against which a petition under Article 227 of the Constitution of India is pending, therefore, subject to whatever orders have been passed in those proceedings under Article 227 of the Constitution of India or which may be passed hereinafter, this Court is of the opinion that there is no jurisdictional error whatsoever in the order dated 20.06.2018 passed by the Waqf Tribunal, as, it is the civil court which passed the decree which has the jurisdiction to execute it.

19. The Court asked the learned counsel as to what is the practice for the parties in the Waqf Tribunal whether the decisions taken by it are executed by it or sent to the civil court learned counsel very fairly informed the Court that they are sent to the civil court for execution but also sated that the civil court does not execute the same for some reason. The Court has now cleared the legal position, therefore, hopefully this will be adhered.

20. Seciton 37 will not come in the way of exectuion of decisons taken by the Waqf Tribunal which has the force of decree of a civil court under Sub-section (7) of Section 83 in view of the specific stipulation contained in Section 83(8) of the Act, 1995 which has been discussed hereinabove and the civil court will be obliged to execute such decisions of the Waqf Tribunal, if they are sent for execution.

21. The revision is, accordingly, **dismissed.**

(2021)12ILR A1297
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

Civil Revision No. 139 of 2019

Ashok Kumar Awasthi & Anr. ...Revisionists
Versus
Sri Morar Bhai Thakkar & Ors. ...Respondents

Counsel for the Revisionists:
Sri Harsh Vikram, Sri Dharm Vir Jaiswal

Counsel for the Respondents:
Sri Hari Manish Bahadur Sinha

Civil Procedure Code,1908 – Sections 92 & 115 - Public Charities - Suit against public trust - Leave to file suit - Grant of - revision u/s 115 CPC against order granting leave under Section 92 CPC - Held - an order granting leave under Section 92 CPC is not revisable since an order does not decide any rights of parties and is made at the stage before the suit comes into being - it is open to the revisionist to apply for revocation of leave to the Court that has made the order impugned and if that application is made, the Trial Court would be bound to

dispose of that application on merits before proceeding with the suit (Para 12)

Dismissed. (E-5)

List of Cases cited:

1. Ghat Talab Kaulan Wala Vs Baba Gopal Dass Chela Surti Dass (Dead) by LR Ram Niwas, (2020) 13 SCC 50

2. B.S. Adityan & ors. Vs B. Ramachandran Adityan & ors., (2004) 9 SCC 720

3. Ambrish Kumar Singh Vs Raja Abhushan Bran Bramhshah & ors. AIR 1989 All 194

4. G.R. Govindarajulu & Sons Charities, Coimbatore & ors. Vs R. Sethurao & ors., 1998 SCC OnLine Mad 292

5. Mahant Sita Ram Das & anr. Vs Ram Chandra Arora & ors., 1988 ALL. L.J. 259

6. Raju Pillai & ors. Vs P. Paramasivan & ors., AIR 1995 MAD 253

(Delivered by Hon'ble J.J. Munir, J.)

1. In this case, Mr. H.M.B. Sinha, learned Counsel for the respondents has raised a preliminary objection in opposition to the motion to admit this revision to hearing. He says that this revision is not maintainable. Mr. Sinha submits that the order impugned is an order granting leave under Section 92 of the Code of Civil Procedure (for short, "CPC'), which is revisable. According to him, it is almost an administrative order and a matter between the applicant for leave and the Court. Therefore, the revisionists, who are opposite parties nos.4 and 5 to the Application under Section 92 CPC, are not entitled to maintain this revision. They can contest the suit, that comes into existence upon grant of leave by the order impugned.

2. Reliance has been placed by the learned Counsel for the respondents upon the decision of the Supreme Court in **Ghat Talab Kaulan Wala v. Baba Gopal Dass Chela Surti Dass (Dead) by LR Ram Niwas, (2020) 13 SCC 50** and particularly upon the decision of their Lordships of the Supreme Court in **B.S. Adityan and others v. B. Ramachandran Adityan and others, (2004) 9 SCC 720.**

3. Learned Counsel has also drawn the attention of this Court to a decision of our Court in **Ambrish Kumar Singh vs. Raja Abhushan Bran Bramhshah and others, AIR 1989 All 194.** Also, relied upon by the learned Counsel for the respondents, to say that this revision is not maintainable is the decision of the Madras High Court in **G.R. Govindarajulu and Sons Charities, Coimbatore and 2 others v. R. Sethurao and 12 others, 1998 SCC OnLine Mad 292.**

4. On the other hand, learned Counsel for the revisionists, Mr. Dharm Vir Jaiswal, has submitted that the objection as to maintainability is ill-founded. He submits that the general principle that an order granting leave under Section 92 CPC is not revisable may be true, but not in a case, where the grant of leave would amount to an abuse of process of Court. He particularly submits that relating to this trust an earlier suit being Original Suit no.8 of 1995, under Section 92 CPC was instituted by the revisionist, seeking to frame a scheme for the management of the trust and to appoint him a trustee. He has been appointed as the Chief Trustee by virtue of the decree dated 24.12.2001 passed in O.S. no.8 of 1995, which too is a class action with a judgment that binds all persons holding an interest in the instant public religious trust. The decree there has appointed the revisionist as the Chief Trustee and the Sarvarakar, besides Brahmadatt Mishra, Gyan Prakash, Vimal Chandra Awasthi and B.L. Narang as the other trustees.

5. In this background, if fresh leave under Section 92 CPC were granted, it would amount to a parallel invocation of the Court's

jurisdiction under Section 92 CPC, where it has already been invoked and a scheme for the management of the trust is in force. If the respondents, who have applied for leave feel that the revisionists or the other trustees are abusing their office or mismanaging the affairs of the trust, they can apply to the Court that passed the decree dated 24.12.2001 in O.S. no.8 of 1995 to remove them and appoint other trustees, or may be for a modification of the scheme to manage the trust. In no case, however, leave could be granted afresh under Section 92 CPC in respect of same trust, where the said jurisdiction has been once exercised by the Court. The exercise of powers, therefore, is an utter abuse of process of Court and the impugned order deserves to be set aside.

6. I have considered the rival submissions. It is true that the power under Section 92 CPC in respect of the same trust is exerciseable once and is not to be invoked by a fresh suit over and over again. A decree under Section 92 is the result of a class action, where those who apply for leave and become plaintiffs represent a class of persons, all of whom are bound by the outcome. Once the Court frames a scheme or appoints a Board of Trustees, it is always open to one of the represented community or class to come forward and apply to the same Court to remove the trustees, about whom it can be shown that they are abusing their position or misusing the office or mismanaging the affairs of the trust. A modification of the scheme can also be made by the Court that has once exercised jurisdiction; and, depending on the circumstances obtaining a new scheme may also be framed. But, the question is whether a Revision again an order granting leave, even in the background of an existing decree relating to the same trust passed by the Court under Section 92 CPC, is maintainable. It is true that an order passed on an application under Section 92 CPC is not required to be an speaking order though it should disclose application of mind.

7. This Court in **Mahant Sita Ram Das and another vs. Ram Chandra Arora and others, 1988 ALL. L.J. 259**, held:

"4. It has now to be seen as to whether the District Judge while granting leave under section 92 C.P.C. has to pass a detailed speaking order. It is true that the order granting leave by the District Judge is a judicial order and should indicate that the District Judge applied his mind before granting leave. However, as rights of the parties are not affected, it is not necessary to pass detailed order but it would suffice if the order indicates that it has been passed by the District Judge after due application of mind."

8. Of particular relevance to the issue are the remarks of their Lordships of the Supreme Court in **B.S. Adityan and others** *(supra)*, where it is said:

"9. ..... Although as a rule of caution, court should normally give notice to the defendants before granting leave under the said section to institute a suit, the court is not bound to do so. If a suit is instituted on the basis of such leave, granted without notice to the defendants, the suit would not thereby be rendered bad in law or non-maintainable. Grant of leave cannot be regarded as defeating or even seriously prejudicing any right of the proposed defendants because it is always open to them to file an application for revocation of the leave which can be considered on merits and according to law or even in the course of suit which may be established that the suit does not fall within the scope of Section 92 CPC. In that view of the matter, we do not think, there is any reason for us to interfere with the order made by the High Court."

9. In **Ambrish Kumar Singh** *(supra)*, it was held by this Court, thus:

"11. So far as Section 92, Civil Procedure Code is concerned it does not contemplate of giving any notice to the proposed defendants before granting leave. However, it has been held by the decision of this Court reported in 1987 All LJ 369, Mahanth Gurmukh Das v. Bhupal Singh, that the proceedings under S.92, C.P.C. are judicial proceedings and the order of the District Judge is a judicial order. The Court should pass the order after hearing the defendants. It is not necessary to pass a detailed order. It is sufficient if the order indicates that it is the result of the due application of mind of the Judge. May be that he has not written very elaborate order which in my opinion it was actually not needed. There is application of mind. Moreover, I see no jurisdictional error or illegal exercise of jurisdiction."

10. The Madras High Court in **Raju Pillai and others v. V. P. Paramasivan and others, AIR 1995 MAD 253** after an extensive review of authorities about the maintainability of a revision against an order granting leave under Section 92 CPC held:

"25. Taking into consideration the law enunciated by the Apex Court and various High Courts, it is clear that while refusing to grant sanction to institute a suit or otherwise, the Court is not deciding the rights of parties, and that the function which was being done by the Advocate-General till 1976 is being vested with the Court now. The effect is, though it is an Order of the Court, it is not discharging a judicial or quasi judicial function. It only authorises a party to institute a suit in the place of the Advocate-General. The effect is, whether the Advocate-General instituted the suit, or the authorised persons institute the suit, the rights of the proposed defendants are not affected the rights of the parties are also not determined. If no rights of the parties are affected, and there is no decision rendered by the Court, it follows that it is not a case decided, and hence a revision under S. 115 of the Code of Civil Procedure is not maintainable."

11. Yet again, in the case of **G.R. Govindarajulu and Sons Charities** *(supra)*, it has been held by the Madras High Court that a revision against an order granting leave is not maintainable. In the aforesaid decision, it has been held:

"15. In a recent decision of our High Court in Tirupattur Nagarathu Vysiyargal Sangam v. Tirupattur Periyakulam Nandavanam Inam Land tenants Association (1998 1 M.L.J. 303) Their Lordships held that the leave granted even without hearing the proposed defendant is not justifiable under Section 115 of the Code of Civil Procedure.

16. I also had an occasion to consider a similar question in Raju Pillai and 4 others v. V.P. Paramasivam and 7 others (1995 1 L.W. 518) wherein I have held that a revision under Section 115 of the Code of Civil Procedure or a revision under Article 227 of the Constitution of India is not maintainable.

17. In this connection, it is worthwhile to note that in all these decisions cited supra reference is made to the decision of Supreme Court in R.M. Narayana Chettiar v. N. Lakshmana Chettiar (A.I.R. 1991 S.C. 221 = 1990 2 L.W. 468) Their Lordships, in para 17 of the judgment have held that the grant of leave is a condition precedent against a public trust. Their Lordships further said that merely because notices were not given to the proposed defendents before the grant of leave, the leave granted will not become invalid or void. Likewise if no rreason in the order is given, that will not make the leave invalid and there is remedy in such cases. Their Lordships also held that grant of leave cannot be regarded as defeating or even seriously prejudicing any right of the proposed defendents because it is always

open to them to file an application for revocation of the leave which can be considered on merits and according to law.

18. Considering the case law, it cannot be doubted that this revision is not maintainable. The petitioners submitted that they have already filed an objection before Court and contested the application that the same should not be granted. Learned counsel apprehended that if there is already an order against them, it would prevent them from filing an application for revoking the leave.

19. "I do not think that such a submission is in any way correct. Learned Senior Counsel for the petitioner is invoking the principle of res judicata in the case. Once it is declared by the Supreme Court as well as by this Court that the order is administrative in character and same does not affect the rights of the parties, nor there is prejudice to the proposed defendant, there is no scope for application of res judicata in such cases". If any specific decision is required in that regard I would only refer to the decision in Simon v. Advocate General (1975 K.L.T 78) corresponding to A.I.R. 1975 Kerala - 38 which is followed in Kannan Adiyta's case cited supra.

27. In view of the declaration of law by this Court and the Supreme Court, leave alone is granted. After granting of leave, a suit is instituted. Thereafter the Court functions as a Court of law. At that time, the petitioners or any persons, who are also likely to be impleaded can very well bring to the notice of the Court that the leave was granted without taking into consideration the relevantt materials or that the principles settled for granting leave were not followed etc. and can apply to have the leave revoked. That power is given to the Court of law."

12. No doubt, the case here presents a background where this Court thinks that the decree passed in the earlier suit ought to be taken into account to judge, whether a subsequent suit also under Section 92 CPC relating to the same trust is at all maintainable, but that would not render the order granting leave under Section 92 CPC amenable to our revisional jurisdiction under Section 115 CPC. The reason is far too obvious. The impugned order does not decide any rights of parties and is made at the stage before the suit comes into being. Of course, it is open to the revisionist to apply for revocation of leave to the Court that has made the order impugned and if that application is made, the Trial Court would be bound to dispose of that application on merits before proceeding with the suit. So far as this revision goes, it is held to be not maintainable and liable to be dismissed as such.

13. This revision is, accordingly, **dismissed** as not maintainable. There shall be no order as to costs.

(2021)12ILR A1301
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.12.2021

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

First Appeal From Order No. 182 of 2019

Smt. Anita & Ors. ...Appellants
Versus
Iffco Tokio General Insurance Co. Ltd. & Anr. ...Respondents

Counsel for the Appellants:
Mukesh Singh

Counsel for the Respondents:
Govind Chaturvedi, Vaibhav Raj

A. Motor Vehicles Act, 1988 - Section 173 - Compensation - Enhancement - Income - it was pleaded that deceased was earning Rs. 25,000/- per month by performing POP work –

document showing income tax return of the financial year 2012-13 was filed - Tribunal ignored the documentary evidence & took notional income of Rs. 3,000/- per month - Held - notional income of the deceased for the purposes of computing the compensation is liable to be considered at Rs. 6,000/- per month (Para 17)

B. Motor Vehicles Act, 1988 - Section 173 - U.P. Motor Vehicle Rules, 1998, Rule 220-A - Compensation - Enhancement - provisions of Rule 220-A should be allowed to operate only upto the extent that it provides "better benefits" to the claimant(s) under the Act of 1988, which is a beneficial legislation on the aspect of grant of compensation (Para 28)

C. Motor Vehicles Act, 1988 - Section 173 - Compensation - Enhancement - Future Prospects 40% of the income - claimants-appellants are entitled to compensation towards future prospects and enhancement under conventional heads, such as, loss of estate, loss of consortium and funeral expenses etc. - Loss of love and affection for entire family (As per Rule 220-A (4) (iii) of the Rules of 1998), Rs. 15,000/- Funeral expenses, Rs. 15,000/- Loss of Estate, Rs. 15,000/- Loss of Consortium, Rs. 2,00,000/- [Rs. 40,000 x 5 (wife, son, daughter, mother and father) - Total Compensation, Rs. 16,10,800/- along with interest @ 6% per annum from the date of filing of claim petition till payment (Para 36)

Allowed. (E-5)

List of Cases cited:

1. Magma General Insurance Company Ltd. Vs Nanu Ram & ors. 2018 SCC Online SC 1546

2. Chameli Devi & ors. Vs Jivrail Mian & ors.; reported in 2019 (4) TAC 724 (S.C.)

3. Smt. Sheela Pandey W/O Late Surendra Kumar Pandey & ors. Vs The New India Insurance Co. Ltd. Bena Ghabar Branch & ors. F.A.F.O. (D) No. 748 of 2011

4. Syed Sadiq & ors. Vs Divisional Manager, United India Insurance Com. Ltd. (2014) 2 SCC 735

5. New India Assurance Co. Ltd. Vs Resha Devi & ors. 2017 (4) T.A.C. 288 (All.)

6. National Insurance Com. Ltd. Vs Pranay Sethi & ors. (2017) 16 SCC 680: 2017 ACJ 2700 7. New India Assurance Com. Ltd.Vs Smt. Somwati & ors.; (2020) 9 SCC 644

7. New India Assurance Co. Ltd. v. Urmila Shukla & ors.; 2021 SCC Online 822

8. Kirti & anr. Vs Oriental Insurance Company Limited (2021) 2 SCC 166

9. Hem Raj Vs Oriental Insurance Co. Ltd. (2018) 15 SCC 654

(Delivered by Hon'ble Saurabh Lavania, J.

1. Heard Sri Mukesh Singh, learned counsel for the appellants and Sri Govind Chaturvedi, learned counsel appearing for the Iffco Tokio General Insurance Co. Ltd.

2. The present appeal has been filed for enhancement of amount of compensation awarded/granted by Motor Accident Claim Tribunal/Additional District Judge/F.T.C. First, District- Balrampur vide judgment and award dated 18.12.2018 passed in Claim Petition No. 6 of 2014 (Smt. Anita and others v. Mahendra and another).

3. The issues framed by the Tribunal for the purposes of adjudication of claim on reproduction reads as under:-

"अवधार्य बिन्दु

5. उभयपक्ष के अभिवचनों के आधार पर प्रस्तुत याचिका के निस्तारण हेतु दिनांक 07.05.2016 को निम्नलिखित अवधार्य बिन्दु विरचित किये गयेः–

1. क्या दिनांक 24.12.2012 को समय करीब 04:20 बजे शाम रेहरा बाबागंज रोड पर भुतहा ताल के पास वहद ग्राम केराडीह थानाक्षेत्र रेहरा बाजार जनपद बलरामपुर में मोटरसाइकिल पंजीयन सं0 यू0पी0 43एन0 4694 का चालक वाहन को तेजी व लापरवाही–पूर्वक चलाते हुए आया और पीछे

से अनिल कुमार की मोटरसाइकिल पंजीयन संख्या एम0एच0 14 डी0 एस0 5308 में टक्कर मार दी, जिससे अनिल कुमार को गम्भीर एवं प्राणघातक चोटें आयी तथा दुर्घटना में आयी चोटों के कारण दौरान इलाज दिनांक 25.12.2012 को मेडिकल कालेज लखनऊ में उसकी मृत्यु हो गयी? यदि हां तो प्रभाव

2. क्या उक्त दुर्घटना के समय दुर्घटना कारक वाहन मोटरसाईकिल पंजीयन सं0 यू0पी0 43एन0 4694 विपक्षी सं0 2 इफको टोकियो जनरल इन्श्योरेन्स कं0 लि0 के द्वारा विधिवत बीमित थी और वाहन का परिचालन बीमा की शर्तों के अनुरूप किया जा रहा था? यदि हां तो प्रभाव?

3. क्या उक्त दुर्घटना के समय दुर्घटनाकारक वाहन मोटरसाईकिल पंजीयन सं0 यू0पी0 43एन0 4694 के चालक के पास वाहन चलाने की वैध एवं प्रभावी चालन अनुज्ञप्ति थी, यदि हां तो प्रभाव?

4. क्या याचीगण किसी प्रकार का प्रतिकर प्राप्त करने के अधिकारी हैं? यदि हां, तो कितनी धनराशि और किस विपक्षी से?"

4. The findings of fact recorded by the Motor Accident Claim Tribunal (in short "Tribunal") regarding age of deceased i.e. 23 years at the time of accident, date of accident i.e. 24.12.2012, place of accident i.e. Village- Karodi, P.S.- Rehra Bazar, District- Balrampur, date of death i.e. 25.12.2012, negligence of driver of Motorcycle bearing Registration No. U.P 43N9694, validity of insurance policy and validity of driving licence, are not in dispute, meaning thereby that there is no dispute regarding findings recorded by the Tribunal on the issue Nos. 1, 2 & 3. There is also no dispute on the issue of multiplier of 18, which was applied by the Tribunal for computing the compensation. As per the pleadings on record, the deceased-Anil Kumar expired leaving behind his wife-Anita, son-Harshverdhan, daughter-Km. Pratima, mother-Smt. Geeta Devi, father-Chandrika Prasad and brother-Mukesh Kumar and after considering the number of dependants, the Tribunal applied multiplicand of 1/4. This multiplicand is also not in dispute. However, while awarding the total amount of compensation, the Tribunal rejected the claim of Mukesh Kumar, brother of the deceased.

5. As the present appeal relates to enhancement of amount of compensation, the issue No. 4 is under consideration.

6. After recording the findings on issue Nos. 1, 2 and 3, the Tribunal awarded compensation vide judgment and award, under appeal, dated 18.12.2018. The relevant portion of the same on reproduction reads as under:-

"31. —:अवधार्य बिन्दु सं0 4 का निस्तारण:—

4— क्या याचीगण किसी प्रकार का प्रतिकर प्राप्त करने के अधिकारी हैं? यदि हां, तो कितनी धनराशि और किस विपक्षी से?

32. उपरोक्त समस्त परिचर्चा के आधार पर यह स्पष्ट हो चुका है कि दिनांक 24.12.2012 को शाम 04:20 पर रेहरा बाबागंज रोड पर भुतहा ताल के पास केराडीह गांव के पास मोटरसाईकिल पंजीयन सं0 यू0पी0 43एन0 4694 चालक वाहन को तीव्रगति व लापरवाही से चलाकर अनिल कुमार की मोटरसाईकिल में टक्कर मार दिया, जिससके अनिल कुमार को गम्भीर व प्राण—घातक चोटें आयी, जिसके फलस्वरूप अनिल कुमार की मृत्यु हो गयी। तदनुसार याचीगण प्रतिकर पाने के अधिकारी हैं। याचीगण के पक्ष में निकले गये निष्कर्ष एवं उपलब्ध साक्ष्य के आधार पर याचीगण प्रतिकर मय ब्याज प्राप्त करने के अधिकारी हैं।

33. कथित दुर्घटना के समय मोटरसाईकिल पंजीयन सं. यू0पी0 43एन0 4694 इफको टोकिया जनरल इन्श्योरेन्स क0लि0 से बीमित थी और वाहन का परिचालन विपक्षी सं0 1 महेन्द्र कुमार द्वारा बीमा की शर्तो के अनुपालन में किया जा रहा था इसलिए समस्त प्रतिकर अदा करने की जिम्मेदारी विपक्षी सं0 2 इफको टोकिया जनरल इन्श्योरेन्स क0लि0 की होगी।

34. प्रतिकर की धनराशि कितनी होगी इस बिन्दु का निस्तारण करने से पूर्व न्यायाधिकरण द्वारा दुर्घटना के समय मृतक अनिल की आयु, मासिक और वार्षिक आय का अंकलन किया जाना न्यायोचित होगा।

35. —:मृतक की आयु का निर्धारण:—

याचीगण ने याचिका में मृतक की आयु 27 वर्ष होना अंकित की है, परन्तु मृतक की आयु के सम्बन्ध में शैक्षिक प्रपत्र पत्रावली में दाखिल नहीं किया है। याची द्वारा दाखिल पोस्ट मार्टम रिपोर्ट में मृतक अनिल कुमार की आयु 29 वर्ष अंकित है और मृतक अनिल चन्द्रिका वर्मा पुत्र चन्द्रिका हितई

वर्मा का आयकर विभाग द्वारा जारी पेनकार्ड नं0 AKHPV1686L में मृतक अनिल वर्मा की जन्मतिथि 12.09.1989 अंकित है। यही जन्मतिथि महाराष्ट्र राज्य मोटर ड्राइविंग लाईसेंस द्वारा अनिल वर्मा के पक्ष में जारी चालन अनुज्ञप्ति–पत्र में अंकित है। ऐसी स्थिति में याचिका एवं पोस्टमार्टम आख्या में मृतक की आयु क्रमश 27 एव 29 वर्ष गलत साबित होती है, क्योंकि घटना दिनांक 24.12.2012 को पेनकार्ड व डी0एल0 में अंकित जन्मतिथि के आधार पर मृतक की आयु दुर्घटना के समय लगभग 23 वर्ष 03 माह 13 दिन होना साबित होती है। याचिका में दाखिल प्रपत्रों के आधार पर न्यायाधिकरण की राय में मृतक अनिल कुमार की आयु दुर्घटना के समय 23 वर्ष अवधारित किया जाना न्यायोचित प्रतीत होता है।

36. –ःमासिक आयः–

याचिका में याचीगण ने मृतक को 25000/– रूपये प्रति माह की औसत आय पी0ओ0पी0 के कारोबार से कमाना कहा है और उसकी मासिक आय मु0 25000/– रूपये प्रति माह याचिका में अंकित की है। याचिका में मृतक को पी0ओ0पी0 का बेहतरीन कारीगर व ठेका लेकर लेबर से कार्य करवाना कहा है। मृतक ठेकेदार था और वह ठेका लेकर लेबर से कार्य करवाता था इस सम्बन्ध में मृतक का ठेकेदारी का पंजीकृत लाईसेंस पत्रावली पर दाखिल नहीं किया गया है। मृतक द्वारा सरकार/प्राईवेट काम का ठेका लेने के सम्बन्ध में अनुबन्ध–पत्र पत्रावली में दाखिल नहीं किया गया है, जिससे यह स्पष्ट हो सके कि मृतक ठेका लेकर निर्धारित धनराशि प्राप्त करके स्वयं अथवा लेबर के माध्यम से विभिन्न स्थानों पर पी0ओ0पी0 का कार्य ठेके पर करवाता था। याची ने मराठी भाषा में अपने एवं श्री द्वारिका प्रसाद माला राम वर्मा के मध्य नोटरी द्वारा प्रमाणित इकरारनामा दाखिल किया है, जिससे मृतक की आय निर्धारित किये जाने में कोई सहायता नहीं मिलती है। याचीगण ने स्टेट बैंक आफ इण्डिया में विभिन्न तिथियों पर अनिल वर्मा के खाता सं0 20112343726 एवं पजांब नेशनल बैंक के खाता सं. 4518000100023321 मु0 99,000/–, 99,000/–, 29,700/–, 1,98,000/– जमा करने की रसीदों की छाया प्रतियां दाखिल की है, परन्तु उन खाता संख्याओं की पासबुक दाखिल नहीं की है और उनमें जमा तथा निकाली गयी धनराशि का कोई विवरण याचिका में दाखिल नहीं किया है। केवल वर्ष 2012–13 का टी0डी0एस0 विवरण पत्र दाखिल किया है। वित्तीय वर्ष 2012–13 का आई0टी0आर0 दाखिल किया है, जिसमें कुल आय 1,78,890/– रूपये प्रदर्शित किया है, परन्तु उक्त आई0टी0आर0 के समर्थन में पूरे वर्ष का आय–व्यय विवरण, समस्त बचत, बैकों/एफ0डी0आर0 आदि की पासबुक पत्रावली में दाखिल नहीं की है। वर्ष 2012–13 के अतिरिक्त अन्य किसी वर्ष्ज्ञ का इन्कम टैक्स रिटर्न पत्रावली में दाखिल नहीं किया है। ऐसी स्थिति में याची की वार्षिक आय केवल एक वर्ष के आयकर विवरण के आधार पर निर्धारित नहीं की जा सकती है। याचीगण द्वारा मृतक अनिल कुमार की मासिक आय मु0 25,000/– रूपये निर्धारण करने के लिए अन्य कोई साक्ष्य नहीं दी गयी है और न ही कोई साक्षी आय निर्धारण के सम्बन्ध में परीक्षित कराया गया है। ऐसी स्थिति में मृतक की मासिक आय माननीय उच्चतम न्यायालय द्वारा निर्णीत लक्ष्मी देवी व अन्य बनाम मोहम्मद तव्वर व अन्य 2008 (2) टी.ए.सी. 394 (एस.सी.) में यह अवधारित किया गया है कि वर्तमान समय में एक स्वस्थ अशिक्षित एवं अप्रशिक्षित मजदूर भी न्यूनतम 100/– रोजाना अथवा 3000/– रू0 माहवार अथवा 36000/– रू0 वार्षिक कमा लेता है। अतः ऐसी परिस्थितियों में उक्त दुर्घटना के समय मृतक अनिल कुमार की मासिक आय माानीय उच्चतम न्यायालय की उपरोक्त विधि व्यवस्था मे प्रतिपादित सिद्वान्तों के अनुसार 3000/– रू. प्रतिमाह अथवा 36,000/– रू0 प्रतिवर्ष अवधारित कर दिया जाये तो इससे न्याय की मंशा पूरी हो जायेगी। तदनुसार दुर्घटना के समय मृतक की मासिक आय 3000/– रू0 अवधारित की जाती है।

–भावी प्रत्याशाओं में वृद्वि–

37. विद्वान अधिवक्ता याचीगण द्वारा अपनी बहस के दौरान मेरे समक्ष यह तर्क प्रस्तुत किया गया कि यदि मृतक जीवित रहता तो वह अपनी आय में बढ़ोत्तरी करता। ऐसी स्थिति में उसकी मासिक आय में 50: की बढ़ोत्तरी/भावी प्रत्याशा को जोड़ते हुए याचीगण को हुई आश्रिता का नुकसान निर्धारित करने के लिए जोड़ा जाना चाहिए।

38. इस सम्बन्ध में मैंने माननीय उच्चतम न्यायालय की नजीर श्रीमती सरला वर्मा व अन्य बनाम दिल्ली परिवहन निगम एवं एक अन्य 2009 (2) द0 मु0 द 161 (सु0 को0) का सम्यक् अवलोकन किया। माननीय उच्चतम न्यायालय द्वारा उक्त नजीर के पैरा 10, 11 में मुआवजे की परिगणना को आरम्भ करने के लिये आयकर को कम कर मृतक की वास्तविक आय निर्धारित किये जाने हेतु भावी प्रत्याशाओं का उल्लेख कर कोई धनराशि जोड़ी जानी चाहिए अथवा नहीं, इस प्रश्न पर माननीय न्यायालय ने विचार किया है तथा यह अवधारित किया है कि मृतक की वास्तविक आय को निर्धारित किये जाने हेतु भावी प्रत्याशाओ को जीवनवृत्त ब

40. उ0प्र0 मोटर यान (ग्यारवां संशोधन) नियमावली–2011 के नियम 220–क एवं विधि व्यवस्था त्रिलोक चन्द्र ¼UPSRTC Vs. TRILOK CHANDRA, 1996 Vol 4 SCC 362)– में कहा गया है कि यदि मृतक विवाहित हो तो उसकी व्यक्तिगत और जीवन के खर्चे 1/4 होगें जहां पारिवारिक सदस्यों की संख्या 4 से 6 हैं। प्रस्तुत प्रकरण में मृतक की वार्षिक आय में से मृतक के स्वयं के खर्चे के लिए एक चौथाई धनराशि की कटौती मानना उचित होगा। इसलिए यदि मृतक जीवित रहता तो वह अपने ऊपर मासिक आय 4,200/– का 1/4 भाग यानि 1050/– रूपये स्वयं पर खर्च करता तथा शेष 3,150/– रूपये मासिक आय अर्थात् 3ए150

ग 12 त्र 37ए800ध् रूपये वार्षिक आय पर याचीगण आश्रित होते।

–गुणांक एवं प्रतिकर निर्धारण–

41. अब हमें यह देखना है कि इस मामले में कौन–सा गुणांक लागू होगा। पत्रावली पर उपलब्ध अभिलेखों के अनुसार मृतक की आयु दुर्घटना के समय 23 वर्ष आयी है। सरला वर्मा व अन्य बनाम दिल्ली ट्रांसपोर्ट कॉर्पोरेशन व अन्य ए0आई0आर0 2009 सुप्रीम कोर्ट पेज–3104 में माननीय उच्चतम न्यायालय ने पैरा–21 में यह अभिनिर्धारित किया है कि:–

"42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas [(1994) 2 SCC 176 : 1994 SCC (Cri) 335] , Trilok Chandra [(1996) 4 SCC 362] and Charlie [(2005) 10 SCC 720 : 2005 SCC (Cri) 1657]), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

42. अतः माननीय उच्चतम न्यायालय द्वारा अभिनिर्धारित सिद्धान्तों के आधार पर 23 वर्ष की आयु के लिए 18 का गुणांक लगाया जाना उचित होगा। इस धनराशि 37,800/– रू0 में 18 के गुणांक का गुणा करने पर यह धनराशि 6,80,400/–रू0 (छः लाख अस्सी हजार चार सौ) रूपये होती है। इस प्रकार मृतक अनिल कुमार की मृत्यु के कारण याचीगण को कुल आर्थिक क्षति मु0 6,80,400/–रूपये की हुई। उत्तर प्रदेश मोटर यान (ग्यारहवां संशोधन) नियमावली–2011 के नियम 220 क (4) (तीन) के अनुसार याचीगण द्वारा मृतक अनिल कुमार को इलाज हेतु रेहरा बाजार से गोण्डा, गोण्डा से लखनऊ मेडिकल कालेज लखनऊ आवागमन में हुआ व्यय मु0 5,000/–रूपया, कियाकर्म में हुआ व्यय मु0 5,000/– रूपया, मानसिक कष्ट/पीड़ा एवं पति सुख से वंचित होने हेतु मु0 10,000/– रूपये दिलाते हुए याचीगण कुल धनराशि मु0 6ए80ए400 . 5ए000 . 5ए000 . 10ए000त्र 7ए00ए400 /– (सात लाख चार सौ) रूपये प्रतिकर प्राप्त करने के अधिकारी हैं। मृतक के दवा इलाज के सम्बन्ध में कोई दवा पर्चा/ बिल दाखिल नहीं किया गया है इसलिए इलाज के सम्बन्ध में कोई प्रतिकर नहीं दिया जा रहा है।

43. प्रस्तुत याचिका दिनांक 28.01.2014 को दाखिल की गयी और पत्रावली में याची ने अपनी साक्ष्य दिनांक 03.03.2017 को अत्यंत विलम्ब से प्रस्तुत की है। ऐसी स्थिति में याचीगण इस प्रतिकर की धनराशि पर याचिका में साक्ष्य प्रस्तुत करने की तिथि 03.03.2017 से छः प्रतिशत वार्षिक साधारण बयाज भी ता अदायगी प्राप्त करने के अधिकारी हैं।

44. पूर्व विवेचन से यह स्पष्ट हो चुका है कि दुर्घटना की तिथि व समय पर दुर्घटना कारक मोटरसाईकिल पंजीयन सं0 यू0पी0 43 एन0 4694 विपक्षी सं0 2 इफको टोकियो जनरल इन्श्योरेन्स कम्पनी लिमिटेड के यहां बीमित थी। अतः याचीगण को प्राप्त होने वाली समस्त प्रतिकर की धनराशि मय ब्याज अदा करने की जिम्मेदारी विपक्षी सं0 2 इफको टोकियो जनरल इन्श्योरेन्स कम्पनी लिमिटेड की होगी।

45. याची सं0 6 मुकेश कुमार नाबालिग श्री चन्द्रिका प्रसाद वर्मा का पुत्र है। वह मृतक पर किस प्रकार आश्रित है यह याचीगण ने अपनी साक्ष्य से साबित नहीं किया है, जबकि उसके प्राकृतिक माता–पिता जीवित हैं। मुकेश कुमार के खानपान व रहन–सहन की समस्त जिम्मेदारी उसके पिता की है, न कि उसके बड़े भाई मृतक अनिल कुमार की। साक्ष्य के अभाव में याची सं0 6 मुकेश कुमार प्रस्तुत याचिका के माध्यम से कोई प्रतिकर प्राप्त करने का अधिकारी नही है।

46. इस प्रकार याचीगण श्रीमती अनीता, हर्षवर्धन वर्मा, कु0 प्रतिमा, श्रीमती गीता देवी, चन्द्रिका प्रसाद वर्मा की प्रतिकर याचिका मु0 7,00,400/– (सात लाख चार सौ) रूपये प्रतिकर एवं उसमें साक्ष्य प्रस्तुत करने के दिनांक 03.03.2017 से छः प्रतिशत वार्षिक साधारण ब्याज की अदायगी हेतु विपक्षी सं0 2 के विरूद्ध स्वीकार किये जाने योग्य है।

आदेश

47. याचीगण द्वारा प्रस्तुत प्रतिकर याचिका आंशिक रूप से स्वीकार की जाती है तथा याचीगण के पक्ष में एवं विपक्षी सं0 2 इफको टोकियो जनरल इन्श्योरेन्स कम्पनी लिमिटेड के विरूद्व, अंकन मु0 7,00,400/–(सात लाख चार सौ) रूपये का अवार्ड/अधिनिर्णय पारित करते हुए विपक्षी सं0 2 इफको टोकियो जनरल इन्श्योरेन्स कम्पनी लिमिटेड को आदेशित किया जाता है कि वह उक्त धनराशि को इस आदेश की तिथि से एक माह के अन्दर याचीगण को अदा करे अन्यथा याचीगण को अधिकार होगा कि वह प्रतिकर की उक्त धनराशि विपक्षी सं0 2 से विधि अनसुार न्यायालय के माध्यम से वसूल कर लें। याचीगण याचिका में साक्ष्य प्रस्तुत करने की दिनांक 03.03.2017 से वास्तविक भुगतान होने की तिथि तक सम्पूर्ण प्रतिकर की धनराशि पर छः प्रतिशत वार्षिक साधारण ब्याज प्राप्त करने के अधिकारी होंगे।

48. उपरोक्त प्रतिकर धनराशि में से याचिनी सं0 1 श्रीमती अनीता जो मृतक की पत्नी है उसको मिलने वाली

धनराशि अंकन 2,00,400/—रू0 (दो लाख चार सौ) रूपये में से मु0 1,00,000/— रूपये एकाउन्टपेयी चेक के माध्यम से प्राप्त करेगी तथा शेष धनराशि मु0 1,00,400/— रूपये तीन वर्ष की अवधि तक के लिए किसी राष्ट्रीयकृत बैंक में सावधि जमा योजना के तहत निक्षेपित की जायेगी। नाबालिगान याचिनी सं0–2 हर्षवर्धन वर्मा एवं याची सं0 3 कु0 प्रतिमा जो मृतक के पुत्र एवं पुत्री हैं उनमें से प्रत्येक को मिलने वाली धनराशि अंकन 1,50,000/— (एक लाख पचास हजार) रूपये प्रत्येक के बालिग होने तक की अवधि के लिए नियमानुसार किसी राष्ट्रीयकृत बैंक की सावधि जमा योजना के तहत निक्षेपित की जायेगी। याची सं0 4 श्रीमती गीता देवी जो मृतक की माता है उसको मिलने वाली धनराशि अंकन 1,00,000/— रू0 (एक लाख) रूपये में से मु0 50,000/— रूपये एकाउन्टपेयी चेक के माध्यम से प्राप्त करेगी तथा शेष धनराशि मु0 50,000/— रूपये तीन वर्ष की अवधि तक के लिए किसी राष्टीयकृत बैंक में सावधि जमा योजना के तहत निक्षेपित की जायेगी। याची सं0 5 चन्द्रिका प्रसाद वर्मा जो मृतक के पिता हैं उसको मिलने वाली धनराशि अंकन 1,00,000/— रू0 (एक लाख) रूपये में से मु0 50,000/— रूपये एकाउन्टपेयी चेक के माध्यम से प्राप्त करेगें तथा शेष धनराशि मु0 50,000 रूपये तीन वर्ष की अवधि तक के लिए किसी राष्ट्रीयकृत बैंक में सावधि जमा योजना के तहत निक्षेपित की जायेगी।

49. उपरोक्त एफ0डी0आर0 पर न्यायालय की अनुमति के वगैर कोई ऋण स्वीकार अथवा भुगतान नहीं किया जायेगा जो केन्द्रीय नाजिर, जिला जजी, बलरामपुर के पास सुरक्षित रखी जायेगी और वे उन्हे नियमानुसार नवीनीकृत कराते रहेंगे।a"

7. While pressing the present appeal for enhancement of amount of compensation, learned counsel for the appellants submitted that before the Tribunal, it was specifically pleaded that the deceased was earning Rs. 25,000/- per month by performing POP work and on this aspect, evidence was also placed before the Tribunal i.e. a document showing income tax return of the financial year 2012-13, however, the Tribunal ignored the documentary evidence placed before it so as the oral evidence and considered it appropriate to grant amount of compensation taking note of notional income of Rs. 3,000/- per month, as such, the amount of compensation is liable to be enhanced.

8. Opposing the prayer of the learned counsel for the appellants, Sri Govind Chaturvedi, learned counsel appearing for the Iffco Tokio General Insurance Co. Ltd. (in short "Company") submitted that the finding of the Tribunal on the aforesaid issue is not liable to be interfered with by this Court as the appellants, claimants before the Tribunal, filed their income tax returns only of one year i.e. financial year 2012-13. There are several Authorities in this regard, as such, the finding on this issue is just and proper.

9. In response to above, learned counsel for the appellants submitted that justice would suffice, if this Court after taking note of pronouncements on the issue of notional income, enhances the compensation awarded by the Tribunal.

10. Elaborating his arguments, learned counsel for the appellants submitted that in the case of ***Magma General Insurance Company Ltd. vs. Nanu Ram and Others; reported in 2018 SCC Online SC 1546,*** wherein, the accident took place in the year 2013, the Hon'ble Apex Court affirmed the notional income at Rs. 6,000/- per month and enhanced the compensation in relation to other heads.

11. He further submitted that in the case of ***Chameli Devi and Others vs. Jivrail Mian and Others; reported in 2019 (4) TAC 724 (S.C.),*** wherein, the accident took place on 02.01.2001, the Hon'ble Apex Court considered the notional income at Rs. 200/- per day, meaning thereby that the Hon'ble Apex Court while considering the case of Chameli Devi (supra) considered it appropriate to grant compensation after taking note of notional income at Rs. 200/- per day i.e. Rs. 6,000/- per month. The relevant paras on reproduction read as under:-

"Keeping in view the fact that the accident took place in 2001 and the deceased was a carpenter, it would not be unjustified to assess his income at Rs.200/- per day. It is true

that carpenter may not get per work every day, hence, we access the income at Rs.5000/- per month. Adding 40% for future prospects Rs.2,000/-, the total income works out to Rs.7,000/-. Deducting 1/5 for personal expenses, keeping in view a large number of dependents, the datum figure comes out to Rs.5,600/- per month or Rs.67,200/- per year. Applying multiplier of 16, the compensation works out to Rs.10,75,200/-. Rs.70,000/- is added towards other non-conventional heads as laid down in National Insurance Co. Ltd. v. Pranay Sethi & Ors. (2017) 16 SCC 680 : 2017 (4) T.A.C. 673. The total compensation comes out to Rs.11,45,200/-."

12. On the issue of notional income, further reliance has also been placed on the judgment dated 10.12.2014 passed in ***F.A.F.O. (D) No. 748 of 2011 (Smt. Sheela Pandey W/O Late Surendra Kumar Pandey & 4 Others. vs. The New India Insurance Co. Ltd. Bena Ghabar Branch & 2 Others).*** In this case, this Court, for granting compensation, assessed the notional income of the deceased, who was doing business of selling milk/ diary business, at Rs. 6,500/- per month.

13. He further submitted that in the judgment passed in the case of ***Syed Sadiq And Others vs. Divisional Manager, United India Insurance Company Limited; reported in (2014) 2 SCC 735***, the deceased was Vegetable Vendor and the Hon'ble Apex Court, for the purposes of granting of compensation, after considering the state of economy and rising prices in agricultural products observed that a vegetable vendor is reasonably capable of earning Rs. 6,500/- per month. Para 9 of the same is as under:-

"9. There is no reason in the instant case for the Tribunal and the High Court to ask for evidence of monthly income of the appellant claimant. On the other hand, going by the present state of economy and the rising prices in agricultural products, we are inclined to believe that a vegetable vendor is reasonably capable of earning Rs 6500 per month.".

14. On the issue of notional income at Rs. 6,000/-, learned counsel for the appellants further submitted that in the case of ***New India Assurance Co. Ltd. Vs. Resha Devi and Others; reported in 2017 (4) T.A.C. 288 (All.),*** *this Court, in para 8, observed that "there can be no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations. Obviously award of damages would depend upon the particular facts and circumstances of the case but the element of fairness in the amount of compensation so determined is the ultimate guiding factor. In such view of the matter, presumption of Rs. 100/- per day as notional income even for a unskilled labour in the year 2014 appears to us to be frugal and by no stretch of imagination to be just even the minimum wages fixed by the State Government is much higher than that looking to the rise in cost index. We are of the considered upon that notional income of an unskilled labour could not be less than Rs. 200/- per day."*

15. In continuation, learned counsel for the appellants submitted that in the instant case, the deceased was earning Rs. 25,000/- by carrying out POP work at Mumbai, as such, considering the inflation & devaluation of rupee and increase in cost of living, particularly at Mumbai, the compensation be enhanced considering the notional income of deceased at Rs. 6,000/- per month.

16. Learned counsel for the Company vehemently opposed the issue of notional income raised by the learned counsel for the appellants, however, he could not place any

judgment, wherein, anything otherwise has been held.

17. Considering the date of accident i.e. 24.12.2012 and the fact that the deceased was earning Rs. 25,000/- per month by performing POP work was not proved by placing required documentary evidence as also the law settled on the issue of notional income, this Court is of the view that the notional income of the deceased, in the instant case, for the purposes of computing the compensation is liable to be considered at Rs. 6,000/- per month.

18. Learned counsel for the appellants also stated that the claimants are also entitled to amount(s) under other heads including the conventional heads i.e. funeral expenses, loss of estate and loss of consortium, as held by the Apex Court in the case of ***National Insurance Company Ltd. Vs. Pranay Sethi and Others; reported in (2017) 16 SCC 680: 2017 ACJ 2700 and New India Assurance Company Limited vs. Smt. Somwati and Others; (2020) 9 SCC 644.***

19. Relevant paragraph 59 of the judgment passed in the case of ***Pranay Sethi (supra)*** reads as under:-

59. In view of the aforesaid analysis, we proceed to record our conclusions:

59.1. The two-Judge Bench in Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma[Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] , a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

59.2. As Rajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] has not taken note of the decision in Reshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] , which was delivered at earlier point of time, the decision in Rajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] is not a binding precedent.

59.3. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

59.4. In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

59.5. For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paras 30 to 32 of Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121

: (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] which we have reproduced hereinbefore.

59.6. The selection of multiplier shall be as indicated in the Table in Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] read with para 42 of that judgment.

59.7. The age of the deceased should be the basis for applying the multiplier.

59.8. Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

20. At this stage, considering para 59 of the judgment passed in the case of ***Pranay Sethi (supra)***, this Court feel that it would be appropriate to refer the relevant paras of the judgment passed by the Hon'ble Apex Court in the case of ***Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002 : 2009 SCC OnLine SC 797***, which are as under:-

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra [(1996) 4 SCC 362] , the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

` *32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third.*

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42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas [(1994) 2 SCC 176 : 1994 SCC (Cri) 335] , Trilok Chandra [(1996) 4 SCC 362] and Charlie [(2005) 10 SCC 720 : 2005 SCC (Cri) 1657]), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

21. In the case of ***Smt. Somwati (supra)***, relied upon by the learned counsel for the appellants, the Hon'ble Apex Court observed as under:-

"30. The next judgment which needs to be noted is Magma General Insurance Co. Ltd. v. Nanu Ram [Magma General Insurance Co. Ltd. v. Nanu Ram, (2018) 18 SCC 130 : (2019) 3 SCC (Civ) 146 : (2019) 3 SCC (Cri) 153] , the concept of consortium was explained in paras 21, 22 and 23, which are as follows : (SCC pp. 136-37)

"21. A Constitution Bench of this Court in Pranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] 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. [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149]

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.' [Black's Law Dictionary (5th Edn., 1979).]

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.

22. Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world over have recognised that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions, therefore, permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to

the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

23. The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of filial consortium. Parental consortium is awarded to children who lose their parents in motor vehicle accidents under the Act. A few High Courts have awarded compensation on this count [Rajasthan High Court in Jagmala Ram v. Sohi Ram, 2017 SCC OnLine Raj 3848 : (2017) 4 RLW 3368; Uttarakhand High Court in Rita Rana v. Pradeep Kumar, 2013 SCC OnLine Utt 2435 : (2014) 3 UC 1687; Lakshman v. Susheela Chand Choudhary, 1996 SCC OnLine Kar 74 : (1996) 3 Kant LJ 570] . However, there was no clarity with respect to the principles on which compensation could be awarded on loss of filial consortium."

31. A two-Judge Bench in Magma General Insurance Co. Ltd. [Magma General Insurance Co. Ltd. v. Nanu Ram, (2018) 18 SCC 130 : (2019) 3 SCC (Civ) 146 : (2019) 3 SCC (Cri) 153] awarded the amount of Rs 40,000 to father and sister of the deceased. Para 24 is as follows : (SCC p. 137)

"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 [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] . 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."

32. A three-Judge Bench in United India Insurance Co. Ltd. v. Satinder Kaur [United India Insurance Co. Ltd. v. Satinder Kaur, (2021) 11 SCC 780 : 2020 SCC OnLine SC 410] , had reaffirmed the view of the two-Judge Bench in Magma General Insurance Co. Ltd. [Magma General Insurance Co. Ltd. v. Nanu Ram, (2018) 18 SCC 130 : (2019) 3 SCC (Civ) 146 : (2019) 3 SCC (Cri) 153] The three-Judge Bench from paras 53 to 65, dealt with three conventional heads. The entire discussion on three conventional heads of the three-Judge Bench is as follows:

"53.InPranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] , the Constitution Bench held that in death cases, compensation would be awarded only under three conventional heads viz. "loss of estate", "loss of consortium" and "funeral expenses".

54. The Court held that the conventional and traditional heads, cannot be determined on percentage basis, because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified, which has to be based on a reasonable foundation. It was observed that factors such as price index, fall in bank interest, escalation of rates, are aspects which have to be taken into consideration. The Court held that reasonable figures on conventional heads, namely, "loss of estate", "loss of consortium" and "funeral expenses" should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The Court was of the view that the amounts to be awarded under these conventional heads should be enhanced by 10% every three years, which will bring consistency in respect of these heads.

(a) Loss of estate -- Rs 15,000 to be awarded

(b) "Loss of consortium"

55. Loss of consortium, in legal parlance, was historically given a narrow meaning to be awarded only to the spouse i.e. the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads for awarding compensation in various jurisdictions such as the United States of America, Australia, etc. English courts have recognised the right of a spouse to get compensation even during the period of temporary disablement.

56.InMagma General Insurance Co. Ltd. v. Nanu Ram [Magma General Insurance Co. Ltd. v. Nanu Ram, (2018) 18 SCC 130 : (2019) 3 SCC (Civ) 146 : (2019) 3 SCC (Cri) 153] , this Court interpreted "consortium" to be a compendious term, which encompasses spousal consortium, parental consortium, as well as 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.

57. 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.

58. 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 and affection, and their role in the family unit.

59. Modern jurisdictions world over have recognised that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is the compensation for loss of love and affection, care and companionship of the deceased child.

60. The Motor Vehicles Act, 1988 is a beneficial legislation which has been framed with the object of providing relief to the victims, or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of filial consortium.

61. Parental consortium is awarded to the children who lose the care and protection of their parents in motor vehicle accidents.

62. The amount to be awarded for loss of consortium will be as per the amount fixed in Pranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] .

63. At this stage, we consider it necessary to provide uniformity with respect to the grant of consortium, and loss of love and affection. Several Tribunals and High Courts have been awarding compensation for both loss of consortium and loss of love and affection. The Constitution Bench inPranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2

SCC (Cri) 205] , has recognised only three conventional heads under which compensation can be awarded viz. "loss of estate", "loss of consortium" and "funeral expenses".

64.InMagma General [Magma General Insurance Co. Ltd. v. Nanu Ram, (2018) 18 SCC 130 : (2019) 3 SCC (Civ) 146 : (2019) 3 SCC (Cri) 153] , this Court gave a comprehensive interpretation to consortium to include spousal consortium, parental consortium, as well as filial consortium. loss of love and affection is comprehended in loss of consortium.

65. The Tribunals and High Courts are directed to award compensation for loss of consortium, which is a legitimate conventional head. There is no justification to award compensation towards loss of love and affection as a separate head.

(c) Funeral expenses -- Rs 15,000 to be awarded."

(emphasis supplied)

33. The three-Judge Bench in the above case approved the comprehensive interpretation given to the expression "consortium" to include spousal consortium, parental consortium as well as filial consortium. The three-Judge Bench, however, further laid down that "loss of love and affection" is comprehended in "loss of consortium", hence, there is no justification to award compensation towards "loss of love and affection" as a separate head.

34. The Constitution Bench in Pranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] has also not, under conventional head, included any compensation towards "loss of love and affection" which have been now further reiterated by the three-Judge Bench in United India Insurance Co. Ltd. [United India Insurance Co. Ltd. v. Satinder Kaur, (2021) 11 SCC 780 : 2020 SCC OnLine SC 410] . It is thus now authoritatively well settled that no compensation can be awarded under the head "loss of love and affection".

35. The word "consortium" has been defined in Black's Law Dictionary, 10th Edn. The Black's Law Dictionary also, simultaneously, notices the filial consortium, parental consortium and spousal consortium in the following manner:

"Consortium1. The benefits that one person, esp. A spouse, is entitled to receive from another, including companionship, cooperation, affection, aid, financial support, and (between spouses) sexual relations a claim for loss of consortium.

- Filial consortium A child's society, affection, and companionship given to a parent.

- Parental consortium A parent's society, affection and companionship given to a child.

- Spousal consortium A spouse's society, affection and companionship given to the other spouse."

36. In Magma General Insurance Co. Ltd. [Magma General Insurance Co. Ltd. v. Nanu Ram, (2018) 18 SCC 130 : (2019) 3 SCC (Civ) 146 : (2019) 3 SCC (Cri) 153] as well as United India Insurance Co. Ltd. [United India Insurance Co. Ltd. v. Satinder Kaur, (2021) 11 SCC 780 : 2020 SCC OnLine SC 410] , the three-Judge Bench laid down that the consortium is not limited to spousal consortium and it also includes parental consortium as well as filial consortium. In para 87 of United India Insurance Co. Ltd. [United India Insurance Co. Ltd. v. Satinder Kaur, (2021) 11 SCC 780 : 2020

SCC OnLine SC 410] , "consortium" to all the three claimants was thus awarded. Para 87 is quoted below:

"87. Insofar as the conventional heads are concerned, the deceased Satpal Singh left behind a widow and three children as his dependants. On the basis of the judgments in Pranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] and Magma General [Magma General Insurance Co. Ltd. v. Nanu Ram, (2018) 18 SCC 130 : (2019) 3 SCC (Civ) 146 : (2019) 3 SCC (Cri) 153] , the following amounts are awarded under the conventional heads:

(i) Loss of estate : Rs 15,000

(ii) Loss of consortium:

(a) Spousal consortium : Rs 40,000

(b) Parental consortium : 40,000 × 3 = Rs 1,20,000

(iii) Funeral expenses : Rs 15,000"

37. The learned counsel for the appellant has submitted that Pranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] has only referred to spousal consortium and no other consortium was referred to in the judgment of Pranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] , hence, there is no justification for allowing the parental consortium and filial consortium. The Constitution Bench in Pranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] has referred to amount of Rs 40,000 to the "loss of consortium" but the Constitution Bench had not addressed the issue as to whether consortium of Rs 40,000 is only payable as spousal consortium. The judgment of Pranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] cannot be read to mean that it lays down the proposition that the consortium is payable only to the wife.

38. The three-Judge Bench in United India Insurance Co. Ltd. [United India Insurance Co. Ltd. v. Satinder Kaur, (2021) 11 SCC 780 : 2020 SCC OnLine SC 410] has categorically laid down that apart from spousal consortium, parental and filial consortium is payable. We feel ourselves bound by the above judgment of the three-Judge Bench. We, thus, cannot accept the submission of the learned counsel for the appellant that the amount of consortium awarded to each of the claimants is not sustainable.

39. We, thus, found the impugned judgments [Somwati v. Dharmendra Kumar, 2019 SCC OnLine All 3897] , [Sangita Devi v. New India Assurance Ltd., 2019 SCC OnLine Del 10877] , [New India Assurance Co. Ltd. v. Azmati Khatoon, 2019 SCC OnLine Del 10530] , [Cholamandalam MS General Insurance Co. Ltd. v. Umarani, 2019 SCC OnLine Mad 29630] , [Pinki v. Rajeev, 2019 SCC OnLine Del 11882] , [Nanak Chand v. New India Assurance Co. Ltd., 2020 SCC OnLine Del 62] , [Oriental Insurance Co. Ltd. v. Rinku Devi, 2019 SCC OnLine Del 10493] of the High Court awarding consortium to each of the claimants in accordance with law which does not warrant any interference in this appeal. We, however, accept the submissions of the learned counsel for the appellant that there is no justification for award of compensation under separate head "loss of love and affection". The appeal filed by the appellant deserves to be allowed insofar as

the award of compensation under the head "loss of love and affection".

40. We may also notice the three-Judge Bench judgment of this Court relied upon by the learned counsel for the appellant i.e. Sangita Arya v. Oriental Insurance Co. Ltd. [Sangita Arya v. Oriental Insurance Co. Ltd., (2020) 5 SCC 327 : (2020) 3 SCC (Civ) 254 : (2020) 2 SCC (Cri) 905] The counsel for the appellant submits that this Court has granted only Rs 40,000 towards "loss of consortium" which is an indication that "consortium" cannot be granted to children. In the above case, Motor Accidents Claims Tribunal has awarded Rs 20,000 to the widow towards loss of consortium and Rs 10,000 to the minor daughter towards "loss of love and affection". The High Court has reduced [Oriental Insurance Company Ltd. v. Sangita Arya, 2016 SCC OnLine Utt 970] the amount of consortium from Rs 20,000 to Rs 10,000. Para 16 of the judgment is to the following effect : (Sangita Arya case [Sangita Arya v. Oriental Insurance Co. Ltd., (2020) 5 SCC 327 : (2020) 3 SCC (Civ) 254 : (2020) 2 SCC (Cri) 905] , SCC p. 330, para 10)

"10. The consortium payable to the widow was reduced [Oriental Insurance Company Ltd. v. Sangita Arya, 2016 SCC OnLine Utt 970] by the High Court from Rs 20,000 (as awarded by MACT) to Rs 10,000; the amount awarded towards loss of love and affection to the minor daughters was reduced from Rs 10,000 to Rs 5000. However, the amount of Rs 5000 awarded by MACT towards funeral expenses was maintained."

41. This Court in the above case confined its consideration towards the income of the deceased and there was neither any claim nor any consideration that the consortium should have been paid to other legal heirs also. There being no claim for payment of consortium to other legal heirs, this Court awarded Rs 40,000 towards consortium. No such ratio can be deciphered from the above judgment that this Court held that consortium is only payable as a spousal consortium and consortium is not payable to children and parents.

42. It is relevant to notice the judgment of this Court in United India Insurance Co. Ltd. [United India Insurance Co. Ltd. v. Satinder Kaur, (2021) 11 SCC 780 : 2020 SCC OnLine SC 410] which was delivered shortly after the above three-Judge Bench judgment of Sangeeta Arya [Sangita Arya v. Oriental Insurance Co. Ltd., (2020) 5 SCC 327 : (2020) 3 SCC (Civ) 254 : (2020) 2 SCC (Cri) 905] specifically laid down that both spousal and parental consortium are payable which judgment we have already noticed above.

43. We may also notice one more three-Judge Bench judgment of this Court in M.H. Uma Maheshwari v. United India Insurance Co. Ltd. [M.H. Uma Maheshwari v. United India Insurance Co. Ltd., (2020) 6 SCC 400 : (2020) 3 SCC (Cri) 274 : (2020) 3 SCC (Civ) 744] decided on 12-6-2020. In the above case, the Tribunal had granted the amount of rupees one lakh towards loss of consortium to the wife and rupees three lakhs for all the appellants towards loss of love and affection. The High Court in the above case had reduced the amount of compensation in the appeal filed by the insurance company. The High Court held [United India Insurance Co. Ltd. v. M.H. Uma Maheshwari, 2017 SCC OnLine Kar 6258] that by awarding the amount of rupees one lakh towards loss of consortium to the wife, the Tribunal had committed error while awarding rupees one lakh to the first appellant towards the head of "loss of love and affection". Allowing the appeal filed by the claimant, this Court maintained the order of MACT.

44. In the above judgment although rendered by the three-Judge Bench, there was

no challenge to award of compensation of rupees one lakh towards the consortium and rupees three lakhs towards the loss of love and affection. The appeal was filed only by the claimants and not by the insurance company. The Court did not pronounce on the correctness of the amount awarded under the head "loss of love and affection".

45. We may also notice the additional submission advanced in Civil Appeal No. 3099 of 2020 [arising out of SLP (C) No. 8250 of 2020], Oriental Insurance Co. Ltd. v. Rinku Devi & Others. As noted above, we have taken the view that the order [Oriental Insurance Co. Ltd. v. Rinku Devi, 2019 SCC OnLine Del 10493] of the High Court awarding compensation towards "loss of love and affection" @ Rs 50,000 to each of the claimants is unjustified which is being set aside in this appeal. We, further, in the above appeal also set aside the directions of the High Court in para 9 by which statutory amount along with interest accrued thereon was directed to be deposited in Aasra fund.

46. In result, all the appeals are partly allowed. The award of compensation under the conventional head "loss of love and affection" is set aside. Motor Accidents Claims Tribunals shall recompute the amount payable and take further steps in accordance with law.

47. All the appeals are partly allowed accordingly. No costs."

22. On the issue of compensation under other heads including the conventional heads, learned counsel for the Company submitted that the judgment of Hon'ble Apex Court rendered in ***Pranay Sethi (supra)*** was pronounced on 31.10.2017 and subsequent to the same, the judgment was pronounced in the case of ***Smt. Somwati (supra)***, however, the present case relates to the accident which took place on 24.12.2012, as such, the law settled by the Hon'ble Apex Court in this regard would not apply in the present case. The submission of learned counsel for the appellants is fallacious because all the judgments operate retrospectively except provided otherwise, as held by the Hon'ble Apex Court in a catena of judgments.

23. After the above, it is submitted that under different heads including the conventional heads, compensation has been awarded after considering the Rule 220-A of U.P. Motor Vehicle Rules, 1998 (in short "Rules of 1998") and as such, the appellants are not entitled to any enhancement.

24. On the aforesaid aspects, it would be appropriate to refer the judgment passed by the Apex Court in the case of ***New India Assurance Co. Ltd. v. Urmila Shukla and Others; 2021 SCC Online 822,*** wherein, the Hon'ble Apex Court after considering the judgment passed by it in the case of ***Pranay Sethi (supra)*** and Rule 220-A of the Rules of 1998, observed as under:-

"8. It is submitted by Mr. Rao that the judgment in Pranay Sethi does not show that the attention of the Court was invited to the specific rules such as Rule 3(iii) which contemplates addition of 20% of the salary as against 15% which was stated as a measure in Pranay Sethi. In his submission, since the statutory instrument has been put in place which affords more advantageous treatment, the decision in Pranay Sethi ought not to be considered to limit the application of such statutory Rule.

9. It is to be noted that the validity of the Rules was not, in any way, questioned in the instant matter and thus the only question that we are called upon to consider is whether in its application, sub-Rule 3(iii) of Rule 220A of the Rules must be given restricted scope or it must be allowed to operate fully.

10. The discussion on the point in Pranay Sethi was from the standpoint of arriving at "just compensation" in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in Pranay Sethi cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in Pranay Sethi cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs."

25. From the above quoted paras of the judgment of the Hon'ble Apex Court, it appears to this Court that if a "formula" or "provision" in a statute provides "better or greater benefit" then in that event, such "formula" or "provision" of a statute must be allowed to operate.

26. The Rule 220-A of the Rules of 1998, being relevant, as has been pressed upon by the learned counsel for the respondents, is quoted below for ready reference:-

*"**220-A. Determination of compensation**--(1) The multiplier for determination of loss of income payable as compensation in all the claim cases shall be applied as per Second Schedule provided in the Act.*

(2) Deduction for personal and living expenses of a deceased, shall be as follows--

(i) The deduction towards personal expenses of a deceased unmarried shall be 50% where the family of a bachelor is large and dependent on the income of the deceased, the deduction shall be 1/3 (33.33%).

(ii) The deduction towards personal and living expenses of a married person deceased shall be 1/3rd where dependent family members are 2 to 3 in number, 1/4th where dependent family members are 4 to 6 in number and 1/5th where dependent family members are more than 6 in number.

(iii) For the purpose of calculation of number of family members in Clause (ii), a minor dependent will be counted as half.

(3) The future prospects of a deceased, shall be added in the actual salary or minimum wages of the deceased as under--

(i) Below 40 years of age : 50% of the salary.

(ii) Between 40-50 years of age : 30% of the salary.

(iii) More than 50 years of age : 20% of the salary.

(iv) When wages not sufficiently Proved : 50% towards inflation and price index.

(4) The non-pecuniary damages shall also be payable in the compensation as follows--

(i) Compensation for loss of estate : Rs. 5,000 to Rs. 10,000

(ii) Compensation for loss of consortium : Rs. 5,000 to 10,000

(iii) Compensation for loss of love and affection : Rs. 5,000 to 15,000

(iv) Funeral expenses, costs of transportation of body : Rs. 5,000 or actual expenses whichever is less

(v) Medical expenses : actual expenses proved to the satisfaction of the Claims Tribunal.

(5) For determination of compensation in case of injuries, partial or permanent disability provisions of second schedule of the Act shall apply:

Provided that the Claims Tribunal may also award compensation for future prospects according to sub-rule (3) in case of permanent disability depending upon the nature, extent and its effect on the future of disabled claimants.

(6) The rate of interest shall be 7% pendente lite and future till the actual payment."

27. From the Rules of 1998, it is evident that the Rule 220-A was inserted in the Rules of 1998 vide U.P. Motor Vehicles (Eleventh Amendment) Rules 2011 published in U.P. Gazette Extraordinary dated 26.09.2011 and this Rule has not been amended till date though more than 10 years have elapsed.

28. Considering the date i.e. 26.09.2011 of insertion of Rule 220-A in the Rules of 1998 as also that the same has not been amended till date and inflation, devaluation of rupee, increase in cost of living and increase in cost of expenses towards funeral etc. and the law propounded/ declared by the Hon'ble Apex Court in the judgments passed in the cases of ***Pranay Sethi (supra)*** and ***Smt. Somwati (supra),*** in the matter of determination of amount of compensation under the Motor Vehicle Act, 1988 (in short "Act of 1988"), provides "better benefits" and also keeping in mind the observation of the Apex Court in the judgment passed in the case of ***Urmila Shukla (supra)***, this Court is of the opinion that the provisions of Rule 220-A should be allowed to operate only upto the extent that it provides "better benefits" to the claimant(s) under the Act of 1988, which is a beneficial legislation on the aspect of grant of compensation.

29. Thus, for the above reasons, in the opinion of this Court, for the purposes of awarding compensation in each head, the judgments of the Hon'ble Apex Court in which principles have been settled on the issue of providing/awarding compensation and the Rules of 1998, both should be considered and whichever provides "better benefits" should be applied.

30. At this juncture, it would be appropriate to refer a judgment delivered in the case of ***Kirti & Another vs. Oriental Insurance Company Limited reported in (2021) 2 SCC 166,*** wherein three Judges Bench of Hon'ble Apex Court after relying upon the observation made in earlier judgment passed in the case of ***Hem Raj vs. Oriental Insurance Co. Ltd. reported in (2018) 15 SCC 654,*** observed as under:-

"13. Given how both deceased were below 40 years and how they have not been established to be permanent employees, future prospects to the tune of 40% must be paid. The argument that no such future prospects ought to be allowed for those with notional income, is both incorrect in law [Sunita Tokas v. New India Insurance Co. Ltd., (2019) 20 SCC 688 : (2020) 4 SCC (Cri) 436] and without merit considering the constant inflation-induced increase in wages. It would be sufficient to quote the

observations of this Court in Hem Raj v. Oriental Insurance Co. Ltd. [Hem Raj v. Oriental Insurance Co. Ltd., (2018) 15 SCC 654 : (2019) 1 SCC (Civ) 293 : (2019) 2 SCC (Cri) 864], as it puts at rest any argument concerning non-payment of future prospects to the deceased in the present case: (Hem Raj case [Hem Raj v. Oriental Insurance Co. Ltd., (2018) 15 SCC 654 : (2019) 1 SCC (Civ) 293 : (2019) 2 SCC (Cri) 864] , SCC p. 656, para 7)

"7. We are of the view that there cannot be distinction where there is positive evidence of income and where minimum income is determined on guesswork in the facts and circumstances of a case. Both the situations stand at the same footing. Accordingly, in the present case, addition of 40% to the income assessed by the Tribunal is required to be made."

31. From the aforesaid, it is evident that in a case of notional income also, the compensation should be calculated/ awarded after considering the "future prospects".

32. On the issue of awarding the compensation towards future prospects as also under conventional heads, this Court considered the submissions of learned counsel for the parties, the judgment passed in the case of ***Pranay Sethi (supra)***, which was delivered after considering the various pronouncements on the issue of granting compensation under the Act of 1988 and other judgments on the issue referred above as also the Rule 220-A of the Rules of 1998 and upon due consideration of aforesaid, this Court is of the opinion that the claimants-appellants are entitled to compensation under these heads.

33. From the judgment and award dated 18.12.2018, relevant portion of which is quoted above, this Court finds that under the head(s) i.e. medical expenses and funeral expenses, the Tribunal has awarded Rs. 5,000/- under each head and Rs. 10,000/- towards consortium and towards future prospects no amount has been awarded.

34. Considering the aforesaid facts as also the reasons recorded hereinabove, the award of the Tribunal dated 18.12.2018, so far it relates to grant of compensation towards future prospects and under conventional heads, such as, loss of estate, loss of consortium and funeral expenses etc. is concerned, in view of this Court, is not in consonance with the judgment passed by the Hon'ble Apex Court in the cases of ***Pranay Sethi (supra)*** and ***Smt. Somwati (supra)*** as also Rule 220-A of the Rules of 1998 as also the law laid down by the Hon'ble Apex Court in the judgment passed in the case of ***Kirti & Another vs. Oriental Insurance Company Limited reported in (2021) 2 SCC 166.*** Accordingly, this Court holds that the claimants-appellants are entitled to compensation towards future prospects and enhancement under conventional heads, such as, loss of estate, loss of consortium and funeral expenses etc.

35. In regard to rate of interest, for the reasons recorded by the Tribunal, this Court is not inclined to interfere in the rate of interest awarded by the Tribunal i.e. 6% per annum.

36. In view of the aforesaid, this Court is of the view that appellants are entitled to an amount to the tune of Rs. 16,10,800/- as detailed hereinunder, with interest @ 6%, as awarded by the Tribunal, from the date of filing of claim petition till realization.

Calculation Chart

Sl. No.	Heads	Compensation awarded
1.	Income	Rs. 6,000/-

2.	Future Prospects	Rs. 2,400/- (i.e. 40% of the income)
3.	Deduction towards personal expenditure	Rs. 2,100/- [i.e. 1/4th of (6,000 + 2,400)]
4.	Total Income	Rs. 6,300/- [i.e. 3/4th of (6,000 + 2,400)]
5.	Multiplier as per the age of the deceased i.e. 23 years	18
6.	Loss of future income	Rs. 13,60,800/- (Rs. 6,300 x 12 x 18)
7.	Loss of love and affection for entire family (As per Rule 220-A (4) (iii) of the Rules of 1998)	Rs. 15,000/-
8.	Funeral expenses	Rs. 15,000/-
9.	Loss of Estate	Rs. 15,000/-
10.	Loss of Consortium	Rs. 2,00,000/- [Rs. 40,000 x 5 (wife, son, daughter, mother and father)
11.	Medical Expenses	Rs. 5,000/-
	Total Compensation	**Rs. 16,10,800/-** along with interest @ 6% per annum from the date of filing of claim petition till payment.

37. It is made clear that this Court has modified the judgment and award dated 18.12.2018, under appeal, passed by the Tribunal, in above terms only. The Tribunal in its judgment and award dated 18.12.2018 has apportioned the amount awarded by it and this Court also deems it appropriate that the enhanced amount awarded by this Court in this judgment shall also be disbursed in the same manner by the Tribunal. Ordered accordingly. The Tribunal while providing the amount in terms of this judgment shall adjust the amount, if any, already paid/ provided to the appellants.

38. The appeal is ***allowed*** in above terms.

39. Let records, if any, be returned to the Court concerned along with the copy of this judgment for necessary compliance.

(2021)12ILR A1320
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Habeas Corpus W.P. No. 782 of 2020
along with
Habeas Corpus W.P. Nos. 785 of 2020, 786 of 2020, 787 of 2020, 817 of 2020 & 40 of 2021

Munvar Razai @ Munvwar Ali & Anr.
...Petitioners
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ajay Srivastava, Sri Sadaful Islam Jafri, Sri Shiv Bahadur Singh, Sri Sharique Ahmed, Sri Ali Zamal Khan, Sri Nazrul Islam Jafri

Counsel for the Respondents:
A.S.G.I., G.A., Sri Kuldeep Singh Chauhan

A. Preventive detention - National Security Act, 1980, Sections 3 (3) & 3 (4) - Constitution of India Art.22 - Preventive Detention order passed by the detaining authority/ D.M. under sub-section (3) of Section 3 can remain in force for twelve days from the date of the order unless approved by the State Government - S. 10 mandates that the appropriate Government shall place the detention order, grounds on which the order has been made and the representation made by the affected person alongwith the report of the officer before the Advisory Board, within three weeks from the date of detention of a person - In case, the deadline prescribed under the Act at any stage of the decision making process has not been met, it is for the authority concerned to explain the delay, which in turn resulted in delay in disposing of the representation - delay, however, short it may be, requires explanation of the authority concerned - deadlines have to be strictly obeyed - delay caused on account of any indifference, slackness or callous attitude of the authority/Government at any stage of the decision making process, if remained unexplained, cannot be condoned (Para 21)

On 3.9.2020, orders for detention of the petitioners were passed by the District Magistrate - On 14.9.2020,petitioners made representations - D.M. sent the representations of the petitioners to the State Government on 24.9.2020 which were received by the State Government on 28.9.2020 - Order dated 3.9.2020 could have remained in force only for twelve days i.e. upto 15.9.2020 - delay of nine days caused by the detaining authority / District Magistrate in forwarding the representations of the petitioners on 24.9.2020 to the State Government has not been explained - representations moved by the petitioners on 14.9.2020 were sent to the State Advisory Board on 28.9.2020 when the period of three weeks from the date of detention order (3.9.2020) had already expired on 24.9.2020 - unexplained delay at the ends of the District Magistrate has resulted in placing the matter before the State Advisory Board beyond the period of three weeks - delay caused in placing the matter before the Advisory Board cannot be condoned for the reason that the Advisory Board had submitted its report within the prescribed period of seven days - non-compliance of the mandatory provision of Section 10 of the NSA renders the detention orders illegal (Para 19, 22)

B. Preventive detention - National Security Act, 1980, S. 3 (2), S. 3 (3) - Detention order - that there must be a reasonable basis for the detention order and there must be material to support the same - subjective satisfaction of the detaining authority must be based upon some pertinent/relevant material and any non-existent or misconceived or irrelevant consideration, if forms basis of detention order, the order of detention would be invalid - though the detaining authority is not obliged to record his subjective satisfaction in the detention order but it cannot record its subjective satisfaction on the irrelevant grounds - it is the duty of the sponsoring authority to collect all the relevant material and place it before the detaining authority upon which the detaining authority has to apply its independent mind to arrive at its subjective satisfaction on the material before it - Court is entitled to scrutinize the material relied upon by the authority in coming to its conclusion, and accordingly determine, if there was an objective basis for the subjective satisfaction - relevancy or irrelevancy of the material before the detaining authority can be seen so as to ascertain as to whether the subjective satisfaction has been recorded on relevant grounds or irrelevant material formed the basis of such a decision (Para 23, 28)

Material which formed basis of passing the detention orders by the District Magistrate, Mau, i.e. for recording his satisfaction is the report of the Incharge Inspector - said report in each case is dated 27/28.8.2020 and verbatim the same - a Beat information dated 27/28.8.2020 in each case had been noted to state that it was reported that the detenues who were lodged in jail had been telling their friends and relatives, who went to meet them in jail that after release from jail, they would repeat the same crime again and the incident this time would be bigger than the last one - Held - there is no denial to the fact that the petitioner therein did not meet any of his friends or relatives or talk to them during

COVID period - detaining authority had proceeded to record his satisfaction without verification of the statement made in the reports of the Incharge Inspector - satisfaction recorded by the detaining authority was not based on the objective criteria by application of its independent mind - Detention order invalid (Para 35)

Allowed. (E-5)

List of Cases cited:

1. Rajammal Vs St.of T.N. (1999) 1 SCC 417

2. Devendra Kumar Goel @ Babua Vs St. of U.P. 1985 Supreme (All) 27

3. Surya Prakash Sharma Vs St.of U.P. & ors. 1994 Supp (3) SCC 195

4. Pebam Ningol Mikoi Devi & St. of Manipur & ors. (2010) 9 SCC 618

5. Afsar Vs St. of U.P. & ors. Habeas Corpus Writ Petition No. 893 of 2019

6. Aftab Alam @ Noor Alam @Hitler Vs U.O.I. Habeas Corpus Writ Petition No. 468 of 2020

7. K.M. Abdulla Kunhi & B.L. Abdul Khader Vs U.O.I. & ors. St. of Karn. & ors. 7 (1991) 1 SCC 476

8. St. of Raj. Vs Talib Khan (1996) 11 SCC 393

9. U.O.I. Vs Laishram Lincola Singh (2008) 5 SCC 490

10. Rameshwar Shaw Vs D.M., Burdwan & anr. 1964 (4) SCR 921

11. Dharmendra Suganchand Chelawat & anr. Vs U.O.I. & ors. AIR 1990 SC 1196

12. Fazal Ghosi Vs St. of U.P. (1987) 3 SCC 502

13. Shafiq Ahmed Vs D.M., Meerut (1989) 4 SCC 556

14. St. of Pun. Vs Sukhpal Singh (1990) 1 SCC 35

15. Ramesh Yadav Vs D.M., Etah AIR 1986 SC 315

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. & Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Since the issues raised in all the connected Habeas Corpus petitions are one and the same and hence they have been heard together and are being decided by this common judgment.

Heard Sri Nazrul Islam Jafri learned Senior Advocate assisted by Sri Sharique Ahmed, Sri Ali Zamal Khan and Sri Sadaful Islam Jafri learned Advocates for the petitioners, Ms. Nand Prabha Shukla learned A.G.A. for the State-respondents and Sri Shashi Dhar Sahai learned Standing Counsel for the Union of India.

2. The petitioners herein have been detained under Section 3(2) of the National Security Act, 1980 (herein after referred to as "NSA").

The prayer in the writ petitions is to quash the order dated 3.9.2020 passed by the District Magistrate, Mau invoking powers under Section 3(2) of the NSA as also the order dated 23.10.2020 passed by the State Government extending the period of detention for three months under Section 12(1) of the NSA.

Certain dates of the proceedings undertaken against the petitioners are relevant to be noted at the outset.

3. In an incident occurred on 16.12.2019 at about 6:30 PM, a first information report was lodged against 85 named persons and 600 unnamed on 17.12.2019, by the informant namely S.H.O. Nihar Nandan Kumar at the Police Station Dakshin Tola, District Mau. The report of the sponsoring authority namely S.H.O., Police Station Dakshin Tola, District Mau addressed to the Superintendent of Police, District Mau was submitted on 27/28.8.2020. Pursuant thereto, by the letter dated 31.8.2020, the Superintendent of Police, District Mau had requested the District Magistrate, Mau to detain the petitioners by invoking powers under

Section 3(2) of the NSA. On 3.9.2020, separate orders for detention of the petitioners were passed by the District Magistrate, Mau recording his satisfaction that the detention of the petitioner(s) was necessary in order to prevent them from acting in any manner prejudicial to the maintenance of the public order. At the time of the passing of the detention order, the petitioners herein were already in custody in the District Jail, Mau.

4. The grounds of detention were communicated to the petitioners on 3.9.2020 itself. On 14.9.2020, the petitioners made representations (separately) for presentation of the same before the State Advisory Board. The said representations were forwarded by the Superintendent, District Jail, Mau to the office of the District Magistrate, Mau on 15.9.2020. The District Magistrate, Mau had sent the representations of the petitioners to the State Government on 24.9.2020. On 11.9.2020, the detention orders passed by the District Magistrate, Mau were approved by the State Government exercising powers under Section 3(4) of the National Security Act.

Soon after the receipt of the representations, the District Magistrate had rejected them on the ground that the detention orders were already approved by the State Government before the representations were received in his office. On 6.10.2020, the representations of the petitioners were rejected by the State Government and the orders were communicated on 7.10.2020. On 13.10.2020, the petitioners were produced before the State Advisory Board through Video Conferencing. The State Advisory Board had submitted its report on 19.10.2020 in accordance with Section 11(1) of the NSA through the Registrar, State Advisory Board. On the basis of the said report, the State Government had confirmed the order of detention under Section 12(1) of the National Security Act on 23.10.2020 and extended the period of detention for further three months.

In the meantime, the Union of India had also rejected the representations of the petitioners and information was given to the petitioners by wireless messages. On 24.11.2020 and 24.2.2021 and lastly on 31.5.2021, the detention orders were extended for three months (each time), making total period of detention being 12 months from 3.9.2020, the date of detention.

5. In the counter affidavit filed on behalf of the State/respondent no. 2, it is stated that the copy of the representations of the petitioners alongwith parawise comments were received in the concerned section of the department of the State Government on 28.9.2020 alongwith the letter of the District Magistrate, Mau dated 24.9.2020. The State Government, thereafter, sent the representations and parawise comments thereon to the Central Government, New Delhi and to the Advisory Board (Detentions) vide separate letters dated 28.9.2020.

6. The argument of learned Senior Advocate appearing for the petitioners are two folds:- firstly the delay of nine days caused by the District Magistrate in forwarding the representations of the petitioners to the State Government has not been explained and secondly that the satisfaction recorded by the District Magistrate, the detaining authority was not based on any cogent material. It is contended that as per Section 10 of the NSA, the grounds of detention in every case where the detention order has been made under the Act as also the representations, made by the affected person alongwith the report of the officer concerned under Section 3(3) and (4), have to be placed before the State Advisory Board with three weeks from the date of detention of the said person. As per own admission of the State/respondent no. 2, the representations moved by the petitioners on 14.9.2020 were sent to the

State Advisory Board on 28.9.2020. The period of three weeks from the date of detention order (3.9.2020) had expired on 24.9.2020. The delay in sending the representations of the petitioners to the State Advisory Board had occurred at the ends of the detaining authority, i.e. the District Magistrate who admittedly had forwarded the representations only on 24.9.2020, the date when the period of three weeks prescribed under Section 10 of the Act was expiring. No explanation is forthcoming as to why the delay of nine days had occurred in forwarding the representations to the State Government. As per the requirement of the Act, the representations submitted by the detenues were to be forwarded to the State Government in such a manner that the entire report submitted by the District Magistrate under sub-sections (3) and (4) of Section 3 of the NSA alongwith the representations of the detenue, if made, are placed before the State Advisory Board by the State Government within the prescribed period under Section 10 of the Act. The unexplained delay at the ends of the District Magistrate has resulted in placing the matter before the State Advisory Board beyond the period of three weeks.

The contention is that the failure on the part of the detaining authority to strictly comply with the provisions of the National Security Act (NSA) has rendered the detention of the petitioners illegal. However, during the pendency of the present petition, the total period of detention (of twelve months) has expired and hence no effective relief can be granted to the petitioners herein. However, as the right of the petitioners guaranteed under Article 22(5) of the Constitution of India has been seriously infringed for the action of the detaining authority, the detention order dated 3.9.2020 is liable to be quashed noticing that the detaining authority has acted in an irresponsible and negligent manner.

7. Reliance is placed on the decisions of the Apex Court in **Rajammal vs. State of Tamil Nadu1, Devendra Kumar Goel alias Babua vs. State of U.P.2, Surya Prakash Sharma vs. State of U.P. and others3, Pebam Ningol Mikoi Devi and State of Manipur and others**4 and of this Court in **Afsar vs. State of U.P. and 4 others**5 and Aftab Alam alias Noor Alam alias Hitler vs. Union of India6 on various points dealing with the validity of the detention order. The detail discussion with regard to the decisions placed by the learned Senior Counsel for the petitioners would be made at the appropriate stage in the judgment.

8. Ms. Nand Prabha Shukla learned A.G.A. for the State-respondents and Sri Shashi Dhar Sahai learned Standing Counsel appearing for the Union of India have defended the action of the sponsoring authority, detaining authority, the State and the Central Government.

The counter affidavits on behalf of the respondent nos. 1, 2 and 3 have been placed before the Court to substantiate the stand of the respondents to assert that there was no irregularity much less illegality in the entire decision making process and the detention order having been passed after recording satisfaction of the detaining authority may not be interfered with.

9. Having heard learned counsels for the parties and perused the record, we may, at the outset, note the stand of the respondents in the affidavits filed on their behalf.

The respondent no. 3 namely the District Magistrate, Mau in his affidavit dated 5.2.2021 has submitted that the petitioners/detenues alongwith other accused persons have participated in the violent demonstration against the N.R.C./C.A.A., which was imposed by the Government and in order to restore the peace and to maintain public order, the provisions of the National Security Act (NSA) were imposed.

The Circle Officer, City, Mau, after perusal of the report of the Incharge Inspector, Police

Station Dakshin Tola, District Mau where the first information report of the incident dated 16.12.2019 was lodged, recommended for forwarding the said report to the Higher Authority by the communication dated 29.8.2020 addressed to the Additional Superintendent of Police, Mau. The said report was, then forwarded to the District Magistrate, Mau by the Superintendent of Police with his recommendation for taking action under the NSA. The District Magistrate, Mau after considering the entire material and recording his subjective satisfaction had passed the detention orders dated 3.9.2020 invoking power under Section 3(2) of the National Security Act. The grounds of detention alongwith other relevant material were served upon the petitioners/detenues on 3.9.2020 through the Superintendent, District Jail, Mau. The representations of the petitioners/detenues dated 14.9.2020 was received in the office of the District Magistrate on 15.9.2020 and the parawise comments in respect of the representations alongwith the representations were sent to the concerned authority on 24.9.2020.

The contention, thus, is that at the time of hearing, complete record including the parawise comments in respect of the representations of the petitioners were before the State Advisory Board which had granted personal hearing to the petitioners/detenues on 13.10.2020 through Video Conferencing.

It is contended that the petitioners/detenues were making efforts to get bail in the criminal cases lodged against them under the Gangster Act by moving bail applications in the High Court at Allahabad and noticing the material on record and the reports, it was found that the petitioners/detenues had incited the mob to create violence and their action had led to violent demonstration against N.R.C./C.A.A. The act of the detenues was found prejudicial to maintenance of the public order. The provisions of the National Security Act were invoked on being satisfied on the relevant material before the District Magistrate, Mau. In addition to the first information report, the reports of the sponsoring authority also referred to the L.I.U. report wherein serious apprehension were raised regarding possibility of repetition of such type of activity by the detenues, in case, they were released on bail. The detention orders, therefore, cannot be said to be illegal.

10. In the counter affidavit filed on behalf of the State, it is submitted that the State Government had approved the detention orders on 11.9.2020 and the approval order was communicated to the detenues/petitioners within the period of twelve days specified in Section 3(4) of the NSA. The copy of the detention orders, grounds of detention and all other relevant documents received from the District Magistrate, Mau were sent to the Central Government within the period of seven days from the date of approval, i.e. 11.9.2020, as required under Section 3(5) of the NSA. The copy of the representations dated 14.9.2020 alongwith parawise comments of the detaining authority were received in the concerned section of the department of the State Government on 28.9.2020 alongwith the letter of the District Magistrate, Mau dated 24.9.2020. It was then forwarded to the Central Government and the State Advisory Board vide separate letters dated 28.9.2020 itself.

Thereafter, the representations of the petitioners were considered at the ends of the State Government and final order rejecting the same was passed on 6.10.2020. It was immediately communicated to the petitioners on 7.10.2020 thorough radiogram. The State Advisory Board vide letter dated 6.10.2020 had informed the State Government that the case of the petitioners would be taken up for hearing on 13.10.2020 and directed that the petitioners be

informed that if they desired, they can appear personally through their next friend. The said information was given to the petitioners on 9.10.2020. Personal hearing was accorded to the petitioners and the State Advisory Board having found sufficient grounds for preventive detention of the petitioners under the NSA had submitted its report on 19.10.2020, which was received in the office of the State Government on 20.10.2020. The report of the State Advisory Board was, thus, submitted within the prescribed period of seven weeks from the date of the detention of the petitioners, as per Section 11(1) of the NSA. Accordingly, the decision was taken by the State Government to confirm the detention orders as per the report of the State Advisory Board on 23.10.2020 in accordance with Section 12(1) of the NSA. It is then contended that in view of the report/recommendation received from the District Magistrate, Mau and after consideration of the facts and circumstances of the case, the State Government, was satisfied that there was requirement of extension of the detention order and hence the extension orders were passed from time to time.

11. The respondent no. 1/Union of India in its affidavit in reply to the averments in the writ petition stated that the representations dated 14.9.2020 of the detenues were forwarded by the Under Secretary, Government of U.P. to the Central Government through the Ministry of Home Affairs on 28.9.2020 and was received in the concerned section in the Ministry of Home Affairs on 7.10.2020. The same was processed on 8.12.2010 and after consideration of the material on record, the representations of the detenues was rejected by the Central Government and information in this regard was forwarded through wireless message dated 19.10.2020.

12. Having perused the stand of the respondents in the affidavits filed by them, it would be pertinent, at this stage, to go through the relevant provisions of the Act namely the National Security Act and the Constitution of India.

Article 22(5) provides that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

Article 22(5) has two facets:- (i) communication of the grounds on which the order of detention has been made; (ii) opportunity of making a representation against the order of detention.

Section 3(2) of the NSA confers power on the District Magistrate to pass detention order under sub-section (2), under authorization of the State Government by an order in writing. Sub-section (4) of Section 3 states that when an order is made under sub-section (3), the officer concerned shall forthwith report the fact to the State Government alongwith the grounds on which the detention order has been made and such other particulars which have a bearing on the matter. The order passed by the officer under sub-section (3) of Section 3 can remain in force for twelve days from the date of the order unless approved by the State Government. The period of 12 days, however, can be extended upto fifteen days if the circumstance as per proviso to sub-section (4) of Section 3 exist. A reading of sub-section (2) of Section 3 shows that the detention order can be passed on satisfaction to be recorded in writing that it is necessary to detain a person with a view to prevent him from acting in any manner prejudicial to the maintenance of the public order.

The requirement of Section 3, thus, is that:-

(i) The detaining authority shall record its satisfaction to pass preventive detention order; (ii) the detaining authority, if is an officer mentioned in sub-section (3) of Section 4, i.e. the District Magistrate or the Commissioner of Police authorized by the State Government, the detention order would not remain in existence beyond the period of twelve days [fifteen days as per the proviso to sub-section (4)], unless it has been approved by the State Government. (iii) Sub-section (5) of Section 3 states that the order approved by the State Government shall be reported to the Central Government within a period of seven days from the date of approval.

The grounds of order of detention are required to be disclosed to the affected person, as soon as possible, but not later that five days ordinarily and not later than ten days from the date of detention, in exceptional circumstances. On receipt of the communication of the order of detention, the affected person is at liberty to make representation against the detention order to the appropriate Government. The Advisory Board constituted under Section 9 of the NSA is empowered to make a scrutiny of the detention order made under the NSA as also the representation of the affected person.

Section 10 mandates the appropriate Government to place detention order alongwith the representation of the affected person as also the grounds on which the detention order has been made and the comments of the detaining authority to the Advisory Board constituted under Section 9 of the Act within three weeks from the date of detention of the person concerned.

Sections 11 and 12 relates to the report of the Advisory Board and the action taken by the State Government on the said report.

13. Under the scheme of the National Security Act, a deadline has been provided for each stage of the action. The Act mandates that the decision taken at each stage shall be communicated to the higher authority within the time bound period so that there is no delay in the final decision taken by the State Government on the report of the State Advisory Board under Section 12 of the Act. Section 12(2) provides that the appropriate Government shall revoke the detention order and release the person concerned, in case, where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the detention of a person. The appropriate Government, thus, is bound by the report of the Advisory Board constituted under Section 9 of the Act. The reference to the Advisory Board after every decision of the appropriate Government for preventive detention of a person, in each case, within the time prescribed under Section 10 of the NSA, is mandatory. Further the mandatory period within which the detention order alongwith the representation of the affected person has to be placed before the Advisory Board is three weeks from the date of detention of a person.

14. In the instant case, though it could be demonstrated by the appropriate Government (State Government) that the report of the Advisory Board was submitted to the State Government within seven weeks form the date of the detention of the petitioners and action on the said report under Section 12(1) had been taken within the shortest possible time, i.e. three days of the receipt of the report, but the delay in sending the matter to the Advisory Board, i.e. beyond three weeks as against the mandate of Section 10 of the Act has not been explained.

15. From the analysis of the pleadings of the parties, it is evident that the representations of the petitioners/detenues were forwarded by the District Magistrate, Mau alongwith his parawise comments thereon to the State Government on 24.9.2020 and it was then forwarded to the Advisory Board by the State Government on

28.9.2020. By 24.9.2020, three weeks from the date of detention under the orders of the District Magistrate, Mau had expired. Section 10 mandates that the appropriate Government shall place the detention order, the grounds on which the order has been made and the representation, if any, made by the affected person alongwith the report of the officer under sub-section (4) of Section 3 before the Advisory Board, within three weeks from the date of detention of a person. Article 22(5) of the Constitution cast obligation upon the authority making the detention order to afford the earliest opportunity of making representation against the order of detention. The authority under the NSA to consider the representation of the affected person is the Advisory Board constituted under Section 9 of the Act. The preventive detention curtails personal liberty of a person guaranteed under the Constitution of India. It is a constitutional obligation of the Government to consider the representation forwarded by the detenue without any delay.

16. The constitution Bench of the Apex Court in **K.M. Abdulla Kunhi and B.L. Abdul Khader vs. Union of India and others State of Karnataka and others**7 has held that it is a constitutional mandate commanding the concerned authority to whom the detenue submits his representation to consider the representation and dispose of the same as expeditiously as possible. Though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation but the words "as soon as may be" occurring in Clause 5 of Article 22 convey the message that the representation should be considered and disposed of at the earliest.

The observations of the Constitution Bench are to be noted as under:-

"12. xxxxxxxxxxxxxx The words "as soon as may be" occuring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard it depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal xxxxxxx."

Relying upon the aforesaid decision, the Apex Court in **Rajammal**1 has held that the legal position is that if delay was caused on account of any indifference or lapse in considering the representation such delay will adversely affect further detention of the person. It is observed in paragraph '9' of the said decision that it is for the authority concerned to explain the delay in disposing the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned.

17. It has been argued before us by the learned Senior Counsel for the petitioners that taking consideration of the above decisions, in similar situation, the Division Bench of this Court in the above noted decision had held the detention order illegal.

In **Afsar**5, the delay of nineteen days in deciding the representation was found without explanation. Whereas in **Aftab Alam**6, the detention order was held illegal on the ground that the representation of the petitioners therein

was not placed before the Advisory Board within three weeks as required under Section 10 of the NSA.

In **Devendra Kumar Goel alias Babua**2, the detention order was held illegal as the representation was placed by the State Government before the Advisory Board after expiry of the period stipulated under Section 10 of the NSA.

18. Further, in **State of Rajasthan vs. Talib Khan**8, the Apex Court observed that:

"8. ....what is material and mandatory is the communication of the grounds of detention to the detenu together with documents in support of subjective satisfaction reached by the detaining authority."
(emphasis supplied)

In a recent decision in **Pebam Ningol Mikoi Devi and State of Manipur and others**4, it was considered that Article 22(5) of the Constitution of India mandates in preventive detention matters that the detenue should be afforded the earliest possible opportunity to make a representation against the order. With regard to the importance of delay in preventive detention matters under the National Security Act, the decision of the Apex Court in Union of India vs. Laishram Lincola Singh9 has been noted, wherein following observations had been made:-

"34.....xxxxxxx.... 6. There can be no hard and fast rule as to the measure of reasonable time and each case has to be considered from the facts of the case and if there is no negligence or callous inaction or avoidable red-tapism on the facts of a case, the Court would not interfere. It needs no reiteration that it is the duty of the Court to see that the efficacy of the limited, yet crucial, safeguards provided in the law of preventive detention is not lost in mechanical routine, dull casualness and chill indifference, on the part of the authorities entrusted with their application. When there is remissness, indifference or avoidable delay on the part of the authority, the detention becomes vulnerable.
(emphasis supplied)"

In paragraph '35' of the said judgment, it was noted that:-

"35. On the specific ground of delay in forwarding the representation under the National Security Act, it has been observed by this Court in Haji Mohammad Akhlaq vs. District Magistrate, Meerut, 1988 Supp (1) SCC 538, that:

"3. ...There can be no doubt whatever that there was unexplained delay on the part of the State Government in forwarding the representation to the Central Government with the result that the said representation was not considered by the Central Government till October 16, 1987 i.e. for a period of more than two months. Section 14(1) of the Act confers upon the Central Government the power to revoke an order of detention even if it is made by the State Government or its officer. That power, in order to be real and effective, must imply a right in a detenu to make representation to the Central Government against the order of detention. Thus, the failure of the State Government to comply with the *request of the detenu for the onward transmission of the representation to the Central Government has deprived the detenu of his valuable right to have his detention revoked by that Government."*
(emphasis supplied)".

In the said case, unexplained delay of seven days in forwarding of the representation had been found fatal.

19. From the above decisions, it is settled that under Article 22(5), the detenue has two rights; (i) to be informed, as soon as may be, of the grounds on which his detention is based; and

(ii) to be afforded the earliest opportunity of making representation against his detention.

Having considered the mandate of Article 22(5) readwith Section 10 of the National Security Act, we find in the facts of the instant case that the deadline for placing all papers, i.e. the ground of detention, the representation and the report of the detaining authority before the Advisory Board had not been adhered to by the State Government. The non-compliance of the mandatory provision of Section 10 of the NSA renders the detention orders illegal.

20. It is evident that the detaining authority could not explain the delay in forwarding the representations of the petitioners/detenues before the State Government. The explanation of the State Government that report was submitted by the Advisory Board within the prescribed period of seven weeks from the date of detention of the petitioners and thus, Section 11(1) of the Act has been complied with, cannot be treated sufficient explanation to the delay in placing representations before the Advisory Board, after expiry of the period stipulated in Section 10. The maximum period prescribed under Section 11(1) to submit the report by the Advisory Board to the appropriate Government cannot be taken to condone the delay on the part of the State Government, in placing the matter before the Board which in turn had occurred on account of the delay caused at the ends of the District Magistrate, Mau/the detaining authority. The deadline for the action of every authority at every stage of the decision making process has been fixed under the Act in order to meet the constitutional obligation under Article 22(5) of the concerned authority/Government.

21. The stringent provisions of the National Security Act resulting in curtailment of personal liberty of a person guaranteed under Article 21 of the Constitution of India have to be strictly complied with. The deadlines have to be strictly obeyed. The delay caused on account of any indifference, slackness or callous attitude of the authority/Government at any stage of the decision making process, if remained unexplained, cannot be condoned. The representation of the detenues in any case, has to be considered at the earliest, as soon as may be, without any delay. In case, the deadline prescribed under the Act at any stage of the decision making process has not been met, it is for the authority concerned to explain the delay, which in turn resulted in delay in disposing of the representation. The delay, however, short it may be requires explanation of the authority concerned. Mere explanation of the State Government, as in this case, that final decision was taken within the time prescribed under the Act is not a justifiable explanation when the liberty of a person guaranteed under Article 22 of the Constitution is involved. The outer limit of seven weeks from the date of detention to submit its report prescribed under Section 11(1) of the Act is for the Advisory Board. But the State Government is mandated under Section 10 of the Act to submit the detention order alongwith the report of the Officer concerned and the representation of the affected person within three weeks from the date of detention. The delay caused in placing the matter before the Advisory Board cannot be condoned for the reason that the Advisory Board had submitted its report within the prescribed period of seven days.

The contention of the respondent no. 2/State Government cannot be accepted as an explanation of the delay caused on the part of the District Magistrate, Mau/respondent no. 3, when no explanation is found in his affidavit.

22. For the aforesaid, on the first ground of challenge itself, the detention orders dated 3.9.2020 are found illegal. However, we would also like to add that while analyzing the second ground of challenge, within the scope of judicial

review, considering the orders passed by the detaining authority i.e. the District Magistrate, Mau, we find that the subjective satisfaction recorded by the District Magistrate to arrive at the conclusion of detaining the petitioners is not based on any relevant material which would form an objective criteria to reach at the decision.

23. As per the settled law, though the detaining authority is not obliged to record his subjective satisfaction in the detention order but it cannot record its subjective satisfaction on the irrelevant grounds. The application of mind in a mechanical manner cannot be permitted to be termed as a subjective satisfaction of the detaining authority. It is the duty of the sponsoring authority to collect all the relevant material and place it before the detaining authority upon which the detaining authority has to apply its independent mind to arrive at its subjective satisfaction on the material before it. Sufficiency or insufficiency of the material before the detaining authority cannot be examined by the Court in exercise of the power of judicial review. However, relevancy or irrelevancy of the material before the detaining authority can be seen so as to ascertain as to whether the subjective satisfaction has been recorded on relevant grounds or irrelevant material formed the basis of such a decision.

24. It is also settled that the Court in exercise of judicial review can only examine the correctness of the decision making process and not the decision itself. Judicial review, it may be noted, is not an appeal from a decision but review of the manner in which the decision was made. The purpose of review is to ensure that the individual receives a fair treatment.

25. The question as to whether and in what circumstance an order of preventive detention can be passed against a person who is already in custody had been considered for the first time by the Constitution bench in **Rameshwar Shaw vs. District Magistrate, Burdwan & another**10.

Considering the said decision in **Dharmendra Suganchand Chelawat and another vs. Union of India and others**11, it was observed as under:-

*"**19**. The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."*

26. In **Surya Prakash Sharma**3 decided on 9th August, 1994, the Apex Court having considered the above principles had observed in the facts of that case that the grounds of detention therein indicated the detaining authority's awareness of the fact that the detenu was in judicial custody at the time of making the order of detention. However, the detaining authority had not brought on record any cogent material nor furnished any cogent ground in support of the averment that if the detenue therein was released on bail, he might again indulge in serious offences causing threat to public order. The satisfaction of the detaining

authority that the detenu might indulge in serious offences causing threat to public order, was not found proper and justifiable.

27. In a recent decision in **Pebam Ningol Mikoi Devi**4 , it was observed by the Apex Court that the individual liberty is a cherished right, one of the most valuable fundamental rights guaranteed by the Constitution to the citizens of this country. The observations in paragraphs '3' and '4' of the said decision are relevant to noted hereunder:-

"3. Individual liberty is a cherished right, one of the most valuable fundamental rights guaranteed by the Constitution to the citizens of this Country. On "liberty", William Shakespeare, the great play writer, has observed that "a man is master of his liberty". Benjamin Franklin goes even further and says that "any society that would give up a little liberty to gain a little security will deserve neither and lose both". The importance of protecting liberty and freedom is explained by the famous lawyer Clarence Darrow as "you can protect your liberties in this world only by protecting the other man's freedom; you can be free only if I am free." In India, the utmost importance is given to life and personal liberty of an individual, since we believe personal liberty is the paramount essential to human dignity and human happiness.

4. The Constitution of India protects the liberty of an individual. Article 21 provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. In matters of preventive detention such as this, as there is deprivation of liberty without trial, and subsequent safeguards are provided in Article 22 of the Constitution. They are, when any person is detained pursuant to an order made under any law providing for preventive detention, the authority making the order is required to communicate the grounds on the basis of which, the order has been made and give him an opportunity to make a representation against the order as soon as possible. It thus, cannot be doubted that the Constitutional framework envisages protection of liberty as essential, and makes the circumstances under which it can be deprived."

On the scope of judicial scrutiny to the decision of preventive detention under the National Security Act, it was observed that there must be a reasonable basis for the detention order, and there must be material to support the same. The Court is entitled to scrutinize the material relied upon by the authority in coming to its conclusion, and accordingly determine, if there was an objective basis for the subjective satisfaction. The subjective satisfaction as observed therein must be two folds:-

(i) The detaining authority must be satisfied that the person to be detained is likely to act in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of the public order.

(ii) The authority must be further satisfied that it is necessary to detain the said person in order to prevent from so acting, i.e. from repealing his action.

The previous decisions of the Apex Court in **Fazal Ghosi vs. State of U.P.**12 and **Shafiq Ahmed vs. District Magistrate, Meerut**13 have been considered therein in the following manner:-

"22. Some of the decisions of this Court may be of relevance in determining in what manner such subjective satisfaction of the Authority must be arrived at, in particular on Section 3(2) of the National Security Act. In Fazal Ghosi v. State of Uttar Pradesh, (1987) 3 SCC 502, this Court observed that:

"3..... The District Magistrate, it is true, has stated that the detention of the detenus

was effected because he was satisfied that it was necessary to prevent them from acting prejudicially to the maintenance of the public order, but there is no reference to any material in support of that satisfaction. We are aware that the satisfaction of the District Magistrate is subjective in nature, but even subjective satisfaction must be based upon some pertinent material. We are concerned here not with the sufficiency of that material but with the existence of any relevant material at all."
(emphasis supplied)

23. In Shafiq Ahmed v. District Magistrate, Meerut (1989) 4 SCC 556, this Court opined :-

"5.....Preventive detention is a serious inroad into the freedom of individuals. Reasons, purposes and the manner of such detention must, therefore, be subject to closest scrutiny and examination by the courts." (emphasis supplied)

This Court further added:

"5.....there must be conduct relevant to the formation of the satisfaction having reasonable nexus with the action of the petitioner which are prejudicial to the maintenance of the public order. Existence of materials relevant to the formation of the satisfaction and having rational nexus to the formation of the satisfaction that because of certain conduct "it is necessary" to make an order "detaining" such person, are subject to judicial review." (emphasis supplied)

Further the observations of the Apex Court in **State of Punjab vs. Sukhpal Singh**14 has also been noted in paragraphs '24' quoted as under:-

"24. In State of Punjab v. Sukhpal Singh, (1990) 1 SCC 35, this Court held:

"9. .....the grounds supplied operate as an objective test for determining the question whether a nexus reasonably exists between grounds of detention and the detention order or whether some infirmities had crept in."

(emphasis supplied)

28. It is, thus, settled that the subjective satisfaction of the detaining authority has to be based on objective material and any non-existent or misconceived or irrelevant consideration, if forms basis of detention order, the order of detention would be invalid. The inclusion of an irrelevant or non-existent ground among other relevant ground is an infringement of the first right of the detenue guaranteed under the Constitution, to be informed of the grounds on which his detention is based. If the actual allegations are vague and irrelevant, detention would be rendered invalid.

29. In **Ramesh Yadav vs. District Magistrate, Etah**15, it was observed by the Apex Court that though there is no bar in passing a detention order against a person in custody, however, such an order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature. There must be "compelling reason" justifying such detention to record satisfaction by the detaining authority that taking into account the nature of the antecedent activities of the detenue, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

30. In the light of the above legal position, we have perused the grounds of detention and the material relied on by the detaining authority while passing the order of detention. The material which formed basis of passing the detention orders dated 3.9.2020 by the District Magistrate, Mau, i.e. for recording his satisfaction is the report of the Incharge Inspector, Police Station Dakshin Tola, Mau. In the said report, the Incharge Inspector had narrated the incident which occurred on 16.12.2019 from the first information report

lodged against 85 named persons including the petitioners herein. The said report in each case is dated 27/28.8.2020 and verbatim the same. While narrating the incident occurred on 16.12.2019, the report of L.I.U. has also been noted to submit that the public order and peace in District Mau had been completely disturbed on account of the said incident. Thereafter, a Beat information dated 27/28.8.2020 in each case had been noted to state that it was reported that the detenues who were lodged in jail had been telling their friends and relatives, who went to meet them in jail that after release from jail, they would repeat the same crime again and the incident this time would be bigger than the last one. It was reported that the veracity of the beat information was verified by the Senior Inspector and it was found correct. A report in this regard had also been noted in the General Diary. This statement of the said report is verbatim the same in the report of each of the petitioners herein.

31. In one of the Habeas Corpus Writ Petition No. 40 of 2021 (Shaharyar vs. Union of India and 3 others), specific ground has been taken to assail the contents of the Beat information. It has been categorically stated in paragraph '31' of the said writ petition that the averments in the Beat information were totally false and baseless, inasmuch as, during COVID times, no visitors were allowed in the District Jail, Mau. No person in jail was permitted to meet his friends and relatives. It is categorically stated therein that it can be verified that the petitioner therein did not meet any outsider in jail nor any friend and relative of him had visited the jail either on the date mentioned in the beat information or any other date during the COVID period.

32. In reply to this specific averment of the petitioner in the said petition, affidavit of the Deputy Jailer, District Jail, Mau dated 2.2.2021 has been filed.

The reply to paragraph '31' of the writ petition is as under:-

"*31. That it is important to mention that in paragraph 12 of the detention order dated 8.10.2020 it is mentioned that the petitioner had stated to his friends and relatives that after the release from jail, he would repeat the alleged crime again, when they have visited District Jail Mau on 2.10.2020. In this regard it is submitted that it is totally false and baseless as firstly during Covid period no visitors were allowed to visit the District Jail Mau to meet with any person in jail nor the friend and relatives of the petitioner had visited to District Jail either on 2.10.2020 or any other date during the Covid period."*

A vague assertion has, thus, been made by the deponent of the said affidavit that the facility of telephonic conversation had been provided to the petitioner and his friends and relatives could talk through telephone. However, there is no denial to the fact that the petitioner therein did not meet any of his friends or relatives or talk to them during COVID period.

33. All the petitioners herein were lodged in the District Jail, Mau, so the above facts highlighted in one of the petitions would be relevant for all the detenues. It can be safely inferred that all of the petitioners were not allowed to meet their relatives and friends in Jail due to COVID and the vague assertion of the Deputy Jailer of providing telephone facilities to the prisoners is irrelevant.

34. From the statement of the Deputy Jailer, Mau in the affidavit filed in Habeas Corpus Writ Petition No. 40 of 2021, at least, it is evident that the incorporation of one of the grounds in the reports of the Incharge Inspector, Police Station Dakshin Tola, Mau based on the Beat information was not on the correct facts. It is evident that the said ground had been added

on incorrect facts in the reports so as to influence the detaining authority to record his satisfaction to the effect that the likelihood of the detenues in indulging in prejudicial activities after their release from jail was imminent.

35. We may further note that the above facts make it evident that the detaining authority had proceeded to record his satisfaction without verification of the statement made in the reports of the Incharge Inspector, Police Station Dakshin Tola, District Mau.

It is, thus, clear that the satisfaction recorded by the detaining authority was not based on the objective criteria by application of its independent mind. The incorporation of non-existent and misconceived ground in the material placed before the detaining authority to influence its decision to pass the order of detention, would make the detention order invalid. The flaw in the decision making process in recording satisfaction by the detaining authority without verification of the information supplied to it makes the whole process illegal.

36. Thus, on both the above counts, the detention orders dated 3.9.2020 of the District Magistrate, Mau in respect of all other petitioners herein as also the detention order dated 8.10.2020 to detain the petitioner namely Shaharyar in one of the connected writ petition, passed under Section 3(2) of the National Security Act, 1980 are liable to be quashed.

All the writ petitions are **allowed.**

However, as the detention orders have outlived their life for the fact that the writ petitions could be heard only after the expiry of the maximum period of twelve months as prescribed in Section 13 of the National Security Act, 1980, no other direction has to be issued.

However, it is clarified that the petitioners could not be kept under detention pursuant to the detention orders passed under Section 3(2) of the National Security Act, 1980 by the District Magistrate, Mau.

(2021)12ILR A1335
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.11.2021

BEFORE

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

Criminal Appeal No. 5598 of 2006

Nadeem ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Yogendra Mishra, Sri Mahboob Ahmad Siddiqui, Sri R.K. Rathore, Sri Yogesh Kumar Srivastava, Sri Faizul Hasan

Counsel for the Respondent:
A.G.A.

Criminal jurisprudence – Punishment - Indian Penal Code, 1860 -Section 376 - Award of sentence - rehabilitary & reformative theory in sentencing - 'doctrine of proportionality' - Sentence should not be either excessively harsh or ridiculously low - undue harshness should be avoided - criminal justice jurisprudence adopted in India is not retributive but reformative and corrective - all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream (12, 13, 14)

Victim child was of four months - doctor St.d that except internal parts there was no injury, doctor categorically conveyed that it is not because of sexual

intercourse - learned Judge opined that there was injuries on the private part of the minor - Held - sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence – court directed to punish accused for a period of 17 years with all remissions and fine enhanced to Rs. 10,000/- to be paid to the parents of the prosecutrix.

Partly Allowed. (E-5)

List of Cases cited:

1. Mohd. Giasuddin Vs St. of AP, [AIR 1977 SC 1926]

2. Deo Narain Mandal Vs St. of UP [(2004) 7 SCC 257]

3. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

4. Jameel Vs St. of UP [(2010) 12 SCC 532]

5. Guru Basavraj Vs St. of Karnatak, [(2012) 8 SCC 734]

6. Sumer Singh Vs Surajbhan Singh [(2014) 7 SCC 323]

7. St. of Punjab Vs Bawa Singh, [(2015) 3 SCC 441]

8. Raj Bala Vs St. of Har., [(2016) 1 SCC 463]

9. Manoj Mishra @ Chhotkau Vs St. of U.P. dt 08.10.2021

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

1. By way of this appeal, the appellant has challenged the Judgment and order 29.08.2006 passed by court of Additional District and Sessions Judge/Fast Track Court No. 2, Firozabad in Sessions Trial No.211 of 2005, arising out of Case Crime No. 305 of 2004, under Section 376 I.P.C., Police Station Ramgarh, District Firozabad whereby the accused-appellant was sentenced under Section 376 I.P.C. with a sentence of life imprisonment and fine of Rs.2000/- and in event of default of payment of fine, to undergo six months' further imprisonment.

2. The brief facts as per prosecution case are that on 31.12.2004 at about 3:00 p.m., the accused-Nadeem came to the house of complainant and started playing with her five months old daughter and when his wife was busy with her household work he took her daughter to his house. After sometime when his wife did not find her daughter in the house, she went to the house of accused-Nadeem and saw that accused-Nadeem was with her daughter and the daughter was screaming. On the wife's scream the complainant also rushed to Nadeem house. The complainant was one of his neighbours and saw that accused-Nadeem fled away from the spot and while running he was seen by other villagers also.

3. On F.I.R being lodged, the investigating Officer, Nawab Ali tookup the investigation visited the spot, prepared site plan, recorded statements of the witnesses and after completing investigation submitted charge sheet against the accused.

4. The accused being charge sheeted for offence triable by court of session, the learned Magistrate committed the case to the court of session. The court of session summoned the accused who pleaded not guilty to the charges framed and wanted to be tried.

5. The prosecution so as to bring home the charges examined five witnesses, who are as under:-

1.	Kamil	P.W.1
2.	Smt. Razia	P.W.2
3.	Dr. S.P.Rawat	P.W.3
4.	Head Moharir Kuldeep Singh	P.W.4
5.	I.O Nawab Ali	P.W.5

6. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1	F.I.R.	Ex. Ka-4
2.	Written report	Ex. Ka-1
3.	Injury Report	Ex. Ka-2
8.	Charge Sheet Mool	Ex. Ka-6
9.	Site Plan with Index	Ex. Ka-5

7. Heard learned counsel for the appellant, learned AGA for the State and also perused the record.

8. The learned counsel for the applicant has taken us to the record and has submitted that the learned Sessions Judge has misread the testimony of the witnesses and has come to a wrong conclusion. The evidence of the witnesses who were examined by the accused have not been believed. The learned Judge has considered the case with a tainted eyes and has committed gross error of facts. The learned Judge has committed an error of law and fact where by he has not considered the medical evidence being such which shows that a child could not have been subjected to intercourse. It has been submitted that the finding of facts is perverse and requires to be upturned.

9. We would now be shifting to the evidence on record. The provisions of Section 375 read with Section 376 I.P.C reads as follows:-

[375. Rape.- A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person;

or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person;

or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person;

or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First.- Against her will.

Secondly.- Without her consent.

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

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

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

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

Seventhly.- When she is unable to communicate consent.

Explanation 1.- For the purposes of this section, "vagina" shall also include labia majora.

Explnation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Excpetion 2.- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

"376. Punishment for rape.--

(1)Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,--

(a) being a police officer commits rape--

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or (b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years."

10. The child was of four months even if we consider the medical evidence it is with the accused. The accused was in good relation with the complainant and his family. The child was 4.5 kg in weight, Dr. S.P.Rawat has conveyed that except the internal parts there was no injuriey.

11. The learned Judge has opined that there was injuries on the private part of the minor. Dr. S.P. Rawat has categorically conveyed that it is not because of sexual intercourse, however these injuries would atleast bring to force that that accused is guilty of commission of a lessor offence.

12. Thus when blood was oozing from the private parts, the facts are very clear on the basis of the injuries which have been found on the private parts of the minor and the fact that findings are corroborated by P.W.-3. We also concur with the same, however looking to the factual scenario and in **Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926],** explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries.". 'Proper Sentence' was explained in **Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]** by observing that Sentence should not be either excessively harsh or ridiculously low, In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,** the Supreme Court referred the judgments in **Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463]** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

13. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

14. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for

life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system and in the recent and latest judgement of the Apex Court in **Manoj Mishra @ Chhotkau Vs. State of U.P. Decided on 08.10.2021** will permit us to punish him for a period of 17 years with all remissions and fine enhanced to Rs. 10,000/- looking to condition of the accused which should be paid to the parents of the prosecutrix who by now must have become major.

15. In view of the above, this criminal appeal is partly allowed.

16. Record and proceedings be sent back to the trial court.

17. If the accused is not want in any litigation, he may be set free forthwith.

18. We are thankful to learned counsel for appellant and learned AGA for the State who have ably assisted the Court.

(2021)12ILR A1340
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.12.2021

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE CHANDRA KUMAR RAI, J.

Criminal Appeal No. 6075 of 2006
with
Criminal Appeal No. 5482 of 2006

Sokendra & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Desh Ratan Chaudhary, Sri Birendra Singh Khokher, Sri Pankaj Kumar Tyagi, Sri B.K. Yadav, Sri F.N. Dubey, Kamla Mishra, Sri Md. Khalid, Sri Pankaj Bharti, Sri Saurabh Gour, Smt. Archana Tyagi, Sri Anish Kumar, Sri Santosh Kumar, Sri A.B.L. Gour, Sri Mohd. Khalid, Sri Shailendra Kumar Singh

Counsel for the Respondent:
A.G.A., Sri I.K. Chaturvedi

Indian Penal Code, 1860 - Sections 302 & 201 - Arms Act,1878 - Section 25 - Murder - Circumstantial evidence - Delayed F.I.R. & discrepancy regarding date of recovery of dead body & number of accused – As per F.I.R. dead body of deceased was found on 20.03.2002 7 thereafter F.I.R. was lodged on 21.03.2002 at about 12.45 P.M. in the noon but P.W.-1 (first informant) stated that the deceased was searched on 20.03.2002 & dead body was found on 21.03.2002 then F.I.R. was lodged - this discrepancy regarding recovery of dead body not explained by the prosecution – Non examination llast seen witness effect - According to prosecution, deceased was taken away from the house by accused & last seen by witnesses, Krishnapal and Sardar Singh - however relevant witnesses Krishnapal and Sardar Singh were not examined by prosecution & no explanation was given for their non-examination which creates doubt upon prosecution story - alleged eye witnesses P.W.-1 and P.W.-3 considered to be unreliable as their names were not mentioned in F.I.R nor their names were told by last seen witness Krishnapal and Sardar Singh to informant - recovery of fire-arm from accused after about 14 days of incident from an open space in absence of any public witness of recovery, is highly doubtful - possibility of murder of deceased by unidentified culprits and false implication of appellants in belated FIR due to enmity - prosecution failed to prove charges by any reliable, cogent and independent evidence to the hilt beyond reasonable doubt - accused entitled to the benefit of doubt. (Para 27, 28, 31)

Allowed. (E-5)

List of Cases cited:

1. Criminal Appeal No.2438 of 2010, Bijender @ Mandar Vs St. of Har.

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. The instant criminal appeals have been filed against the judgment and order of conviction and sentence dated 31.8.2006 passed by the Sessions Judge, Meerut in S.T. No.730/2002 (State vs. Pawan and Others), under Sections 302 & 201 IPC and in S.T. No.961/2002 *(State vs. Pappu @ Jitendra @ Bijendra)*, under Section 25 of the Arms Act, both P.S. Partapur, Meerut, convicting accused (Pawan, Kendra, Pappu @ Jitendra @ Bijendra) for offence under Section 302/201 IPC and sentencing each of them with imprisonment of life and fine of Rs.5000/- under Section 302 IPC and rigorous imprisonment for a period of one year under Section 201 IPC. Apart from it, accused Pappu @ Jitendra @ Bijendra was also convicted and sentenced with rigorous imprisonment for a period of one year under Section 25 of the Arms Act.

2. Being aggrieved therefrom, accused Sokendra and Pappu @ Jitendra @ Bijendra preferred Criminal Appeal No.6075 of 2006 and accused Pawan preferred Criminal Appeal No.5482 of 2006 for setting aside their conviction and passing an order of acquittal.

3. Since common issues are involved in both the appeals, both are being disposed of by a common order. The facts stated in Criminal Appeal No.6075/2006 shall be treated as a leading appeal.

4. The brief facts relating to the case are that Rampal Singh (father of deceased) lodged an FIR at P.S. Partapur, District Meerut on 21.3.2002 at 12.45 PM with the averment that at 1 PM (noon) on 19.3.2002, Pawan, son of Nauraj and Sokendra son of Suraj, came to his house and called his son Rajendra Kumar @ Raju and taken him (deceased Rajendra Kumar @ Raju) for pretext of sale / measure of sugarcane. On the same day at about 7.30 PM, hotel owner of his village, namely, Krishnapal and his younger brother Sardar Singh were present at Mohiuddinpur Hotel belonging to Krishanpal, at the same time, my son, Pawan, Sokendra & 2 other persons came to the hotel which were in drunken stage and they took tea at the hotel. Krishnapal told that Rejendra @ Raju should stay in hotel during night but Pawan and Sokendra said that they had come with them and they will go to the village with them, after some time, all the four persons, went along with Rajendra Kumar @ Raju from hotel. His son did not come to home on 20.3.2002 till morning then he along with villagers started search and when they reached to farm situate back side of Kisan Inter College, Mohiuddinpur in the wheat field, adjoining to road, then he found a slipper of his son, stone and blood was also seen, wheat crop was damaged. They searched the area then about 200 mtrs. from blood, they found dead body in naked stage, wound was found towards right side of ear and blood was also found there. About 15-20 years before, there was criminal case between his family at one side and family of Nauraj and Suraj on other side to cover the panchayat well in which incident his younger brother received serious injuries, due to old enmity Sokendra along with 2 others murdered his son Rajendra @ Raju, burnt his dead body in order to disappear the offence, the dead body of his son Rajendra @ Raju is lying on the spot.

5. Upon lodging the FIR, investigation started and after preparing memo of recovery of ash and simple earth, kerosine oil in ash, blood-stained square stone, plastic jerry having ½ ltr. of petrol, body of deceased was sent for postmortem. During investigation, the weapon of crime, country-made pistol and two live cartridges were recovered from the possession of

Pappu @ Jitendra @ Bijendra on 4.4.2002 of which memo was prepared, FIR was lodged against Pappu @ Jitendra @ Bijendra under Section 25 of the Arms Act. After obtaining the postmortem report and report of Forensic Science Laboratory, completed investigation, respective investigating officer submitted charge-sheet against accused Pawan, Sokendra & Pappu @ Jitendra @ Bijendra under Sections 302/201 IPC and against accused Pappu @ Jitendra @ Bijendra under Section 25 of the Arms Act. Charges were framed against Pawan, Sokendra, Pappu @ Jitendra @ Bijendra under Sections 302/201 IPC and against Pappu @ Jitendra @ Bijendra under Section 25 Arms Act to which they denied and claimed trial.

6. In joint trial of two cases, prosecution produced as many as 11 witnesses viz. Rampal Singh, the 1st informant and father of deceased as P.W.-1; Om Prakash and Mam Chand, the eye-witnesses as P.W.'s- 2 & 3; Jai Prakash, formal witness and witness of inquest and recovery as P.W.-4; Om Pal, formal witness and witness of recovery of container of petrol as P.W.-5; Dr. Gyanendra Kumar, Radiologist, formal witness who conducted postmortem as P.W.-6. Constable Dev Singh Head Moharrir formal witness as P.W.-7 S.I. Rahul Kumar Sharma and S.I. Amresh Chandra Tyagi Ist and IInd Investigating Officer formal witnesses as P.W.8 & 9, Rajiv Kuumar Yadav Investigating officer of Section-25 of Arms Act formal witness as P.W.10, S.i. Suresh chandra Gupta, formal witness of recovery of country made pistol as P.W.11.

7. After completion of prosecution evidence, statements of accused Sokendra was recorded under Section-313 Cr.P.C.. who denied incident & stated that they have been falsely implicated due to enmity. In defence Nahar Singh was produced as D.W.-1.

8. P.W.-1, Rampal 1st informant in his statement-in-chief alleged that Rajendra Kumar @ Raju was his son, on 19.03.2002 at 1.00 p.m. accused Sokendra and Pawan came to his house and bring his son Raju for pretext of sale/ measure of sugarcane. Raju did not come back till evening then he started search from the house of Sokendra, Pawan but till the morning of 21.03.20002 Raju did not return. On 21.03.2002 he started search since morning and reached in the field in the backside of Kisan Inter College and found chappal, stone stained with blood and 200 meter from these item naked dead body was found, which was burnt. He further stated that 15-20 years before Rishipal covered the panchayati well so there was quarrel in which his younger brother Rajpal received injuries as well as father of accused Pawan and Sokendra were also involved in the incident. However, in cross examination, he stated that compromise has taken place in respect of aforementioned incident of 15-20 years before. In cross-examination, he stated that Hotel owner Krishnapal told him on 21.03.2002 after dead body of deceased Raju was found that on 19.03.2002 at 7.30 p.m. Krishnapal and his younger brother Sadar Singh were sitting at Hotel and deceased Raju, Pawan, Sokendra came to hotel and took tea, at that time Pawan, Sokendra along with their two friends and deceased Raju were drunk, Krishnapal told him that Raju (deceased) to sleep at Hotel but Pawan and Sokendra told that they will carry him to his home.

9. P.W.-2, Om Prakash alleged eye witness in his statement-in-chief stated that deceased Rajendra @ Raju is resident of his village, accused Pawan and Sokendra are also resident of his village and Pappu @ Jitendra @ Brijendra is resident of village-Ukhralsi, P.S.-Murad Nagar, District-Ghaziabad and brother-in-law of one Shripal resident of Village-Gejha, Police Station-Partapur, District-Meerut . On 19.03.2002 at 7.30 P.M. he, Mamchand and Nahar Singh were taking tea sitting at the Hotel situated Mohiuddinpur belonging to Krishnapal

who also belongs to his village, Sadar Singh of his village was also taking tea at the hotel, at the same time, three accused Pawan, Sokendra, Pappu @ Jitendra and deceased Rajendra @ Raju came to the Hotel, Rajendra @ Raju was over drunken, all the three accused took tea at the Hotel but Rajendra @ Raju did not take tea, when all the four persons Pawn, Sokendra, Pappu @ Jitendra @ Bijendra and Rajendra @ Raju were ready to go then Krishnapal said to Rajendra @ Raju to sleep at the Hotel as he has drunk, all the three accused told they have brought him so they will drop him at his house. So at 8.30 P.M. in night all the four went towards village-Gejha from Hotel on foot, immediately thereafter they walk there. Mamchand and Nahar were also with them and walking in the same direction, after some distance they saw that Pawan, Sokendra, Papu @ Jitendra @ Bijendra were dragging Rajendra @ Raju towards wheat field from road and Pappu @ Jitendra @ Bijendra was saying that you had insulted my sister by abusing her so he will take revenge today and will kill you, Pappu @ Jitendra fired at Raju, they frighten and walk speedily towards his village. They did not tell about incident to anybody in the village because they were frightened that accused can kill him also. In cross-examination P.W.-2 admit that there was no litigation between the father of deceased Raju and father of Pawan and Sokendra. He went to his village immediately after the incident. The distance between his house and house of deceased is 200 Meter. He went to the house of deceased after 4-5 days.

10. P.W.-3, Mamchand another alleged eye witness in statement-in-chief stated that accused Pawn, Sokendra, Pappu @ Jitendra @ Bijendra belong to his village, deceased Raju @ Rajendra belnged to his village, in all other respect he had deposed same thing as stated by P.W.2 in his statement-in-chief. In cross-examination P.W.-3 admitted Papppu @ Jitendra @ Bijendra had fired by country-made pistol on the head of deceased Raju, after incident they went to his village directly, his house is at the distance of 400 meter from the house of deceased, he had not told about the incident to anybody on that day.

11. P.W.-4 Jai Prakash witness of inquest and recovery of ash stated in his statement-in-chief that on 19.03.2002, resident of his village Raju was murdered and his body was recovered on 21.03.2002 in the filed back side of Kisan Inter College, Mohiuddinpur and he was one of the panch of the Panchayatnama. Police has prepared memo of ash and plane earth.

12. P.W.-5, Ompal witness of recovery of container of petrol from accused Sokendra has stated in his statement-in-chief that on 19.03.2002 Raju resident of his village had been murdered and Police was searching for Sokendra, resident of same village. On 01.02.2002 at about 12.15 P.M. Sokendra was standing in front of the gate of Rajkamal factory, he informed the police accordingly police arrested him who confessed the guilt of murder of Raju, the plastic cane having petrol was also recovered from the field at the instance of Sokednra, accordingly memo was prepared which was Ex Ka-7.

13. P.W.-6, Dr. Gyanendra Kumar, Senior Radiologist, District-Hospital Meerut conducted the postmortem of the dead body of Rejendra Kumar @ Raju on 22.03.2002 at 3.45 P.M. He has proved the post mortem report as Ext-Ka-8 and has stated that following injuries were found on the body of the deceased:-

1. Gun shot wound of entry 1x1.5 cm x bone cavity deep right temporal region with fracture right temporal pair parital and frontal bone.

2.Gun shot wound of exit 1x1.5 x 1.4 cm x bone cavity deep left side head just

behind left ear communicating to injury no. 1, fracture left parietal bone.

3. incised wound 3x1.5 cm x bone deep right side front upper part of chest II rib cut.

4. incised wound 3x1.5 cm x muscle deep front of chest 1 cm below stemal notch.

Postmortem burn injury are all over the body except front of right and left thing right leg and part of left leg.

In the internal examination, membrane and brain was punctured, right lung was punctured, the cause of death was due to shock and hemorrhage.

14. P.W.-7, Constable Dev Singh (Head Moharrir) who has proved the chik FIR (Ext. Ka-20), GD Report (Ext. Ka-21).

15. P.W.-8, Rahul Kumar Sharma, 1st Investigating Officer has stated that he was posted on the post of Sub-Inspector at P.S. Partapur, this case was lodged in his presence on 21.3.2002 at 12.45 PM. He prepared the site plan after inspection which is Ext. Ka-23.

16. P.W.-9, Amresh Chand Tyagi, 2nd Investigating Officer has stated that he took over the investigation on 24.3.2002. On 1.4.2002, he arrested Sokendra on the information of Ompal Singh and Nawab Singh and recovered jerrycane, having ½ ltr. Petrol, memo was accordingly prepared, the same is Ext. Ka-7, the site plan was also prepared and the same is Ext. Ka-11. On 4.4.2002, accused Pappu @ Jitendra @ Bijendra was arrested on information received who confessed his guilt and at his instance country-made pistol and two cartridges were recovered, the memo was prepared and marked as Ext. Ka-9. In his cross-examination, P.W.-9 admitted that there was no public witness of alleged recovery of country-made pistol and cartridges as well as the arrest of Pappu @ Jitendra @ Bijendra.

17. P.W.-10, Rajiv Kumar Yadav, Investigating Officer of Section 25 of the Arms Act, he recorded statement and prepared site plan Ext. Ka-18, on 18.5.2002 approved case under Section 25 of the Arms Act against accused Pappu.

18. P.W.-11, S.I. Suresh Chandra Gupta was witness of recovery of country-made pistol from accused Pappu @ Jitendra @ Bijendra.

19. D.W.-1, Nahar Singh in his statement has stated in his statement-in-chief that on 19.3.2002 at 7.30 P.M., he was with Mam Chand and Om Prakash and he has not seen any incident at that time, he is a labour, he is resident of the village of the accused person.

20. Heard Sri Desh Ratan Chaudhary and Sri Birendra Singh Khokher, learned counsel for the appellants and learned A.G.A. for the State and perused the record.

21. Learned Counsel for the appellants contended that appellants have been falsely implicated for murder of Rajendra Kumar @ Raju and further submitted that prosecution case is very weak and is wholly unreliable. Counsel for the appellants submitted that F.I.R. is delayed & there is discrepancy regarding date of recovery of dead body. According to F.I.R. version dead body of deceased was found in the field on 20.03.2002 however F.I.R. was lodged on 21.03.2002 at about 12.45 P.M. in the noon & there is no explanation for this delay. In his deposition P.W.-1 (first information) had improved his case by stating that the deceased was searched on 20.03.2002 & dead body was found on 21.03.2002 then F.I.R. was lodged, this discrepancy regarding recovery of dead body has not been explained by the prosecution. Learned counsels for the appellants further submitted that there is discrepancy regarding number of accused in the F.I.R. the first informant had stated that deceased Rajendra Kumar @ Raju was taken away from his house by Pawan, Sokendra and he was last seen by Krishnapal and Sardar Singh in the Hotel along

with Pawan, Sokendra and two other persons, while in his examination-in-chief he had stated only two persons namely Pawan and Sokenda came to his house and taken the deceased with them. In his cross-examination he had stated that he was informed by Krishnapal that Rajendra Kumar @ Raju (deceased) came to hotel alongwith accused Pawan, Sokendra and with their two friends however, P.W.-2 and P.W.-3 alleged eye-witnesses had stated that deceased was at Hotel along with three accused Pawan, Sokendra and Pappu @ Jitendra @ @ Bijendra. P.W.-2 and P.W.-3 had not stated about any other fourth person.

22. The next submission made by Counsels for appellants is that most important and relevant witnesses Krishnapal and Sardar Singh, who are cousin and real brother of first informant and are witnesses of last seen have not been examined by prosecution and no explanation has been given for non-examination of Krishnapal and Sardar Singh.

23. The counsels for appellants further submitted that alleged eye witnesses P.W.-1 and P.W.-3 are unreliable as their names are not mentioned in F.I.R. Krishnapal and Sardar Singh, who were present at Hotel had not stated about the presence of P.W.-2 and P.W.3 in the Hotel. The alleged eye-witnesses PW.-2 and P.W.-3 are resident of same village and their houses are at distance of 200 yards & 400 yards from the house of first informant but they had not disclosed to anyone in the village that they had seen the incident rather they had disclosed about the incident after 4-5 days, the alleged eye witness account is in conflict with medical evidence and there is no explanation of two incised/punctured wounds and postmortem burn injuries of the deceased, the alleged eye witnesses P.W.-2 and P.W.-3 are having grudge with the accused persons on account of election gram Pradhan and they had admitted this fact in their cross-examination counsel for the appellants further submitted that prosecution has failed to prove motive of the incident and further submission was made that Nahar Singh/D.W.-1, who was named as witness in the statement of P.W's- 2 & 3, had stated that he was not there along with mam Chand and Om Prakash, counsel for the appellants further submitted that from the pointing out of Sokendra, a container for keeping petrol was recovered while from the ash which was sent for forensic examination, Kerosene oil was found and not the petrol which proves that prosecution had tried to concoct evidence of alleged statement and with respect to the recovery of country made pistol and live cartridges from the possession of Pappu @ Jitendra @ Bijendra there is no public witness of the alleged recovery and arrest. Counsel for the appellants further submitted that statement of P.W.-6, Dr. Gyanendra Kumar is unreliable as he had mentioned two incised wound on the person of deceased and wound appears to be cavity deep as the second rib below this injury and right lung were found cut in his statement he said that these injuries can be caused by stone having one sharp edge this shows that the medical evidence is in conflict with prosecution evidence.

24. Learned AGA for the State on the other hand supported the impugned judgments and order of conviction by contending that no inordinate delay has been caused in lodging the FIR, recovery memo and recovery of country-made pistol from accused Pappu @ Jitendra @ Bijendra fully make out the case against accused / appellants. Prosecution case is fully proved from statement of P.W.'s- 2 & 3, the appeal has been filed with false and baseless allegations and is liable to be dismissed.

25. Upon hearing learned counsel for the parties and perusal of record, we find that 1st informant do not claim himself to be eye witness of occurrence, FIR states that deceased Rajendra Kumar @ Raju along with Pawan, Sokendra along with 2 others was last seen by Hotel owner

Krishnapal and Sardar Singh (younger brother of 1st informant) at the hotel in drunken stage but Krishna Pal and Sardar Singh had not been examined, P.W.'s-2 & 3, Om Prakash and Mam Chand have not been mentioned in the FIR, there is no whisper in FIR about providing of any information to 1st informant by P.W.'s- 2 & 3. According to FIR version, the dead body of deceased was found after search on 20.3.2002 but in his deposition, the 1st informant improved his case by stating that the deceased was searched on 20.3.2002 and dead body of deceased was found on 21.3.2002, this discrepancy has not been explained by prosecution. According to prosecution, deceased was taken away from the house by accused Pawan and Sokendra and in the last seen at Hotel by witnesses, Krishnapal and Sardar Singh, the deceased was seen along with Pawan, Sokendra and two unknown person.

In the cross-examination, P.W.-1 again stated that he was informed by Krishnapal that deceased Rajendra Kumar @ Raju came to his hotel along with Pawan, Sokendra and their two friends while P.W.'s- 2 & 3 had stated that deceased was at hotel along with accused Pawan, Sokendra and Pappu @ Jitendra @ Bijendra but they have not stated about 4th one. It shows that allegations about date of recovery of dead body and number of accused are totally imaginary part of prosecution story in FIR which may not be relied upon in absence of any evidence.

26. Prosecution witnesses Om Prakash - P.W.-2 and Mam Chand- P.W.-3, the alleged eye witnesses of the incident have not been mentioned in the FIR, the witnesses mentioned in the FIR Krishna Pal (cousin of 1st informant) and Sardar Singh (younger brother of 1st informant) have not mentioned about the presence of P.W.'-2 & 3 in the hotel to the 1st informant. It is further material that P.W.'s- 2 & 3 are resident of same village - Gejha and their houses are situated at the distance of 200 - 400 yards from the house of deceased even then P.W.'s- 2 & 3, the alleged eye-witnesses had not told about the incident to any of the villagers including 1st informant rather had told about the incident after 4-5 days. It is further material to state that the statements of P.W.'s- 2 & 3 are in conflict to medical report / evidence as two incised / punctured wounds and burn injuries were found on the body of deceased but in chief as well as in cross-examination of P.W's- 2 & 3, they had stated about fire only. It is further material to state that P.W.-2 in his cross-examination admitted that in the panchayat election, his brother contested for Pradhan against Bijendra, in the same manner, P.W.-3, in the cross-examination stated about accused Pawan, these facts prove that P.W.'s- 2 & 3 had enmity against accused person. From the aforementioned fact, it is fully established that testimony of P.W.'s- 2 & 3, alleged eye-witnesses cannot be relied upon.

27. Another argument of learned counsel for the appellants is that most important and relevant witness of the incident, namely, Krishnapal who is cousin of 1st informant and Sardar Singh, younger brother of 1st informant, witnesses of the last seen and not been examined by prosecution, is very much relevant. It is material to state that non-examination of Krishnapal and Sardar Singh by prosecution is very crucial as they were witnesses of the last seen as such it creates doubt upon prosecution story.

28. In view of the facts and circumstances stated above, we are of the considered view that the prosecution case is based on testimony of alleged eye-witnesses P.W.'s-2 & 3 which is not found reliable in absence of the testimony of witnesses of last seen, Krishna Pal & Sardar Singh whose names were mentioned in FIR but the names of P.W.'s- 2 & 3 were not mentioned in FIR nor their names were told by Krishnapal

and Sardar Singh to P.W.-1 as such the prosecution case is doubtful.

29. It is also pertinent to state that with respect to motive of the incident in the FIR, it is alleged that about 15-20 years before, there was quarrel between the family of 1st informant and family of Nauraj & Shauraj (father of accused) in which younger brother of 1st informant received serious injury, due to that enmity the son of 1st informant, has been murdered, however, in the cross-examination, P.W.-1 admitted that dispute of 20 year before was compromised, this admission part is on page-29 of the paper book. P.W.-2 / Om Prakash in his cross-examination had denied about enmity / criminal litigation between the family of the deceased and family of accused Pawan and Sokendra, the relevant part of cross-examination of P.W.-2 is on page no. 33 of the paper book. P.W.'s-2 & 3 in their examination-in-chief had stated that accused Pappu @ Jitendra @ Bijendra was saying just before the incident that you have insulted my sister and abused her also so I will take revenge today. Relevant portion is on page nos. 33 & 35 of the paper book, P.W.-2 & P.W.-3 had introduced another motive rather than set up by P.W.-1in the FIR. Accordingly, motive of the incident had also not been proved by the prosecution.

30. With respect to recovery, it is relevant to mention here that Ext. Ka-7, recovery of plastic jerry can (page nos. 14 to 16 of the paper book) says ½ ltr. of petrol in the jerry can at the pointing out of accused Sokendra while the ash sent for forensic examination says for kerosine oil (page no. 26 of the paper book), this further proves that prosecution concocted the evidence of statement and recovery. The recovery memo of country-made pistol and live cartridges, Ext. Ka-9 (page no. 17 of the paper book) from the accused Pappu @ Jitendra @ Bijendra and his arrest, reveal that there is no public witness of the recovery and arrest, accordingly, recovery of fire-arm from accused pappu @ Jitendra @ Bijendra after about 14 days of incident from an open space in absence of any public witness of recovery, is highly doubtful and may not be relied upon. Learned counsel for the appellants placed reliance upon paragraph no. 19 of the judgement of the Hon'ble Apex Court, delivered on 8.11.2021 in **Criminal Appeal No.2438 of 2010, Bijender @ Mandar vs. State of Haryana.**

19. Unmindful of these age old parameters, we find that the Prosecution in the present case has miserably failed to bring home the guilt of the Appellant and Courts below have been unwittingly swayed by irrelevant considerations, such as the rise in the incidents of dacoity. In its desire to hold a heavy hand over such derelictions, the Trial Court and the High Court have hastened to shift the burden on the Appellant to elucidate how he bechanced to be in possession of the incriminating articles, without primarily scrutinizing the credibility and admissibility of the recovery as well as its linkage to the misconduct. We say so for the following reasons:

Firstly, the High Court and the Trial Court failed to take into consideration that the testimony of ASI Rajinder Kumar (PW14) exhibited no substantial effort made by the police for conducting the search of the residence of the Appellant in the presence of local witnesses. The only independent witness to the recovery was Raldu (PW8) who was admittedly a companion of the Complainant.

Secondly, the Complainant (PW4) as well as Raldu (PW8), have unambiguously refuted that neither the passbook, nor the 'red cloth' was recovered from the possession of the Appellant, as claimed in his disclosure statement.

Thirdly, while the Complainant (PW4) negated his signatures on the recovery memo (EX. PD/2), on the other hand, Raldu (PW8) also neither enumerated the recovery

memo (Ex. PD/2) in the catalogue of exhibited documents, nor did that he affirm to having his endorsement.

Fourthly, the recovered articles are common place objects such as money which can be easily transferred from one hand to another and the 'red cloth' with 'Kamla' embossed on it, as has been acceded by the Investigating Officer, Rajinder Kumar (PW14), can also be easily available in market.

Fifthly, the recovery took place nearly a month after the commission of the alleged offence. We find it incredulous, that the Appellant during the entire time period kept both the red cloth and the passbook in his custody, along with the money he allegedly robbed off the Complainant.

Sixthly and finally, there is no other evidence on record which even remotely points towards the iniquity of the Appellant.

31. The argument raised on behalf of the appellants with respect to statement of P.W.-6 / Dr. Gyanendra Kumar, Senior Radiologist that the same is not reliable, appears to be correct as P.W.-6 had mentioned injury nos. 3 & 4 in his postmortem report as follows:-

No.3- Incised wound 3x1.5 cm x bone deep right side front upper part of chest II rib cut.

No.4- Incised wound 3x1.5 cm x muscle deep front of chest, 1 cm below sternal notch.

In the internal examination, right lung was also found cut but P.W.-6 has stated that injury nos. 3 & 4 can be caused by one sharp edged stone.

It is material to state that evidence of P.W.-6 is in conflict of prosecution evidence as such the same cannot be relied upon.

31. In view of the discussions made above, we have come to the conclusion that prosecution has failed to prove charges levelled against accused persons under Sections 302/34, 201 IPC and Section 25 of the Arms Act by any reliable, cogent and independent evidence to the hilt beyond reasonable doubt. For the reasons mentioned in preceding para, considering the possibility of murder of deceased by unidentified culprits and false implication of appellants in belated FIR due to enmity and suspicion, it will not be safe to base conviction of appellant on uncorroborated testimony of P.W.'- 2 & 3 and accused appellants are entitled to the benefit of doubt. The learned trial court has acted wrongly and illegally in not considering above mentioned material aspect and believing unreliable and uncorroborated testimony of P.W's-2 , 3 & 6 in holding the appellants guilty. The impugned judgment and order of conviction of appellants and sentence is liable to be set aside and appeal is liable to be allowed.

32. The appeals are **allowed** and impugned judgment and orders of conviction and sentence are set aside. The accused appellants Sokendra and Pappu @ Jitendra @ Bijendra in Criminal Appeal No.6075/2006 and accused - appellant Pawan in Criminal Appeal No.5482/2006 are acquitted of the charges under Section 302 and 201 IPC and accused-appellant no. 2 Pappu @ Jitendra @ Bijendra in Criminal Appeal No.6075/2006 is also acquitted of the charges under Section 25 of the Arms Act.

33. The accused-appellant no. 1 Sokendra in Criminal Appeal No. 6075 of 2006 and accused - appellant Pawan in Criminal Appeal No.5482 of 2006 are in jail. They shall be released from jail forthwith. Accused -appellant no. 2 Pappu @ Jitendra @ Bijendra is on bail and need not to surrender. His bail bond is cancelled.

34. Let copy of this order along with the record be sent to the court below for compliance.
